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The Concept of Marriage Through the Prism of Imperative Requirements Theory

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Definition of Marriage and Its Impact on the Institution of Parenthood in Slovenian Law (expert opinion)

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Introduction

Slovenia is one of the seven countries (along with Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Kosovo and North Macedonia) formed after the breakup of the Socialist Federal Republic of Yugoslavia in 1990. Slovenia became a sovereign and independent state following an independence referendum held on December 23, 1990, based on the results of which the Slovenian Parliament declared the country's independence[1]. It has been a member of the Council of Europe since 1993, and in 2004 Slovenia became a member of the European Union. As far as the definition of marriage is concerned, the legal regulations in this area in the member states of the European Union and the Council of Europe are far from uniform, and there are significant differences. Slovenia has passed a milestone in the definition and understanding of marriage, from a traditional (conservative) approach – twice confirmed by referendum results in 2012 and 2015 – to a liberal one, following the Constitutional Court's ruling of June 16, 2022[2], according to which marriage is a community of two people without sex differentiation.

The concept of marriage in legislation

Marriage is defined in the highest legal acts of Slovenia, i.e. the Constitution of Slovenia of December 23, 1991[3], the Family Code[4] and the Law on Marriage and Family Relations[5].

Article 53 of the Constitution of the Republic of Slovenia defines marriage and the family and states that marriage is based on the equality of spouses. Marriage shall be solemnized before an empowered state authority. Marriage and the legal relations within it and the family, as well as those within an extramarital union, shall be regulated by law. The state shall protect the family, motherhood, fatherhood, children, and young people and shall create the necessary conditions for such protection.

Article 54 again refers to the rights and duties of parents. It is the right and duty of parents to maintain, educate and care for their children. Parents may be deprived of or restricted in this right and duty only for reasons specified by law and only to protect the interests of the child. Children born out of wedlock have the same rights as children born in wedlock.

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[1] I. Ziemele, *Is the Distinction between State Continuity and State Succession Reality or Fiction? The Russian Federation, the Federal Republic of Yugoslavia and Germany* "Baltic Yearbook of International Law", 2001, vol. 1, p. 204.

[2] Decision U-I-486/20-14 Up-572/18-36, https://www.us-rs.si/documents/42/d0/u-i-486-20-up-572-18-decision3.pdf.

[3] *Konstytucja Republiki Słowenii*, trans. P. Winczorek, M.T. Wójcik, Warszawa 1994.

[4] Družinski zakonik (DZ). Uradni list RS; Official Gazette RS, Nos. 15/17 and 22/19.

[5] Official Gazette RS, No. 69/04 - official consolidated text.

Article 55 refers to the freedom to decide on the birth of children and states that everyone has the freedom to decide on the birth of a child. The state shall ensure that everyone has the opportunity to exercise this freedom and shall create conditions that enable parents to decide freely on the birth of a child.

Article 1 of the Family Code 2017 identifies the areas of regulation: regulates marriage, cohabitation, relations between parents and their children, assistance provided by the state in cases of difficulties in cohabitation and family life, measures to protect the best interests of the child and maintenance obligations, adoption, granting of parental responsibility to a relative, foster care and guardianship for children and other adult persons requiring special protection.

The Family Code also contains a definition of marriage in Article 3. This is a revised definition as a result of a 2022 Constitutional Court ruling. Currently, the definition of marriage reads as follows: *Marriage is a union of two persons, the formalization, legal consequences and termination of which shall be regulated by this Code. The purpose of marriage is to create a family.* Until the decision of the Constitutional Court and the corresponding changes made by Parliament, Article 3 of the Family Code read as follows

Article 3 (Marriage)

(1) Marriage is a domestic community of one man and one woman, the formalisation, legal consequences and termination of which shall be regulated by this Code.

(2) The purpose of marriage is to create a family.

As a result of the 2022 Constitutional Court ruling, the wording of Article 4 of the Family Code, which relates to cohabitation, has also changed. Currently, its wording is as follows: *An extramarital union is a long-term cohabitation between two people who are not married but there are no reasons for marriage between them to be invalid. Such community shall have the same legal consequences for the relationship between them under this Code as if the partners had formalized their marriage, and this community shall have legal consequences in other areas if so provided by an Act.* Prior to the Constitutional Court's ruling, Article 4 read as follows:

Arnice 4:

(1) Cohabitation is a long-term domestic community of a man and woman who are not married but there are no reasons for marriage between them to be invalid. Such community shall have the same legal consequences for the relationship between them under this Code as if the partners had formalized their marriage, and this community shall have legal consequences in other areas if so provided by an Act.

The Constitutional Court's decision of June 16, 2022 had the effect of changing the law. It changed the definition of marriage to two people, without distinction of sex. This has been a long road, as the issue of legalizing same-sex marriage, i.e. changing the definition of marriage, has been put to referendum twice. On March 25, 2012, the subject of the referendum were amendments to the Family Code (turnout 30.31%, against the amendments 54.55%). On December 20, 2015, Slovenians voted on the Law on Amendments to the Law on Marriage and Family Relations, a de facto amendment to the Constitution, which stipulates that marriage can only be between a man and a woman. Voter turnout was 20.4% and the amendment was not approved.

Same-sex marriage legalization referendum

Slovenians have voted twice in referendums: in 2012 and 2015. In 2012, a referendum was held on family law. The National Assembly decided to refer the citizens' initiative to the Constitutional Court on the constitutionality of the proposed referendum. The Constitutional Court rejected the request for review, and the National Assembly went ahead with the referendum[6]. As Krasovec rightly points out, according to the law, for one year after the plebiscite, the Parliament must not pass a law that contradicts the will of the people expressed in the referendum[7]. Shortly after 2014, another attempt was announced to introduce equal rights for same-sex couples by redefining marriage. In March 2015, the Parliament passed a law defining marriage as *a domestic community of two people* instead of *a domestic community of man and a woman*[8]. Under the proposed law, the union of two consenting adults would also give homosexual couples the right to adopt children[9]. Conservative opponents (supported by the Catholic Church)[10] succeeded in collecting signatures for a referendum on the issue, but Parliament refused to hold a referendum, citing the unconstitutionality of human rights and fundamental freedoms. The National Assembly argued that it was inadmissible to decide in a referendum on a law that would remove the unconstitutionality and put same-sex and heterosexual couples on an equal footing in all rights and obligations[11]. The

[6] M. Haček, S. Kukovič, M. Brezovšek, *Slovenian Politics and the State*, Lanham 2017, p. 151.
[7] A. Krašovec, *Referendum in Slovenia (2015)* "East European Quarterly" 2015, Vol. 43(3), p. 305.
[8] E. Kużelewska, *Demokracja bezpośrednia w Słowenii* „Studia Wyborcze", 2018, Vol. XXV, p. 104.
[9] A. Krašovec, S.P. Ramet, *Liberal Democracy in Slovenia: From Seventh Heaven to the Lobby of Hell in Only Two Decades?*, [in:] *Building Democracy in the Yugoslav Successor States. Accomplishments, Setbacks, and Challenges since 1990*, ed. S.P. Ramet, Ch.M. Hassenstab, O. Listhaug, Cambridge 2017, p. 277.
[10] E. Kużelewska, *Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe,* „Białostockie Studia Prawnicze 2019", Vol. 24, No. 1, p. 22.
[11] B. Žuber, I. Kaučič, *Referendum Challenges in the Republic of Slovenia* "Bialystok Legal Studies", 2019, vol. 24, No. 1, p. 144.

Constitutional Court (by a narrow majority of 5 to 4) found the National Assembly not authorized to declare the referendum unconstitutional and allowed it to proceed[12].

In a 2015 referendum. Slovenians rejected a law that would have given gay couples the right to marry and adopt children[13]. Fundamental rights arguments were dominated by traditional views of the family. Opponents of same-sex marriage argued that treating marriage as a union between a man and a woman, and treating different forms of cohabitation unequally, was inconsistent with international human rights. They pointed out that Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights, and Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms state that the right to marry and to found a family is granted to women and men. They argued that, according to the provisions of international legal documents, the family is a natural and fundamental unit of society that requires special protection by the state. They also argued that the definition of marriage as a union between a man and a woman is also in line with the jurisprudence of international courts. The jurisprudence of the European Court of Human Rights shows that limiting the institution of marriage to a union between a man and a woman does not constitute a violation of the human rights of persons of the same sex and does not constitute discrimination based on their personal situation. The protection of traditional family values is a legitimate reason for regulating the individual rights of spouses and same-sex partners. The question of whether same-sex partners should be granted the same rights with regard to the possibility of marriage is ultimately a matter for the individual states to decide. In this regard, the ECtHR ruled in *Schalk and Kopf v. Austria*[14], that the right is subject to the domestic legislation of the States, both procedurally and substantively, and that the competent authorities of a given State are in the best position to identify the needs of society, bearing in mind that marriage has deep-rooted social and cultural connotations which may vary considerably from one society to another. In the case of Slovenian society, these connotations were clearly expressed in two referendums in which the electorate voted strongly against changing the definition of marriage.

The role of the Constitutional Court in changing the definition of marriage

[12] P.M. Ayoub, *When States Come Out. Europe's Sexual Minorities and the politics of Visibility*, New York 2016, p. 186.
[13] E. Kużelewska, *Direct Democracy in Slovenia*, [in:] *Handbook of Direct Democracy in Central and Eastern Europe aft er 1989*, ed. M. Marczewska-Rytko Opladen-Berlin-Toronto 2018, p. 299.
[14] Judgment of June 24, 2010 in *Schalk and Kopf v. Austria*, Application No. 30141/04, LEX No. 584459.

The Constitutional Court has opened an ex officio review of the constitutionality of the constitutional complaints filed by two same-sex couples whose applications for marriage and registration in the register of potential candidates for joint adoption were rejected in administrative and judicial proceedings. The complainants submitted statements for the record that they wished to marry. The administrative unit in Ljubljana rejected the applicants' application for marriage. It cited Article 16 of the Law on Marriage and Family Relationships, which stipulates that persons entering into marriage must be of different sexes. The Ministry of Labor, Family, Social Affairs and Equal Opportunities rejected the applicants' appeal against this decision. The Administrative Court also dismissed their appeal. The applicants' request for permission to appeal to the Supreme Court was also rejected by the Supreme Court. The case was referred to the Constitutional Court.

The applicants argued that a civil partnership is not and cannot be a legitimate substitute for denying the possibility of marriage. They perceived this as discrimination and argued that it had consequences in other areas of the law. They pointed out that only spouses can jointly adopt a child. They also argued that a couple's inability to conceive a child cannot be a circumstance that deprives them of the right to marry. They cited examples of other countries that recognize marriage regardless of the sex of the spouses, including a ruling by the Austrian Constitutional Court that found a provision that did not allow same-sex couples to marry was discriminatory and violated their personal dignity[15].

The legal regulation of same-sex unions in Slovenia has been developing for a long time. In 2006, a regulation was adopted that allowed same-sex partners to register their union and obtain certain rights arising from such a union, and in 2016, a regulation came into force that introduced a formal union between same-sex partners, known as a civil union. Although the latter is similar to marriage, it still differs from both the institution of marriage and some of its legal consequences. By decision No. U-I-486/20, Up-572/18, dated June 16, 2022. The Constitutional Court ruled that a regulation that does not allow same-sex partners to marry is discriminatory[16]. Such discrimination cannot be justified by the traditional meaning of marriage as the union of a man and a woman, nor can it be justified by the special protection of the family. The decision of the Constitutional Court does not diminish the traditional institution of marriage as a union between a man and a woman, nor does it change the conditions or effects of marriage between persons of different sexes. It simply means that

[15] Decision U-I-486/20-14 Up-572/18-36, https://www.us-rs.si/documents/42/d0/u-i-486-20-up-572-18-decision3.pdf.
[16] Decision U-I-486/20-14 Up-572/18-36, https://www.us-rs.si/documents/42/d0/u-i-486-20-up-572-18-decision3.pdf.

same-sex partners can now marry alongside opposite-sex partners.

The constitutional requirement that peoples be treated equally regardless of their sexual orientation requires that their legal situation be equalized with regard to joint adoption. In Slovenia, same-sex partners have so far been able to establish joint parenthood if one partner adopts the child of the other partner (so-called unilateral adoption). However, according to the decision of the Constitutional Court No. U-I91/21, Up-675/19, same-sex partners living in a formal civil union can now jointly adopt a child under the same conditions as opposite-sex spouses.

The Slovenian Parliament has approved amendments to the Family Code allowing same-sex couples to marry and adopt children. According to the ruling, the existing system, in which only opposite-sex couples can marry and same-sex partners in a formal partnership cannot jointly adopt a child, is incompatible with the constitutional ban on discrimination. The Constitutional Court in 2022 ordered the National Assembly to repeal the unconstitutionality within six months. It gave detailed reasons for its position.

First, Article 3(1) of the Family Code, in so far as it provides that marriage is ta domestic community of a man and a woman, and Articles 3 and 16 of the Marriage and Family Relations Act, in so far as they provide that the persons entering into marriage must be of different sexes as a condition for marriage, are unconstitutional. In fact, the law provided that marriage is a legally regulated domestic community between a man and a woman (Article 3) and that, *in order to enter into a marriage, two persons of different sexes must declare their consent to the marriage before a competent authority in the manner prescribed by law* (Article 16).

Second, Article 3 of the Family Code is unconstitutional to the extent that it states that marriage is the community of a man and a woman. The Constitutional Court stated that until this unconstitutionality is removed, marriage shall be considered a community of two persons. Article 22 (1) of the Family Code is repealed.

In two rulings issued on June 16, 2022. The Constitutional Court declared unconstitutional a legal provision that (i) marriage can only be contracted by persons of different sexes and (ii) same-sex partners living in a formal civil union cannot jointly adopt a child. The Constitutional Court ordered the legislature to remove the unconstitutional provisions within six months. It also ruled that until the unconstitutionality is removed, (i) marriage is a lifelong union between two people regardless of their sex, and (ii) same-sex partners living in a formal civil union may jointly adopt a child under the same conditions as

spouses[17].

The Constitutional Court reported that since the adoption of the Constitution of the Republic of Slovenia (which has been particularly noticeable in the last decade), the traditional view of marriage as a union between persons of different sexes has been changing both in Europe and around the world towards allowing same-sex partners to marry. Today, many European countries (including Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom, and Switzerland) allow same-sex partners to marry. What's more, this trend can be seen in other parts of the world. For example, same-sex partners can marry in the United States, Canada, Argentina, Brazil, Uruguay, Colombia, Ecuador, Costa Rica, Chile, Taiwan, Australia, New Zealand and South Africa. In addition, the Constitutional Court noted that public opinion in Slovenia also supports same-sex marriage. According to a discrimination survey conducted by the Ombudsman for Equal Treatment in cooperation with the Mediana Institute on November 24, 2020, 72 percent of Slovenians agree that same-sex couples should be able to marry, and nearly two-thirds would support such a decision for their children[18].

The Constitutional Court is aware of the importance of international law, which stipulates that marriage can only be contracted between a man and a woman. However, what is decisive for the Constitutional Court's assessment is that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a living instrument that must be interpreted in the light of the current situation[19], and consequently the European Court of Human Rights, referring among other things to Article 9 of the recently adopted Charter, which deliberately omitted any reference to men and women in the definition of the right to marry and the right to found a family, has already taken the position that Article 12 of the ECHR can no longer be limited to persons of different sexes in all cases.

A dissenting opinion to the decision of the Constitutional Court was submitted by

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[17] Constitutional Court, U-I-486/20-20, https://www.us-rs.si/documents/42/d0/press-release-u-i-486-20-up-572-18-u-i-91-21-up-675-196.pdf.

[18] The survey is available at: http://www.zagovornik.si/wp-content/uploads/2021/03/Priloga-kizjavi_Izseki-iz-Javnomnenjske-raziskave-o-staliscih-v-zvezi-z-diskriminacijo.pdf. The purpose was to survey attitudes and the prevalence of discrimination in Slovenia. The sample size was 1,007 people. The sample included the general population aged 18-75. The sample was representative of Slovenia in terms of gender, age, region and education. Regarding the topic under consideration in this case, respondents were asked to comment on the statement: "I have no objection to same-sex couples being able to marry in Slovenia" and on the topic “I would support my child if he or she wanted to marry a person of the same sex”. Respondents were able to select one of the following responses: “Completely agree”, “Agree”, “Neither agree nor disagree”, “Disagree”, and “Completely disagree”.

[19] *The ECtHR Judgment in Christine Goodwin v. the United Kingdom*, paras. 74 and 75 of the reasoning.

Judge Clement Jaklič[20]. things, on the assumption that marriage is something special, something granted to the union of a man and a woman, a union from which offspring can be born and raised in the protection of the family, which is the foundation of the community and the source of the continuation of human life, and thus of humanity itself. And, as this traditional approach teaches, that which is the source of life itself has a special status. Hence the special status of marriage given to the union of man and woman, i.e. the family, including the possibility of the joint adoption of children by such a special couple. He notes that with regard to the exclusion of a minority of same-sex couples from marriage and joint adoption of children, the Court ruled that this was unlawful and unjustified, but the reasoning of the Constitutional Court for its decision (according to the judge who wrote the dissenting opinion) lacked logical and coherent argumentation, and an argumentative vacuum remained. According to Jaklič, the Constitutional Court's decision does not explain why, at the constitutional level, only same-sex couples among the various minorities are unjustly excluded from the possibility to marry and adopt children.

Judge Špelca Mežnar takes a different position, fully agreeing with the Constitutional Court's decision. She reasonably emphasizes that the essence of the decision is to eliminate discrimination against persons of the same sex in order to protect the principle of equality and respect the prohibition of discrimination. In other words, the right already enjoyed by the majority (with a different sexual orientation) is extended to the minority (with a different sexual orientation)[21], and the principle of acquired rights guarantees that the position of same-sex couples (regarding marriage and adoption) cannot be worsened in the future. Similarly, another Constitutional Court judge, Katja Šugman Stubbs, stressed that sexual orientation cannot be a differentiating factor in denying someone the opportunity to marry[22]. She took the opportunity to highlight another important issue. In her view, Article 3 of the Family Code, which states that the purpose of marriage is to create a family, is narrow and restrictive, and its wording is controversial. Some couples know they don't want to have children when they get married, others discover they can't have children, and still others marry long after they are

[20] Dissenting Opinion of Judge dr. Klemen Jaklič (Oxford, UK; Harvard, USA) Regarding Decision No. U-I-486/20, dated 16 June 2022, https://www.us-rs.si/documents/42/d0/u-i-486-20-up-572-18-opinion-dr-dr-jaklic3.pdf.

[21] Concurring Opinion of Judge dr Špelca Mežnar Regarding Decision No. U-I-91/21, Up-675/19 and No. U-I-486/20, Up-572/18, dated June 16, 2022, U-I-91/21-25, Up-675/19-38, U-I-486/20-19, Up-572/18-41, https://www.us-rs.si/documents/42/d0/u-i-91-21-up-675-19-u-i-486-20-up-572-18-opinion-dr-meznar3.pdf.

[22] Concurring Opinion of Judge dr Katja Šugman Stubbs Regarding Decisions No. U-I-91/21, UP-675/19 and No. UI-486/20, UP-572/18, Dated 16 June 2022, U-I-91/21-23, Up-675/19-36 U-I-486/20-17, Up-572/18-39, https://www.us-rs.si/documents/42/d0/u-i-91-21-up-675-19-u-i-486-20-up-572-18-opinion-dr-sugman-stubbs3.pdf.

past childbearing age. Nevertheless, the law continues to regulate and protect the institution of marriage, and she finds it inconceivable that a legal norm should limit marriage to the purpose of creating a family. On the issue of adoption, Judge Katja Šugman Stubbs notes that neither the factual nor the legal understanding of the concept of family is historically fixed, as the phenomenon has undergone constant changes throughout history. The forms of parenthood have also varied in the past, as numerous historical and sociological publications show[23]. It is only right that legal views should follow all these changes. The fact is that children live and have always lived in different families, including those of same-sex unions.

In its decision, the Constitutional Court ruled that respecting the traditional and majority view of marriage as a union between a man and a woman may, in principle, be an acceptable target for legal regulation of this institution. However, the legislator cannot justify the denial of the constitutional right of same-sex couples to non-discriminatory treatment (Article 14(1) in conjunction with Article 53 of the Constitution) by reference to the traditional concept of marriage. The argument of tradition cannot justify discrimination. Moreover, the human activity, right or fundamental freedoms of non-heteronormative persons cannot depend on the support of the majority of society. In the Court's rightful view, appealing to the traditional majority view of marriage cannot be a constitutionally permissible purpose of a legislative scheme to prevent same-sex marriage. Therefore, provisions that did not or do not allow same-sex couples to marry were or are incompatible with the right of same-sex couples to non-discriminatory treatment in relation to marriage under Article 14(1) in conjunction with Article 53 of the Constitution.

Applications

Both in the referendum campaigns and in the decision of the Constitutional Court, including the dissenting opinions, the arguments (including the legal ones) have been thoroughly analyzed. They do not seem to have had much impact on public opinion. The equalization of the status of same-sex couples is essentially an ideological issue. Reasonable arguments are of marginal importance. Worldviews are shaped by upbringing, family, religion, education, personality traits, and life experiences. Therefore, the decision of the Constitutional Court, no matter how well reasoned, will not convince anyone who believes that marriage should remain exclusively a union between a man and a woman and that the traditional family (mother, father, child) is the only appropriate environment for raising (adopted) children. On the other hand, for many people,

[23] Ph. Ariès, *L'Enfant et la Vie Familiale sous l'Ancien Régime,* 1960; M.J. Maynes, A. Waltner, *The Family: A World* History, Oxford 2012.

homosexuality is as natural as heterosexuality. Love between two women or men is no different from love between a man and a woman. The desire to have their relationship accepted and recognized is the same. The partnership model is the same. The desire to have a family is the same. Traditional marriage and the traditional family will not be affected in any way by allowing same-sex couples to marry.

In June 2022, a moderately liberal composition of the Constitutional Court of Slovenia recognized the legal equality of same-sex couples. It is important to note that the Constitutional Court stated that discrimination cannot be justified by the traditional meaning of marriage as the union of a man and a woman, nor by the special protection of the family. According to the Court, the decision does not diminish the importance of the traditional institution of marriage as a union between a man and a woman, nor does it change the conditions or consequences of marriage between persons of different sexes. It simply means that same-sex partners can now marry alongside opposite-sex partners[24].

Changing the definition of marriage and extending it to same-sex couples is the right step in the evolution of human rights. The extension of human rights to new categories of persons entails the gradual development of human law. Acquired rights must be protected. Recognition of the right under Article 53 of the Constitution for same-sex couples is not at the expense of the rights of others or the public interest. Granting same-sex couples the right to marry and adopt children in no way restricts the rights of or discriminates against heteronormative persons. It only has the effect of sanctioning reality and expanding the catalogue of parenthood institutions.

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[24] Decision U-I-486/20-14 Up-572/18-36, https://www.us-rs.si/documents/42/d0/u-i-486-20-up-572-18-decision3.pdf.

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