The Dissenting Opinion of Judge Testen

1. There is No (Longer) a Rightful Proposer

During the proceedings before the Constitutional Court the National Assembly elections took place. Concerning who signed the request for review, it has long been impossible to assert that (at least) thirty deputies still support the request, which is a procedural requirement according to Art. 160.2 of the Constitution. I insisted that the Court interpret this procedural requirement strictly and thus reject the proposal. In addition to what follows from the proposers' assertions that the Agreement was not inconsistent with the Constitution, which thus creates impossible procedural situations, the matter also entails a procedure that leads to a serious disturbance in the interstate relations, for it prevents the ratification and coming into force of a validly concluded treaty. It might prove to be the case that no deputy (still) supports the proposal, or that the President of the Republic or the Government does not conclude that there is anything disputable in the treaty, yet it would be impossible to ratify it since the Constitutional Court must decide on a "proposal" for constitutional review that is no longer supported by any proposer enumeratively determined in the Constitution. No interest protected by Art. 160.2 of the Constitution would be affected if the Court required for the constitutional review of a treaty - and any resulting delay in ratification - that in such cases a proposal for such review is continuously supported by at least one third of the representative body.

In the proceedings on the issuance of this Opinion, the Constitutional Court exhaustively discussed this question.

Therein, it considered its case law, arguments in comparative law, attempted to resolve the question by analyzing the results of analogous proceedings at the expiry of the term of office of National Assembly deputies. Furthermore, it embarked in more detail on the question of how such or different position concerning this question affects other procedural stutus of the proposers, in particular the possibility that the request or proposal be altered or retracted, especially during the ongoing term of office, after the expiry of the term of office or following the deputies (non)re-election.. What prevailed was the position, in contrast to mine, that it is enough that the procedural requirement of a rightful proposer exists at the time the proposal is filed, not necessarily continuously through the proceedings before the Constitutional Court.

In accordance with the established case law of the Constitutional Court, having being outvoted by the majority as regards the existence of this procedural requirement, I had, as a judge, two options: (1) I could have voted against (any) decision based on the merits of the case, and not entered into any discussion of the well foundedness of the application; or (2) due to the fact that the majority opinion in any case obviated the procedural obstacle, I could have participated in deciding on the merits of the case although having previously insisted that the procedural requirements had not been met. The discussed procedural requirement was not directly connected with the substance of the controversy and also could not indirectly affect the criteria of the review, its scope and the effects of the meritorious decision reached. Therefore, upon weighing the standpoint of other judges whose opinion concerning the procedural requirement was different, I decided to set aside this procedural requirement and participate in the decision on the merits.

Since the Court in this case did not apply its previously established requirement that the prescribed procedural requirements must exist continuously through the proceedings and that the Court itself ensures such by virtue of its office, I opine that it is necessary to point to the consequences that logically follow from such position.[1] When an application is submitted, which requires a certain number of signatures in accordance with the Constitution or statute, it or its status may be altered (either changed, supplemented or withdrawn) only by all the signatories together. The withdrawal of one signature is no longer possible, the change in the status or the position of the signer does not affect the correctness of the application: an application is an "arrow shot" and cannot be stopped.

2. No Judicial Controversy Existed

I have had a problem with the question of whether the Court should consider the deputies' proposal at all also due to the fact that it was submitted by deputies who asserted that there was "nothing disputable in the disputed Agreement". In such a manner, in terms of judicial decision-making, a completely unnatural situation developed: adjudication is the deciding on a controversy, not just the confirmation that all participants in the proceedings are right. This fully applies also to constitutional-review proceedings, which in their basic elements are established as adversary proceedings (with certain elements of inquisitorial proceedings - i.e. the non-binding effect of the proposal on the Court, the possibility of extending the review according to the linking-issues principle). However, in the beginning I did not see any procedural obstacles in such illogicality that would prevent the decision-making: as correctly established in the majority decision, the Constitutional Court had already in the first such (Rm) decision [i.e. preventive review of treaties] dealt with a similar situation (although not in such an extensive way - see the separate opinion of Judge Ribičič, in particular Paragraph 2).

Moreover, it seemed that this illogicality was partially written into the Constitution: according to Art. 160.2, the Government can always be the proposer of preventive-review proceedings, which as a rule prepares treaties and proposes their ratification to the National Assembly. However, in the case of the Government the situation is slightly different. It is highly probable to expect that, despite its political decision to submit a treaty for ratification, the Government could ask itself whether a certain solution in the treaty, as a result of the negotiations, might not be in conformity with the Constitution.[2] In such a case it would present all its arguments to protect itself from being responsible for the submission of an unconstitutional treaty for ratification to the National Assembly.[3] The Constitutional Court will in such a case, as a rule, treat the procedural materials which address the Government's doubts concerning the constitutionality of the treaty, so that it will consider a certain disputed question although no real controversy exists. The case at issue is different also concerning the mentioned procedural requirement: the question was not submitted to the Court due to the proposers' doubts about the constitutionality of the Agreement, but only due to their wish to obtain the imprimatur constitutional-review and rebut the argument that the Agreement was unconstitutional, which was expressed by their parliamentary political opponents who did not support the ratification of the Agreement. The Constitutional Court was thus put in the position of deciding on a political controversy without there being any basic elements pointing to the existence of a judicial controversy. It cannot be overlooked that such a proposal entails a peculiar abuse of a procedural right.[4] At this point I realized that in the proceedings in which the Court treated only the procedural materials, which were able to be obtained only in such a manner, I could participate only in such a meritorious review that could remain within the logic chosen by the "proposers" and which would be limited finally to the confirmation that the Agreement was truly not vulnerable in the part attacked by the proposers' blank cartridges.[5] However, there was no need for such a finding.

I could not overlook this procedural obstacle, since it would essentially affect my choice of the criterion of review, its scope and the effects I would ascribe to the decision or the opinion reached in such proceedings. Therefore, for the mentioned procedural reasons, I voted against the decision reached.

Franc Testen

Opombe:
[1] In the discussion I foretold that despite my position that the procedural requirement was lacking, I would participate in the meritorious decision-making only if such decision on the merits also reflected the clear majority position concerning all the discussed issues. As regards the possibility of the withdrawal of such proposal, no majority opinion prevailed. What prevailed was the position that once the composition of the National Assembly changes, the option to withdraw the proposal is enjoyed by only at least 61 deputies (this demonstrates the fact that the proposal is not supported by the constitutionally required number of thirty deputies). I opposed such interpretation since it enables the proposal to be "withdrawn" by those who did not file it, and at the same time prevents those who in fact signed the proposal from withdrawing it.

[2] It is necessary to bear in mind that in the selection of solutions in treaties the Government is restricted by other considerations than in the selection of solutions in bills: while in the first case it must (in addition to the framework of the Constitution) respect the negotiation requirements determined by at least another sovereign subject of international law, in the second case, in addition to the Constitution, it is restricted only by the requirement of a majority support in the parliament. Thus, in legislative debates it can be more flexible and from a greater distance avoid the edge of (un)constitutionality. Also, the risk that some statutory provision will appear to be unconstitutional is smaller than in case the same appears after the ratification of treaty provisions. The constitutional regulation which envisages a priori constitutional review only for treaties is based on this logic.
[3] It is true that also in such a case there is no real controversy and that the Court will issue a certain mandatory advisory opinion in such a case as well, which it does not issue otherwise. However, it has a constitutional basis, as a body specialized in the interpretation of the Constitution, to dismiss the Government's doubts. The position of thirty deputies and the rationale of the provision which gives them the possibility to a priori challenge constitutionally controversial treaty provisions is, however, completely different. It is a weapon of the opposition that opposes the ratification of a treaty. The procedural requirements that must be fulfilled by the three proposers determined in the Constitution must be reviewed separately and considering the role of each of them in the political system, in particular concerning the entering into, ratification and implementation of treaties.
[4] This assertion has a completely constitutional-procedural character: thus, in the framework of the constitutional review and also this separate opinion I do not treat the (political) question of why the deputies who asserted that the Agreement was unconstitutional did not (co-)sign the proposal and perhaps add their arguments to it.
[5] Thereby I do not assert that the decision reached remains only within this field. In particular, this cannot be asserted for the separate opinions of Judges Čebulj and Janko.