U-I-114/11-16
9. 6. 2011

The Concurring Opinion of Judge Dr. Ernest Petrič

1. As already followed from Constitutional Court Decision No. U-I-137/10, it also follows from Decision No. U-I-114/11 that the National Assembly "acted arbitrarily" by failing to establish the Municipalities of Ankaran and Mirna (paragraph 10 of the reasoning). Already in Decision No. U-I-137/10 the Constitutional Court established that the Establishment of Municipalities and Municipal Boundaries Act (Official Gazette RS, Nos. 108/06 – official consolidated text, and 9/10) was therefore inconsistent with the Constitution. By the Decision at hand (No. U-I-114/11), the Constitutional Court reaffirmed such. The National Assembly was obliged to establish the Municipalities of Ankaran and Mirna in accordance with the regulation and criteria based on the provisions regarding the transitional regulation in the Act Amending the Local Self-Government Act (Official Gazette RS, No. 51/10 – hereinafter referred to as the LSA-R) in force at the relevant time and call elections in accordance with the Constitutional Court Decision (No. U-I-137/10). By doing so, the National Assembly would have remedied the unconstitutional state of affairs that it caused by its own arbitrary actions, whereby it acted contrary to the principles of a state governed by the rule of law (Article 2 of the Constitution) and the general principle of equality before the law (the second paragraph of Article 14 of the Constitution), as the Constitutional Court already established and substantiated in Decision No. U-I-137/10. By failing to implement that Decision, the National Assembly also interfered with the principle of the separation of powers (the second paragraph of Article 3 of the Constitution). In order to remedy the unconstitutional state of affairs, the Constitutional Court established the Municipality of Ankaran on the basis of the second paragraph of Article 40 of the CCA.

2. By this Decision the Constitutional Court did not review the feasibility of the existence of this Municipality and even less the feasibility of the current division of Slovenia into more than 200 municipalities, more than half of which do not fulfil the conditions under the LSA-R in force. The National Assembly can, also in light of the state's financial troubles, amend this regulation by adopting a new systemic regulation. Such could require that municipalities be more substantial and self-sustaining. Thereby, however, the National Assembly must not act arbitrarily, but in accordance with the criteria and rules

of conduct that it will itself lay down, which fall into its margin of appreciation, but must be applied in an equal manner to all.

3. I would again like to emphasise the position from my concurring opinion in Decision No. U-I-137/10, according to which the National Assembly should now and in the future assess strictly and from all relevant aspects whether the criteria – as they are and will be in force – for the establishment and functioning of a municipality are fulfilled. It will also have to review the broader aspects, i.e. the effects in the region and at the national level as well, both of which are of particular importance with regard to the Urban Municipality of Koper and the future Municipality of Ankaran. However, this review must not be arbitrary. The Constitutional Court has not "defended" the Municipality of Ankaran, its feasibility, etc., by Decisions No. U-I-137/10 and No. U-I-114/11, but rather the constitutional order, in which no authority of the state, especially not the highest legislative authority, may act arbitrarily and thereby violate the Constitution, in the case at issue, in particular Article 2, the second paragraph of Article 3, and the second paragraph of Article 14 of the Constitution. As I already wrote in my concurring opinion in Decision No. U-I-137/10 and as I also repeat here, the Constitutional Court of course may not substitute for the National Assembly in [the exercise of] its most important competence with regard to shaping local self-government, i.e. in the assessment of the fulfilment of the criteria or conditions for the establishment of a municipality. The Constitutional Court may not interfere with such. However, with regard to such – i.e. the establishment of municipalities – the National Assembly may not act arbitrarily and therefore in an unconstitutional manner. When I agreed with Decision No. U-I-114/11 and voted for it I did not vote for smaller or bigger municipalities, nor for one or another municipality, but against the evident arbitrariness of the procedures of the National Assembly and against disregard for a Constitutional Court decision, which, in accordance with the third paragraph of Article 1 of the CCA, is binding on all authorities of the state. The possibility of challenging Constitutional Court decisions – and consequently eventually also the possibility to challenge the final decisions of other courts – is a path to the collapse of a state governed by the rule of law. The rule of law – an important part of which within constitutional democracies is precisely the role of the Constitutional Court and the binding nature of its decisions in the protection of constitutionality and legality and the protection of human rights – is a value of greater importance than the existence of a greater or smaller number of municipalities. While I oppose the further breaking up municipalities into smaller parts, I cannot find any reasons under constitutional law that could outweigh the fact that in the case at issue the National Assembly acted arbitrarily and thereby in contradiction with the Constitution, in contradiction with the rule of law.

4. By failing to implement Decision No. U-I-137/10 the National Assembly itself prevented the holding of elections in the Urban Municipality of Koper and the new "Municipality of Ankaran", which it was obliged to establish and call elections for within the determined time limit. As a consequence of this disregard for Decision No. U-I-137/10, an important value of any democratic

society, i.e. the right to elections, may be unexercisable by the citizens in this area for a long period. By point 4 of the operative provisions of Decision No. U-I-114/11, the Constitutional Court ensured to the residents of the entire current urban Municipality of Koper the possibility to exercise the right to elections, as the residents of the Municipality of Ankaran, once the latter has been constituted and the unconstitutional state of affairs remedied, will elect municipal authorities in the first regular elections in 2014. Such is also the usual practice regarding the establishment of municipalities.

5. By establishing the Municipality of Ankaran the Constitutional Court took a big step, which, however, was justified due to the above stated reasons and for the protection of constitutionality and the rule of law. The necessity to protect constitutionality, this exceptionally important value of constitutional democracy, led me to the decision to support this step and vote in favour of Constitutional Court Decision No. U-I-114/11. There will be sufficient opportunities in the process leading to the final constitution of the Municipality of Ankaran, which will presumably be concluded by the election of its local self-government authorities in 2014, for an amicable arrangement between the new Municipality and the remaining Urban Municipality of Koper on the questions that are of special importance for their future development, and that are also specific and particularly important due to the future development of the Port of Koper, which is of special importance for Slovenia, as well as the presence of the Italian national community in both Municipalities. In the context of the established state of affairs, in particular with regard to the sustainability of state finances, also the National Assembly might interfere, which is in accordance with its competence, [by introducing] potential changes to the organisation of local self-government.

6. Point 3 of the operative part of Decision No. U-I-114/11 explicitly guarantees that in the new Municipality of Ankaran the members of the Italian national community are to retain all the rights they enjoy as members of the Italian national community – in accordance with reciprocal international obligations in relation to members of minorities as defined in the Special Statute (Appendix II to the Memorandum of Understanding signed in 1954 in London) and whose further protection is guaranteed by Article 8 of the Treaty of Osimo and which, on the basis of [Slovenia's] accession to the international treaties of the former SFRY, are now a reciprocal obligation between the Republic of Slovenia and the Italian Republic. The purpose of this part of the operative provisions is to ensure that a change in the territorial arrangement of municipalities must not affect the level of special rights of the members of the Italian national community, which it enjoys under international law and Article 64 of the Constitution, or the exercise of such rights. The purpose of this part of the operative provisions is to again ensure that changes in the territorial organisation of the Republic of Slovenia or the Italian Republic in the area of the former Free Territory of Trieste must not be made at the expense of either the members of the Slovene national community in Italy or the members of the Italian national community in the Republic of Slovenia in this territory.

7. Due to all the above stated reasons, I decided to join the majority and vote in favour of Decision No. U-I-114/11. At the same time, I would like to add that I also agree with the positions Judge Dr. Mitja Deisinger put forth in his separate opinion.

Dr. Ernest Petrič
Judge