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## DECISION

At its meeting on 14 December 2022, the Constitutional Court held a hearing to review the constitutionality of the Constitutional Court of the Republic of Slovenia, initiated by the request of Metka Zevnik, Kranj, and Aleš Primec, Ljubljana.

decided:

**The decision on the inadmissibility of calling a legislative referendum on the Law on Amendments to the Family Code (DZ-B, EPA 190-IX) (Official Gazette of the Republic of Slovenia, No 138/22) is not incompatible with the Constitution.**

## EXPLANATION

### A.

1. The petitioners (the initiators of the referendum) state that the Act on Amendments to the Family Code (DZ-B, EPA 190-IX) (hereinafter DZ-B) was adopted under the abbreviated procedure in contravention of the provisions of the Rules of Procedure of the National Assembly (Official Gazette of the RS, No. 92/07 - Official Consolidated Text, 105/10, 80/13, 38/17, 46/20 and 111/21 - PoDZ-1) and in contravention of the guideline laid down in Article 89 of the Constitution. DZ-B was also adopted in contravention of the Resolution on Normative Activity (Official Gazette of the Republic of Slovenia, No. 95/09 - ReNDej). In the reasoning of the Decision on the inadmissibility of calling a legislative referendum on the Law on Amendments to the Family Code (DZ-B, EPA 190-IX) (hereinafter referred to as the Decision), the legislator merely made a passing reference to the Constitutional Court's Decisions No. U-I-486/20 and No. Up-572/18 of 16 June 2006 on the inadmissibility of calling a legislative referendum on the Law on Amendments to the Family Code (DZ-B, EPA 190-IX) (hereinafter referred to as the Decision). U-I-486/21, Up-675/19 of 16 June 2022 (Official Journal of the RS, No 94/22), without specifying how the adopted

amendment eliminates the unconstitutionality found in a constitutionally compatible manner, which was its duty under the Constitutional Court's decision No U-II-3/11 of 8 December 2011 (Official Journal of the RS, No 109/11). The petitioners

argue that the DZ-B does not constitute a law that would eliminate the unconstitutionality established in the decisions of the Constitutional Court. Moreover, according to the petitioners, the DZ-B goes substantially beyond the Constitutional Court's decisions, which it was adopted to give effect to. The petitioners submit that, unlike the decisions of the Constitutional Court, the DZ-B does not adopt gender as a binary category, but extends the definition of marriage and the possibility of adopting children to persons of any of 100 or more genders, thereby also extending the meaning of Article 57 and Article 3(2) of the Family Code (Official Gazette of the Republic of Slovenia No. 15/17 and No. 22/19 - hereinafter referred to as 'the DZ') in a way that imposes on the State an obligation to grant the right to children to all combinations of persons who are unable to have children by natural means. At the same time, the DZ-B, on the basis of Article 12 of the DZ, establishes the obligation of the State to educate in kindergartens, schools, health, social and other systems about harmonious partnership and family life, which can also arise from 100 or more genders. The education system should also include content on the possibility of gender reassignment and sexual orientation. The petitioners also argue that the DZ-B extends all the legal consequences of marriage to a number of other legal relationships. None of this, however, is apparent from the decisions of the Constitutional Court.

2. According to the petitioners, the DZ-B does not eliminate the unconstitutionality found by the Constitutional Court in a constitutionally compatible manner, which means that the rejection of the DZ-B would not make it impossible to eliminate the unconstitutionality found. The petitioners submit that, contrary to the requirements of the Constitution, the DZ-B gives priority to the freedom of adults over the best interests of the child. The extension of the possibility of adoption and the freedom to decide on the birth of children to same-sex unions is said to open the door to abuses which could lead to child trafficking, particularly in the context of surrogacy. The right of the child to know his or her origin, protected by Article 35 of the Constitution, is also called into question. The petitioners further argue that the enactment of the DZ-B may violate the right to conscientious objection (Article 46 of the Constitution) of registrars, social work centre employees, educators and similar professions, as the legislator has not regulated the procedure for making conscientious objections in these cases. The principle of the rule of law is also infringed, since the equation of the legal status of different two-person communities with that of same-sex unions creates undesirable legal consequences in various areas which the legislator did not expressly foresee and which will lead to difficulties in the application of sectoral laws in practice (e.g. The petitioners consider that, in accordance with the principles of the rule of law and the right to legal certainty, the legislator should regulate all these areas coherently by means of individual sectoral laws, in accordance with the principles of the rule of law and the right to legal certainty.

3. The petitioners submit that the Constitutional Court, in its Decision No U-II-1/15 of 28 September 2015 (Official Journal of the RS, No 80/15, and Official Journal of the Republic of Slovenia, No 80/15, and Reports XXI, No 5), admitted the referendum in the same case, which means that it must also be admitted in the present case. In their view, if the Constitutional Court were to hold this time that DZ-B does, however, remedy the unconstitutionality found in a constitutionally compatible manner, it would have to apply a strict proportionality test and, in accordance with Decision No U-I-47/94 of 19 January 1995 (Official Gazette of the RS, No. U-I-47/94 of 19 January 1995 (Official Journal of the RS, No. U-I-47/94 of 19 January 1995), the Constitutional Court would have to apply a strict proportionality test and, in accordance with Decision No. 13/95, and Reports of Judgments and Decisions IV, 4) to assess whether the suspension of the entry into force of the law or the rejection of the law at the referendum would really affect constitutional rights of such importance that it would be permissible to interfere with the constitutional right to a referendum. The petitioners submit that the disallowance of a referendum in this case pursues the objectives of protecting the minority, the public interest and limiting public debate which could promote hatred and inequality. However, the referendum is intended to protect the rights of the weakest - children - and therefore the protection of the rights of same-sex couples as a minority cannot be a legitimate objective for preventing the right to a referendum. It is not necessary to disallow the referendum. Moreover, it does not pass the strict proportionality test, since the only factors in favour of excluding the referendum are the established violation of the principle of equality under Article 14 of the Constitution, which, according to the petitioners, has not even been convincingly demonstrated, and the right to a referendum (Article 90 of the Constitution), the right to participate in the management of public affairs (Article 44(1) of the Constitution), the right to a referendum (Article 44(1) of the Constitution) and the right to a fair trial (Article 90(1) of the Constitution). Article 44 of the Constitution), the right to guarantee state protection of the family, maternity, paternity, children and young persons (Article 53 of the Constitution), the right to freedom of expression (Article 39 of the Constitution), the right to freedom of conscience (Article 46 of the Constitution), the right to the protection of privacy and personality rights (Article 35 of the Constitution), and the principles of democracy and the rule of law (Articles 1 and 2 of the Constitution), as well as the principle of the sovereignty of the people and the principle of the separation of powers (Article 3 of the Constitution).

4. In its reply, the National Assembly states that the Constitutional Court, in the procedure of reviewing the constitutionality of the decision on the inadmissibility of calling a legislative referendum on a law referred to in the fourth indent of Article 90, paragraph 2, of the Constitution under Article 21 of the Act on Referendums and Popular Initiatives (Official Gazette of the RS, No. 26/07 - Official Consolidated Text and 52/20 - hereinafter referred to as the Law on Legislative Referendums) (substantively) examines only possible violations of the constitutional provisions on

the institution of a legislative referendum under Article 90 of the Constitution, and not other (alleged) unconstitutionality of the law that is the subject of the legislative referendum. It states that it is therefore only addressing the petitioners' contention that the DZ-B does not constitute a law referred to in the fourth indent of Article 90(2) of the Constitution because it does not eliminate the unconstitutionality identified and because it also regulates other legal issues unrelated to the elimination of the unconstitutionality identified. The National Assembly points out that the petitioners' allegations that the DZ-B does not remedy the unconstitutionality found are purely ad hoc and remain at the level of a bare and contradictory allegation that the unconstitutionality found has not been remedied. They are therefore not legally relevant. Otherwise, the National

The Chamber considers that the regulation of marriage and joint adoption in the DZ-B followed verbatim the manner of implementation set out in paragraph 4 of the operative part of the Constitutional Court's decision No U-I-486/20, Up-572/18 (marriage) and paragraph 5 of the operative part of the Constitutional Court's decision No U-I-486/20, Up-572/18 (marriage). Therefore, the National Assembly, by means of DZ-B, should accordingly abolish the unconstitutionality of Article 3(1), Article 213(1) and Article 223 of the DZ, as established in the above-mentioned decisions of the Constitutional Court.

5. With regard to the petitioners' allegation that the DZ-B also regulates other legal issues unrelated to the abolition of the unconstitutionality found, the National Assembly states that these allegations are incorrect in substantive law. It reiterates that the regulation of marriage in the DZ-B follows verbatim the method of implementation set out in point 4 of the operative part of the Constitutional Court's Decision No U-I-486/20, Up-572/18, which makes it conceptually impossible for the regulation of marriage in the DZ-B to go beyond the content of the Constitutional Court's decision or to regulate other legal issues unrelated to the abolition of the unconstitutionality found. The Constitutional Court itself has already determined that marriage is a living union of two persons and has equalized the legal position of heterosexual and same-sex marriage partners in the family and other legal spheres, unless a particular sectoral law expressly provides otherwise. The National Assembly also submits that the petitioners' allegations regarding the regulation of marriage and joint adoption in the DZ-B are based on erroneous substantive legal conclusions regarding the regulation of sex in the legal order of the Republic of Slovenia. According to the third indent of Article 8(2) of the Act on the Central Population Register (Official Gazette of the Republic of Slovenia, No. 72/06 - hereinafter: ZCRP), the legal order of the Republic of Slovenia has only two sexes, i.e. male and female. In the light of the above, the State party considers that by extending the legal consequences of marriage to the family and other areas of law and by regulating joint adoption, it has not gone beyond the content of the Constitutional Court's Decisions No. U-I-486/20, Up-572/18 and No. U-I-91/21, Up- 675/19.

6. In its opinion, the Government points out that the DZ-B eliminates the unconstitutionality established by the Constitutional Court in the above-mentioned decisions, whereby, in order to equalise same-sex and same-sex partners, it not only allows same-sex partners to enter into marriage, but also abolishes the possibility for same-sex partners to enter into a partnership under the Partnership Act (Official Gazette of the Republic of Slovenia, No. The Government states that the DZ-B ensures the equality of different-sex and same-sex partners of both communities in all legal consequences provided for by the DZ and by laws in other legal fields. The Government considers that the content of the DZ-B concerns a subject matter on which a referendum cannot be called in accordance with the fourth indent of Article

90(2) of the Constitution, therefore the Decision is not contrary to the Constitution.

7. The reply of the National Assembly and the opinion of the Government were forwarded to the petitioners, who state that neither the National Assembly nor the Government has commented on the allegations and key aspects of the reasoning of the request. The only additional substantive reference made by the National Assembly was to the third indent of Article 8, paragraph 2, of the CRPD, which states that the legal order of the Republic of Slovenia has only two sexes, i.e. male and female. The petitioners state that the Constitutional Court and the public are being underestimated and misled in order to legalize the adoption of children in all possible LGBTQIA+ relationships and to introduce LGBTQIA+ education programmes, which include, among other things, teaching how to change one's gender and sexual orientation in kindergartens and primary and secondary schools. The petitioners draw attention to the activities for the adoption of legislation regulating self-determination of gender, which are being carried out in the framework of the State sector (Inter-ministerial Working Group for the Study of the Regulation of Gender Reassignment or Legal Recognition in the Republic of Slovenia, the Equal Opportunities Advocate and civil society). They also draw attention to international practices of gender reassignment recognition, including gender recognition outside the framework of male and female. The petitioners insist that the DZ-B is not only about eliminating the unconstitutionality established by the decisions of the Constitutional Court, but also about amendments that, by deleting female and male sex in the definition of marriage, introduce into family relations other sexes that exist, according to LGBTQIA+ activists, and whose legal recognition is sought by both the parties of the current government coalition and by civil society, which, together with the Government, plans and drafts the legislation.

#### B. - I.

8. According to the Constitution, power in the Republic of Slovenia is vested in the people, who exercise it directly and through elections, in accordance with the principle of the separation of powers (Article 3(2) of the Constitution). Power is exercised directly through the familiar forms of direct democracy, including the legislative referendum. From the point of view of the functioning of state power, the legislative referendum is a way of involving the people in the adoption of laws as the most important legal and political decisions, which are otherwise within the competence of the legislature.<sup>1</sup> In this case, alongside the National Assembly, the people also appear as the legislators.

9. Article 90 of the Constitution provides for a legislative referendum as a subsequent rejection referendum on a law that has already been adopted by the National Assembly. It guarantees two rights to citizens (voters) in relation to the conduct of the referendum: firstly, the right to 40,000

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<sup>1</sup> Cf. I. Kaučič in I. Kaučič (ed.), *Legislative Referendum*, Institute for Comparative Law, GV Publishing, Ljubljana 2010, p. 21.

The Constitution leaves the detailed regulation of the manner in which the legislative referendum is to be conducted to the statutory regulation (Article 90(5)).<sup>2</sup> The ZRLI regulates two different procedures for the National Assembly to decide that a referendum is inadmissible, and also two different procedures for the constitutional judicial review of this decision. Article 21 of the RLIA regulates the procedure with regard to the laws referred to in the second to fourth indent of Article 90(2) of the Constitution, while Article 21a of the RLIA regulates the procedure with regard to the laws referred to in the first indent of Article 90(2) of the Constitution. In proceedings under Article 21a of the ZRLI, the Constitutional Court reviews a law that has already entered into force, and in proceedings under Article 21 of the ZRLI, it reviews a decision of the National Assembly prohibiting a referendum on a law whose entry into force is thereby postponed.

10. Pursuant to Article 21 of the Law on Referendums, the National Assembly, if it considers that the matter is a law referred to in the second to fourth indent of Article 90(2) of the Constitution, shall, within 14 days of the submission of the referendum petition, adopt a decision declaring that it is not permissible to call a referendum and publish it in the Official Gazette of the Republic of Slovenia. Within fifteen days of the publication of this decision, the petitioner may request that the Constitutional Court review its constitutionality. The Constitutional Court shall decide on the request within thirty days. Unlike the procedure under Article 21a of the RLIA, in which the Constitutional Court exercises its power of constitutional protection of the referendum in the procedure for the review of the constitutionality of a law that has already been enacted, in the procedure under Article 21 of the RLIA the subject of review is the decision of the National Assembly that it is not permissible to call a referendum, and the constitutional protection of the referendum is guaranteed even before the enactment of the law.<sup>3</sup> If the Constitutional Court finds that the decision of the National Assembly on the inadmissibility of the referendum is incompatible with the Constitution, it annuls the decision and the referendum procedure on the law continues after the Constitutional Court's decision has been published.<sup>4</sup> These are special procedural rules, which are *lex*

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<sup>2</sup> Article 90(5) of the Constitution provides that a referendum shall be regulated by a law adopted by the National Assembly by a two-thirds majority of the votes of the members present.

<sup>3</sup> If a request for constitutionality review is lodged with the Constitutional Court against a decision of the National Assembly, the National Assembly shall not send the law for promulgation until the decision of the Constitutional Court is published in the Official Gazette of the Republic of Slovenia to the effect that the decision of the National Assembly is not inconsistent with the Constitution, or until it is notified that the request has been withdrawn (Article 21, paragraph 3, sentence 2, of the Law on the Constitutional Review of the Republic of Slovenia).

<sup>4</sup> Article 21(4) and (5) of the LRAA provide:

"If the Constitutional Court finds that a decision of the National Assembly referred to in paragraph 1 of this Article is inconsistent with the Constitution, it shall annul it.

The decision referred to in paragraph 1 of this Article shall suspend the collection of signatures of voters in support of the request for a referendum and the expiry of the time limit for collecting them. In the event of a decision of the Constitutional Court that a decision of the National Assembly is incompatible with the Constitution, the collection of signatures shall continue as follows

*specialis* in relation to the general regulation of the procedure for reviewing the constitutionality of a law in the Constitutional Court Act (Official Gazette of the Republic of Slovenia, No. 64/07 - official consolidated text, 109/12, 23/20 and 92/21 - hereinafter referred to as the Constitutional Court Act). With regard to issues not specifically regulated by the Constitutional Court Act, the general rules provided for by the Constitution and the Constitutional Court Act apply.

11. Article 90(2) of the Constitution sets out the cases in which a legislative referendum is inadmissible, namely that it may not be called:

- laws on emergency measures to ensure national defence, security or to deal with the consequences of natural disasters,
- on laws on taxes, customs duties and other compulsory levies and on the law adopted for the implementation of the state budget,
- on laws ratifying international treaties,
- on laws that remedy an unconstitutionality in the area of human rights and fundamental freedoms or another unconstitutionality.

12. The Constitutional Court has already taken the view that these cases of inadmissible referendums mean that the Constitutional Court has ruled out in advance a referendum on the laws referred to in Article 90(2) of the Constitution.<sup>5</sup> In these cases, there is no question of a right to request a referendum at all,<sup>6</sup> which means that the Constitutional Court, when assessing the decision of the National Assembly that a referendum is inadmissible, does not carry out a balancing exercise between the constitutional values at stake (on the one hand, the right to a referendum and, on the other hand, the other constitutional values protected by the laws on which the referendum is excluded), but rather assesses, within the bounds of legal reasoning and taking into account the totality of the circumstances of the case, as to whether the law referred to in Article 90(2) of the Constitution is in question in the specific case.<sup>7 5.</sup>

13. Thus, both in the procedure under Article 21a of the RLIA (Article 21a(5) of the RLIA) and in the procedure under Article 21 of the RLIA (Article 21(1) of the RLIA), the assessment of the Constitutional Court (in addition to verifying whether the conditions laid down in Articles 21 and 21a of the RLIA and the Constitutional Court Act, respectively, are fulfilled)<sup>8</sup> is limited only to the question of whether the decision of the National Assembly not to hold a referendum is

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the day after the publication of the Constitutional Court's decision in the Official Gazette of the Republic of Slovenia, which shall be published on the website of the National Assembly."

<sup>5</sup> See Constitutional Court Decision No U-II-1/15, point 49.

<sup>6</sup> With regard to the fourth indent of Article 90(2) of the Constitution, which refers to the abolition of unconstitutionality, the Constitutional Court has adopted the position that the National Assembly is even obliged to prevent a referendum on a law abolishing

unconstitutionality (*ibid.*).

<sup>7</sup> See Constitutional Court Decision No U-I-480/20 of 11 March 2021 (Official Journal of the RS, No 57/21),

Point 20 of the Explanatory Memorandum, No U-I-483/20 of 1 April 2021 (Official Journal of the RS, No 64/21), point 23 of the Explanatory Memorandum, No U-I-25/22 of 17 March 2022 (Official Journal of the RS, No 52/22), point 18 of the Explanatory Memorandum, and No U-I-71/22 of 14 April 2022 (Official Journal of the RS, No 59/22), point 23 of the Explanatory Memorandum.

admissible to call for tenders, constitutes a violation of the first to fourth indents of Article 90(2) of the Constitution.<sup>9</sup> In other words, the Constitutional Court has to assess only whether it is a law within the meaning of the first to fourth indents of Article 90(2) of the Constitution. This also means that in the procedure of constitutional protection of the referendum under Articles 21 and 21a of the RLIA, the Constitutional Court does not assess the constitutional compatibility of the new regulation which is supposed to eliminate the unconstitutionality that has been established. Such a legal regulation on the protection of legislative referendums follows the intention of the Constitutional Lawmaker to eliminate unpredictability and ambiguities in the sensitive area of exercising the right to request a referendum or the right to vote in a referendum by explicitly defining the cases in which it is not permissible to call a referendum. The regulation ensures a clear, defined and transparent referendum procedure, creates conditions for a faster completion of the legislative process and introduces predictability into the referendum procedure, thus improving the position of the interested subjects (potential initiators and proposers of the referendum, as well as the National Assembly), while at the same time, by excluding a referendum in predefined cases, it effectively protects important constitutional goods that would be jeopardised by its implementation. The explicit identification of laws on which a referendum is not admissible also removes the risk of arbitrary judgements on the admissibility of a referendum, by setting clearer criteria for such judgements and by making it clear to potential proposers when a referendum is not admissible. The clearer and more unambiguous the rules are, the less ambiguity there is about their interpretation and application and, consequently, the fewer disputes there are.<sup>10</sup>

## **B. - II.**

14. On 4 October 2022, the National Assembly adopted DZ-B. On 11.10.2022, the Council of State accepted the request for the National Assembly to reconsider the DZ-B, and on 18.10.2022, the National Assembly reconsidered the DZ-B. The Petitioners, as initiators of the referendum, submitted a petition to the electorate to request a legislative referendum on the DZ-B. On 28.10.2022, the National Assembly adopted the contested Decision and on the same day the Decision was published in the Official Gazette of the Republic of Slovenia. On 11.11.2022, the petitioners submitted a request

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<sup>8</sup> E.g. whether the request has been submitted by a legitimate petitioner, whether it has been submitted within the prescribed time limit, whether it has all the elements, whether the decision on the inadmissibility of the referendum contains the reasons why the referendum should not be called.

<sup>9</sup> Regarding the assessment under Article 21a of the RTI Act, see Constitutional Court

Decisions No U-I-480/20, point 13 of the reasoning, No U-I-483/20), point 19 of the reasoning, and No U-I-25/22, point 11 of the reasoning. As regards the assessment under Article 21 of the RLIA, see Constitutional Court Decisions No U-I-321/22 of 15 September 2022, point 12 of the reasoning, No U-I-328/22 of 15 September 2022, point 3 of the reasoning, and No U-I-330/22 of 15.9.2022, point 4 of the explanatory memorandum.

<sup>10</sup> See Constitutional Court Decision No U-II-1/15, point 46 of the explanatory memorandum.

for a review of the constitutionality of the Decision. In the light of the foregoing, the procedural conditions laid down in Article 21(2) of the RTI Act have been met for the request to be examined.

15. The petitioners claim that the DZ-B does not abolish the unconstitutionality established by the decisions of the Constitutional Court. Moreover, by defining marriage as a living union of two persons of 100 or more different sexes, the DZ-B defines marriage significantly more broadly than the definition of marriage which was the subject of the Constitutional Court's review in Decision No U-I-486/20, Up-572/18, and which referred to a living union of persons of only two sexes (male and female). Consequently, it also broadens the potential beneficiaries of joint adoption. It also extends the legal consequences of marriage to other areas of law unrelated to the unconstitutionality found. In the event that the Constitutional Court should find that the DZ-B does, however, remedy the unconstitutionality found, the petitioners submit that it does not remedy the unconstitutionality in a constitutionally compatible manner, since it was adopted under an abbreviated procedure and is incompatible with Articles 1, 2, 3, 35, 39, 46 and 53 of the Constitution. The petitioners also submit that the National Assembly, in the reasoning of the Decision, did not justify how the DZ-B remedies the unconstitutionality found in a constitutionally compatible manner, which was its duty under Constitutional Court Decision No U-II-3/11.

16. The Constitutional Court has already clarified its well-established position (see point 13 of the reasoning of this decision) that in the proceedings under Article 21 of the RLIPA, in addition to examining the procedural conditions laid down in this provision, it examines only whether the decision of the National Assembly that it is not permissible to call a referendum constitutes a violation of the second to fourth indent of Article 90(2) of the Constitution. This also means that the Constitutional Court does not examine the compatibility of the new regulation with the Constitution in these proceedings. In the present case, the Constitutional Court must therefore assess only whether the DZ-B is a law that eliminates an unconstitutionality in the area of human rights and fundamental freedoms or another unconstitutionality (Article 90(2)(4) of the Constitution), which precludes a legislative referendum on it. In view of the foregoing, the petitioners' allegations of the unconstitutionality of the DZ-B are irrelevant or cannot be the subject of an assessment in the procedure under Article 21 of the LRAA. These complaints could, under the conditions laid down by the Constitutional Court, be the subject of an assessment in the procedure for reviewing the constitutionality of the DZ-B once it enters into force.

17. Since the question of the constitutionality of the adopted (new) regulation is not subject to review in the procedure under the current Article 21 of the LRAA, the legislator is not obliged to state in the decision prohibiting the referendum the reasons that the new regulation eliminates the established unconstitutionality in a

constitutionally compatible manner. Therefore, the reference to the Constitutional Court's decision No U-II-3/11 and the petitioners' complaints that the reasons for the decision are inadequate are irrelevant. The requirement to state reasons for a decision declaring a referendum inadmissible is also less stringent in the case of laws which, by a reasoned decision of the Constitutional Court, abrogate a

the unconstitutionality found, since the grounds for the unconstitutionality of a particular regulation are already apparent from the decision of the Constitutional Court.

18. The Constitutional Court, in its decisions No U-I-486/20, Up-572/18 and No U-I-91/21, Up-675/19, found that a legal regulation which provides that (i) only two persons of different sexes may enter into a marriage and (ii) same-sex partners living in a formal partnership may not adopt a child together is incompatible with the constitutional prohibition of discrimination. The Constitutional Court has also found that (iii) a marriage may be entered into by two persons of different sexes. DZ-B, by amending Article 3(1) of the DZ, establishes that marriage is a living union between two persons, which consequently also changes the meaning of Article 213(1) and Article 223 of the DZ in such a way that it also allows same-sex partners to jointly adopt children. The Constitutional Court therefore concludes that DZ- B eliminates the unconstitutionality established by the above-mentioned decisions of the Constitutional Court.<sup>11</sup>

19. The petitioners submit that, notwithstanding the foregoing, the DZ-B is not a law within the meaning of the fourth indent of Article 90(2) of the Constitution because it goes beyond the unconstitutionality established by the decisions of the Constitutional Court. In this respect, the petitioners first criticise the legislator for defining marriage in a substantially broader way than is apparent from Decision No U-I-486/20, Up-572/18. The new definition of marriage as a living union of two persons means that, in addition to a man and a woman, a marriage may also be entered into by two persons of the male sex or two persons of the female sex, and, in the event of the adoption of a new regulation recognising several different sexes, also by two persons of any sex out of the alleged 100 sexes. This should also have an impact on the pool of persons eligible for adoption. The Constitutional Court first of all agrees with the National Assembly that the definition of marriage, which consequently also affects the definition of potential beneficiaries of joint adoption, literally follows the method of implementation set out in

The petitioners' allegations that the Constitutional Court's decision refers only to the institution of marriage between a man and a woman, and not to persons of alleged other sexes, are also correct. Given that, according to the third indent of Article 8(2) of the <sup>CRPD</sup><sup>12</sup>

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<sup>11</sup> In Article 2, the DZ-B also modifies in the same way the definition of cohabitation in Art. Article 2 of the DZ, which the petitioners do not accuse the legislator of.

<sup>12</sup> Article 8 of the CRPD (EMN structure) provides:

"(1) The CRP operator shall determine the EMŠO uniformly for all persons referred to in Article 3 of this Law, according to the date of birth and sex - for citizens on the basis of the data from the birth register, and for foreigners on the basis of the data from the identity document.

(2) The EMN shall consist of thirteen numbers, which shall have the following meanings:



- from 1 to 7: date of birth (two digits for the day, two digits for the month and three digits for the year)

the current legal order of the Republic of Slovenia legally defines only two sexes, i.e. male and female, it is evident that the legislator could not have regulated anything more or nothing else with the DZ-B than to allow a man and a woman, and in addition to them also two persons of the male and two persons of the female sex, to enter into a marriage.

20. According to the petitioners, the DZ-B does not merely eliminate the unconstitutionality identified, also because the amendment of the definition of marriage in the DZ-B would indirectly affect all those areas of law in which the legislator attaches certain legal consequences to the institution of marriage. These complaints by the petitioners are frivolous. The petitioners state that the change in the definition of marriage is also to be reflected in changes in, for example, housing, infertility treatments and assisted reproductive procedures, the regulation of the presumption of paternity and maternity of children born in marital unions, the regulation of the right to decide freely on the birth of children and anti-corruption legislation. However, they do not, in particular, specify the provisions of the legislation or the provisions thereof which are allegedly affected by the amended definition of marriage. The Constitutional Court cannot be expected to search the legal order of the Republic of Slovenia itself for the laws and their individual provisions which are to be affected by the new definition of marriage in Article 1 of the DZ-B. This is particularly true in the procedure under Article 21 of the LRAA, which sets an extremely short (albeit instructional) time limit for the Constitutional Court to make a decision.

21. However, even if the definition of marriage in Article 1 of the DZ-B does in fact produce legal consequences (effects) in other areas of law, this does not mean that the DZ-B is not law within the meaning of the fourth indent of the second paragraph of Article 90 of the Constitution. The subject of the Constitutional Court's review in Decision No U-I-486/20, Up-572/18 was the constitutionality of the definition of marriage in Article 3(1) of the DZ. The Constitutional Court reiterates that the definition of marriage in Article 1 of the <sup>DZ-B13</sup> literally follows the method of implementation set out in Article 3(1) of the DZ.

4 of the operative part of the above-mentioned decision of the Constitutional Court. The National Assembly has therefore

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– 8. and 9. number: register number (code 50)

– 10th, 11th and 12th numbers: sequence number or combination of sex and sequence number for persons born on the same day (000-499 for males and 500-999 for females)

– 13. number: control number calculated by mathematical method (module 11).

(3) If an EMN is assigned to an incorrect date of birth or sex, it shall be revoked and reassigned by the CRP Operator and the revoked EMN shall remain in the register. In the event of changes to the other data referred to in Article 11 of this Law, the person shall retain



the assigned EMN. The invalidated EMN may not be assigned to another individual."

<sup>13</sup> Article 1 DZ-B provides that in the first paragraph of Article 3 DZ the words "husband and wife" shall be replaced by the words "two persons".

by adopting Article 1 DZ-B, it regulated precisely what was dictated by this decision of the Constitutional Court. Even if certain laws attach specific legal consequences to the institution of marriage, the effects of the DZ-B on those laws are merely indirect. These effects are therefore a logical consequence of the fact that other laws regulating independent areas of law refer to the institution of marriage, and not a direct consequence of Article 1 of the DZ-B. If such indirect effects of the abrogation of unconstitutionality were to be taken into account for the purpose of finding that the decision of the National Assembly that the referendum was inadmissible was unconstitutional and that the referendum should be admitted in that case, it would be a circumvention of the will of the Constitution-maker that referendums on laws abrogating unconstitutionality are not admissible (Article 90(2), fourth indent, of the Constitution). Consequently, in the light of Article 90(2)(4) of the Constitution Article 90 of the Constitution, the petitioners' arguments that the DZ-B also regulates other areas of law and that it is not merely a matter of compliance with the Constitutional Court's decision are irrelevant. However, if the petitioners consider that the new definition of marriage in Article 1 of the DZ-B makes other laws referring to the institution of marriage incompatible with the Constitution, the Constitutional Court explains that these laws may be subject to review under the conditions laid down by the Constitution and the Constitutional Court in the constitutionality review procedure.

22. The Constitutional Court must also respond to the petitioners' concerns that if the Constitutional Court does not find the Decision on the Inadmissibility of the Referendum unconstitutional, it will depart from the position taken in the Constitutional Court's Decision No U- II-1/15. U-II-1/15, the Constitutional Court allowed a referendum on the Act on Amendments and Additions to the Act on Marriage and Family Relations, adopted by the National Assembly on 3 March 2015 (EPA-257-VII - hereinafter referred to as the Act on Marriage and Family Relations), on the basis of which marriage could also be entered into by persons of the same sex. In that context, the Court considered whether the ZZZDR-D was a legal situation under Article 90(2)(4) of the Constitution. The Constitutional Court took the view that, under this provision of the Constitution, a referendum could not be called only on those laws which abolished an unconstitutionality previously established by the Constitutional Court (and, in addition, on laws which abolished a violation of a human right established by a judgment of the European Court of Human Rights (hereinafter referred to as the ECtHR)). It clarified that this provision cannot be interpreted as meaning that a referendum cannot be called in cases where the legislator adopts legislation which, although indirectly, through its knock-on effects on other areas of law, remedies an unconstitutionality already established by the Constitutional Court or the ECtHR, but which is only a minor part of the amended legislation. In such cases, the legislator is amending the regulation of issues that are not directly related to the unconstitutionality found.<sup>14</sup> This is precisely the case in the above-mentioned case.<sup>15</sup>

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<sup>14</sup> Cf. point 51 of the reasoning of the Constitutional Court Decision No U-II-1/15.

23. In the present case, however, the legislator, by means of the DZ-B, as already stated, literally followed the method of implementation set out in paragraph 4 of the operative part of the Constitutional Court's decision No U-I-486/20, Up-572/18 and, by adopting Article 1 of the DZ-B, regulated precisely what the Constitutional Court's decision dictated. In doing so, it directly eliminated the very unconstitutionality in Article 3(1) of the DZ DZ which had been established by that decision of the Constitutional Court, without directly regulating any other area of law on its own initiative. Any indirect effects of this regulation are, however, due to the fact that other laws refer to the institution of marriage, as already mentioned. In view of the above, the present case of deciding on the (in)admissibility of a referendum is not identical to the one decided by the Constitutional Court in its Decision No U-II-1/15, which consequently requires a different decision of the Constitutional Court.

24. With regard to the petitioners' arguments that the majority position of citizens, which can best be expressed in a referendum, must be taken into account when reorganizing the foundations of family law relations, the Constitutional Court finally emphasizes that the Republic of Slovenia has established a so-called constitutional democracy, the essence of which is that the values protected by the Constitution, and among them in particular fundamental human rights and freedoms, can prevail over democratically adopted decisions of the majority.<sup>16 16</sup>

25. In view of the above, the Constitutional Court finds that the DZ-B is a law within the meaning of the fourth indent of Article 90(2) of the Constitution, in respect of which a referendum is excluded under the Constitution. Consequently, the contested decision is not incompatible with the Constitution.

### C.

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<sup>15</sup> The National Assembly argued that the referendum was not permissible because the Act repealed the unconstitutionality established by Decision No U-I-425/06 of 2 July 2009 (Official Journal of the RS, No 55/09 and Official Journal of the RS, No XVIII, 29) on the regulation of inheritance by same-sex partners. However, the Constitutional Court took the view that the ZZZDR-D, by directly amending the definition of marriage, only indirectly eliminates the unconstitutionality found by the Constitutional Court in Decision No U-I-425/06, and, in addition, indirectly interferes with the regulations in an unspecified number of sectoral laws (approximately 70 laws). However, in the view of the Constitutional Court, such regulation was not a direct abolition of the unconstitutionality already established, but rather a regulation of something other than what is required by the aforementioned decision (cf. point 52 of the reasoning of Constitutional Court Decision No U-II-1/15).

<sup>16</sup> Cf. Constitutional Court Decisions No U-I-111/04 of 8 July 2004 (Official Journal of the RS, No 77/04 and Official Journal of the RS, No XIII, 54), point 26 of the reasoning, and No U-II-1/15, point 32 of the reasoning.

26. The Constitutional Court has adopted this decision pursuant to Article 21 of the RTI Act in conjunction with Article 21 of the Constitutional Court Act, composed of: the President, Dr Matej Accetto, and the following Judges: Dr Rok Čeferin, Dr Rajko Knez, Dr Špelca Mežnar, Dr Marijan Pavčnik, Dr Rok Svetlič, Dr Marko Šorli and Dr Katja Šugman Stubbs. The President of the Constitutional Court is Dr Rok Čeferin, Dr Rajko Knez, Dr Špelca Mežnar, Dr Marijan Pavčnik, Dr Rok Svetlič, Dr Marko Šorli and Dr Katja Šugman Stubbs. It adopted its decision by seven votes to one. Judge Svetlič, dissenting, voted against. Judge Šorli dissented in the affirmative.

Dr Matej Accetto President