Dissenting Opinion of Judge Dr Etelka Korpič – Horvat

1. In the hitherto assessment of referendum issues under Article 21 of the Referendum and Popular Initiative Act (Official Gazette RS No. 26/07 – official consolidated text – hereinafter referred to as the RPIA), the Constitutional Court carried out an assessment of the possibility of the occurrence of unconstitutional consequences by first assessing whether the act currently in force was inconsistent with the Constitution. If it determined that it was unconstitutional, it proceeded with an assessment of whether the adopted act that was to be the subject of decision-making in a referendum remedied the existing unconstitutionality in a constitutionally consistent manner.

2. In Decision No. U-II-1/12 and U-II-2/12, the Constitutional Court abandoned such an approach. What is especially problematic is that it abandoned an assessment of whether the act to be decided on in a referendum is consistent with the Constitution. The Constitutional Court did not assess at all whether the Slovene National Holding Company Act (EPA 516-VI – hereinafter referred to as the SNHCA) and the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (EPA 637-VI – hereinafter referred to as the MSSBA) are consistent with the Constitution, but was satisfied with the finding that "there exists the possibility to remedy possible unconstitutionalities in the [newly] adopted statutory regulation by applying the institute of a constitutional review to the Acts at issue " (Paragraph 58 of the reasoning). I believe that by allowing the implementation of an unconstitutional act, the Constitutional Court itself can contribute to an unconstitutional situation.

3. The issue to which the current Decision of the Constitutional Court refers is, in my opinion, comparable namely to case No. U-II-1/11 (Decision dated 10 March 2011, Official Gazette RS No. 20/11), by which the Constitutional Court assessed the admissibility of a referendum regarding the Pension and Disability Insurance Act (EPA 1300-V – hereinafter referred to as the PDIA-2). At that time, the allegations of the National Assembly that unconstitutional consequences would occur due to the rejection of the PDIA-2 in a referendum did not convince the Constitutional Court. The Court namely adjudged that the National Assembly did not demonstrate (1) that the applicable statutory regulation, i.e. the Pension and Disability Insurance Act (Official Gazette RS

No. 109/06 – official consolidated text – hereinafter referred to as the PDIA-1) was evidently unconstitutional and (2) that what was at issue was an unconstitutionality that already existed during the decision-making of the Constitutional Court (hereinafter referred to as an actual unconstitutionality), and not an unconstitutionality that would occur in the more or less distant future (hereinafter referred to as a hypothetical unconstitutionality). Therefore, the Constitutional Court allowed the referendum on the PDIA-2.

4. The National Assembly substantiated the request for a review of the constitutionality of the referenda regarding the SNHCA and the MSSBA, *mutatis mutandis,* in the same way as the request for an assessment of the admissibility of a referendum regarding the PDIA-2. As in the case in which the Constitutional Court assessed the admissibility of the referendum regarding the PDIA-2, *mutatis mutandis,* the National Assembly also in this case alleges that the rejection of the adopted Acts in a referendum would worsen the public finance situation of the state, which already is unfavourable, due to which unconstitutional consequences would eventually occur, i.e. in the more or less distant future a situation inconsistent with the Constitution would occur.

5. In my opinion, as in the case where the Constitutional Court assessed the admissibility of the referendum regarding the PDIA-2, the National Assembly also in this case failed to demonstrate the existence of an actual unconstitutionality; it only possibly demonstrated a hypothetical unconstitutionality. Therefore, I believe that the decision in this case should be the same as that regarding the admissibility of the referendum on the PDIA-2.

6. In the case in which it assessed the admissibility of the referendum on the PDIA-2, the Constitutional Court explicitly requested that the National Assembly demonstrate the existence of the actual unconstitutionality. That was the *ratio decidendi* of the decision in that case, which in my opinion represents a relevant precedent for a decision on the current requests.

7. It is nonetheless true, as Judge Petrič realises in the eighth paragraph of his concurring opinion to Decision No. U-II-1/11, that "a precedent is neither eternal nor unchangeable" and that "even in the Anglo-Saxon legal system, in which a precedent is exalted more than anywhere else […], it is established that an *ultima ratio* precedent is only worth as much as the reasons which substantiate it are solid and as much as the arguments for it are convincing." The case law can change "if *compelling reasons* exist for such." Then, in the tenth paragraph, Judge Petrič adds that "…the Constitutional Court's case law must not blindly follow the hitherto decisions if new understanding and changed social circumstances demonstrate that also the correction of some prior

position of the Constitutional Court is needed" (emphasis added by EKH). Such considerations of Judge Petrič did not refer to the *precedent* at issue, as his reflections on *precedent* are true in general.

8. The principle disturbing issue in this decision is not the disregard for the precedent, but that the majority decision in this regard lacks any substantiation whatsoever, even though it is mainly bound by the principle of equal treatment when applying the law and the principle of trust in law.[1] In German constitutional case law, a precedent is not a formal source of law and changes in the case law (even in stable case law) are admissible, as long as they remain in the framework of expected legal development, that is, if the decisions do not represent a surprise (*Überraschungsentscheidung*) to the participants in the procedure, and under condition that they are sufficiently substantiated by the courts.[2] In the case at issue, there was a substantial change in the constitutional assessment, which in my opinion was not sufficiently substantiated.

9. The majority decision does not state the urgent and *compelling reasons* for the fact that in this case the Constitutional Court did not insist that the National Assembly demonstrate that there exists an actual (and not a hypothetical) unconstitutionality. The Constitutional Court does not explain which new understanding and changed social circumstances dictated the modification of the position that it adopted in case No. U-II-1/11. Decision No. U-II-1/11 was adopted less than two years ago (on 10 March 2011). The social circumstances were already very unfavourable at that point (i.e. bad economic circumstances, a credit crunch, the significant indebtedness of the state, a critical situation with regard to public finances, low credit ratings), and yet the Constitutional Court rejected the request with the following statement: "At this time, it is not possible to substantiate the unconstitutionality of the PDIA-1 with the allegations and data by which the National Assembly and Government can, in fact, substantiate that changes in the pension system are necessary in the future due to macroeconomic, public-finance, and demographic reasons. Constitutionally, these reasons are not measurable, therefore the Constitutional Court cannot take them into consideration in its assessment and must also not assess if they are well-founded."

10. If the Constitutional Court assessed that the social circumstances have deteriorated to such a degree in less than two years that for such reason it had to urgently and inevitably (due to a *compelling reason*) abandon the position that it can only assess whether there exists an actual unconstitutionality, it has thus passed over into the domain of determining a hypothetical unconstitutionality. In other words, it has passed from the domain of assessing

the constitutional consistency of the adopted acts to the domain of assessing the suitability of the adopted acts (even though it proceeds from the majority decision that the Court does not address the suitability of such [Paragraph 56 of the reasoning]). This, in my opinion, is not within the competence of the Constitutional Court.

11. The National Assembly alleges that the implementation of the SNHCA and the MSSBA will produce effects that will improve the economic and public finance situation, which will significantly reduce the risk that in the state a situation inconsistent with Articles 1, 2, 3, 8, 34, 50, 51, 86, 87, 89, 90, 91, and 153 of the Constitution will occur; a situation in which the implementation of entire chapters of the Constitution that determine the organisation of the state will be seriously jeopardised and where also ensuring the human rights and fundamental freedoms guaranteed by the Constitution will be jeopardised. In brief, the National Assembly alleges that the SNHCA and the MSSBA are suitable Acts for preventing or at least reducing the risk that a general unconstitutional situation will occur.

12. If I disregard the fact that assessing the suitability of an adopted act does not fall within the competence of the Constitutional Court, I believe that the Constitutional Court should perform such assessment by treating the allegation of the National Assembly as a hypothesis which has to be tested (confirmed or rejected, empirical, epistemological discretion) in an appropriate way. However, it failed to do so. It stems from the Decision that "the Constitutional Court lacks sensible reasons that would cast doubt over the assessment of the National Assembly" and that the SNHCA and the MSSBA "are urgently needed to ensure the sustainability of the functioning of the state with regard to the public finances in the current circumstances of economic crisis" (Paragraph 54 of the reasoning). However, the Constitutional Court did not refute doubts regarding the assessment of the National Assembly on the basis of an appropriate test of its allegations. It simply accepted the assessment offered by the National Assembly and regarded it as its own. The allegations of the National Assembly regarding the SNHCA, for instance, do not quantify the future profit of the national holding company, which could be the only direct source of income of the budget of the Republic of Slovenia. Therefore I have – in contrast to the majority of the judges of the Constitutional Court – certainly sensible reasons to have doubts regarding the assessment of the National Assembly that the SNHCA is a suitable measure for preventing or at least reducing the risk of the occurrence of a general unconstitutional situation in the conditions of the existing economic crisis. We could say that the National Assembly alleges, as the only proof of the existence of a link between the implementation of the SNHCA and the future situation of the state from the viewpoint of public

finances, the by now already popular thesis that even the suspension of the implementation of the SNHCA due to a referendum – let alone its possible rejection in a referendum – would lead the credit agencies to lower the already low credit ratings of the state and of the banks. I hope that such does not entail that henceforth the Constitutional Court will in every similar case suspend the constitutional right to a referendum as soon as the National Assembly or the Government mentions such credit agencies.

13. When I state that I have, in contrast to the other judges of the Constitutional Court, sensible reasons for doubting that the SNHCA and the MSSBA are suitable measures for reducing the risk that a general unconstitutional situation will occur in the conditions of the existing economic crisis, I do not say that it is not urgent to replace, without undue delay, the current legal regulation with another; I only state that neither the National Assembly nor the majority decision of the Constitutional Court convinced me that it is reasonable to expect that the SNHCA and the MSSBA represent a suitable legal regulation for reducing the risk that sooner or later a general unconstitutional situation will occur. Perhaps it is really not "wise" to decide on the SNHCA and the MSSBA in a referendum. But "the Constitutional Court does not decide whether it is "wise" to make a decision on certain issues in a referendum, but whether such decision-making is consistent with the Constitution."[3] While voting on the Decision in the cases U-II-1/12 and U-II-2/12, I could not rid myself of the feeling that this time the majority composition of the Constitutional Court was above all deciding whether it is "wise" to allow a referendum on the SNHCA and the MSSBA. Therefore I could not regard as proved that there exists a collision between the constitutional right to a referendum on the SNHCA and the MSSBA, and the constitutional values that in a more or less distant future would be substantially limited or endangered by the unfavourable economic and public finance circumstances.

Dr Etelka Korpič – Horvat

Endnotes:
[1] Jarras claims, for instance, that an unsubstantiated departure from the case law of the highest courts in a particular case would entail a violation of the prohibition of arbitrary treatment. See H. D. Jarras in: H. D. Jarras and B. Pieroth (Editor), Grundgesetz für die Bundesrepublik Deutschland – Kommentar, 11th edition, Verlag C. H. Beck, München 2011, p. 120, Para. 39. See also the Order of the BVerfG, 1 BvR 1557/01, dated 4 August 2004, Paras. 7–9, available at:

http://www.bverfg.de/entscheidungen/rk20040804_1bvr155701.html (17 December 2012). Dürig claims that Article 3 of the German Federal Constitution protects against surprising decisions and requires a certain steadiness of the case law. See G. Dürig in: T. Maunz and G. Dürig (Editors), Grundgesetz – Kommentar, book I, Verlag C. H. Beck, München 1973, Article 3, Para. I, p. 187, Para. 407.

[2] Order of the BVerfG, 1 BvR 779/85, dated 26 June 1991, Para. 43, available at: http://www.servat.unibe.ch/dfr/bv084212.html (17 December 2012); Order of the BVerfG, 2 BvR 2044/07, dated 15 January 2009, Para. 85, available at: http://www.bverfg.de/entscheidungen/rs20090115_2bvr204407.html (17 December 2012); B. Grzeszik in: T. Maunz and G. Dürig (Editors), op. cit., Article 20, section VII, pp. 40–41, Para. 106.

[3] Judge of the Constitutional Court Jan Zobec, in Para. 11. of his concurring opinion to Decision No. U-II-1/11.