



**REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE**

U-I-111/04
8 July 2004

DECISION

At a session held on 8 July 2004 in proceedings to examine the petition and in proceedings initiated upon the request of the Mayor of the Urban Municipality of Ljubljana, and upon the petition of the Islamic Religious Community in the Republic of Slovenia, based in Ljubljana, represented by Mufti Osman Đogič, and Nevzet Porić, Ljubljana, the Constitutional Court

decided as follows:

1. The Order Calling a Subsequent Referendum on the Implementation of the Ordinance Amending the Ordinance on the Adoption of Spatial Planning Conditions for the V2 Trnovo – Tržaška Cesta Planning Unit (for the VR-2/6 Ob Cesti Dveh Cesarjev Planning Area) and the Order Amending this Order (Official Gazette RS, No. 41/04) are annulled.
2. The request for the review of the constitutionality of the Local Self-Government Act (Official Gazette RS, Nos. 72/93, 57/94, 14/95, 26/97, 70/97, 10/98, 74/98, 70/2000, and 51/02) and the petition to initiate proceedings for the review of its constitutionality are rejected.

Reasoning

A

1. The applicant [i.e. the Mayor] submitted a request to review the constitutionality of the Order Calling a Subsequent Referendum on the Implementation of the Ordinance Amending the Ordinance on the Adoption of Spatial Planning Conditions for the V2 Trnovo – Tržaška Cesta Planning Unit (for the VR-2/6 Ob Cesti Dveh Cesarjev Planning Area) and of the Order Amending this Order (Official Gazette RS, No. 41/04) (hereinafter [collectively] referred to as the Order Calling the Referendum) because she believes that holding the referendum and the consequences resulting from the possible rejection of the general act that is to be submitted to the referendum would be contrary to the Constitution. As the Local Self-Government Act (hereinafter referred to as the LSGA) does not provide for the possibility of a constitutional review of a referendum question prior to the calling of the referendum, she submitted the request on the basis of Article 33 of the LSGA. She believes that she is entitled, on the basis of the mentioned provision of the LSGA, to request a constitutional review of the Order Calling the Referendum as, within the preliminary procedure for deciding on an initiative to call a referendum, Article 47 of the LSGA

grants her only the right to review the conditions determined by statute and the municipal charter that are of a "procedural-technical character".

2. The applicant deems that the Constitutional Court may also conduct a substantive review of the Order Calling the Referendum. She deems that such a review is justified by the special circumstances (i.e. the exceptionality of the case, the serious unconstitutionality that might occur if in the referendum the citizens decided on the constitutional rights of a religiously defined social minority, and preventing a [referendum] decision on constitutional rights). The request for the referendum allegedly gained the support of the required number of voters as it was based on religious intolerance that was clearly and unambiguously expressed during the process of collecting signatures. Its initiators clearly and unambiguously expressed their view that the referendum entails "a referendum against the mosque" in the media, on the streets, on billboards in front of the offices of administrative units, and in written pamphlets inviting people to support the initiative to call the referendum.[1] The purpose of the referendum question was allegedly clearly evident from the reasoning of the request to call a referendum, in which its initiators stated that the construction of a mosque was not necessary and that Muslims could satisfy their religious needs in a simpler manner (i.e. in prayer rooms). The applicant emphasises that the initiators of the referendum publicly substantiated the initiative to call the referendum with statements in which they connected Muslims with terrorism, a different culture, way of life, and historical past, and expressed general distrust and fear of them. Thus, the referendum allegedly does not concern issues involving [the mosque's] location or technical realisation, as the initiators began to emphasise such only in the last stage of the process of collecting signatures, after having realised, on the basis of the publicly expressed opinions of a number of legal experts, that the referendum question was constitutionally disputable.

3. The applicant submitted a comparative analysis of the consideration of legislatures' actual intent in conducting a constitutional review, and referred in particular to decisions of the Supreme Court of the United States of America and to academic literature from the area of constitutional law. Concerning such, she also cited Constitutional Court decisions and separate opinions of individual judges, Constitutional Court Order No. U-II-3/03, dated 22 December 2003, and the analysis and commentary on that Order in the article "*(Referendumske) meje in pasti ustavne demokracije* [(Referendum) Limits and Traps of Constitutional Democracy]".[2] As constitutional theory undoubtedly recognises the consideration of intent in a constitutional review, the Constitutional Court should allegedly not only review the text of the referendum question, which at first glance appears to be linguistically neutral, but should also consider that it in fact concerns the prevention of the exercise of the constitutional rights of a certain group of people.

4. The applicant believes that deciding in a referendum whether or not to build a mosque is contrary to the Constitution, in particular Articles 1, 7, 15, 2, 34, 35, 39, 41, 42, 61, and 63. The equality of religious communities determined by Article 7 of the Constitution and the principle of equality determined by Article 14 of the Constitution allegedly guarantee that adherents of the Islamic religion can exercise their religious rights in the same manner as adherents of other religions, and that for this purpose they can build places of worship. The free pursuit of the activities of religious communities is allegedly ensured only when religious communities can, in conformity

with the Constitution and the laws, freely decide on the manner of their religious activity. If such activity is rendered impossible, the rights determined by Articles 34, 35, 39, 41, and 42 are allegedly violated. Such referendum is allegedly also contrary to the fourth paragraph of Article 15 of the Constitution and Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR), which do not allow that the Islamic religious community be recognised rights to a lesser extent than other religious communities. From the principle of the separation of religious communities and the state (Article 7 of the Constitution) there allegedly follows the obligation of the state to ensure religious equality, not to privilege or discriminate against a certain religion or certain religions, to be neutral regarding all religions and beliefs, and to create conditions for the exercise of this constitutional right not only in private, but also in public premises. The reasoning of the initiative to call the referendum, the initiators' public appearances, and the public debates are allegedly an evident expression of religious intolerance, which is prohibited by Article 63 of the Constitution.

5. Furthermore, the applicant emphasises the findings of the Human Rights Ombudsman and the report of the European Commissioner for Human Rights on the situation in the area of human rights protection in Slovenia. She also suggests that the Constitutional Court review the constitutionality of the LSGA as, in the case of an initiative to call a referendum, it does not enable municipal authorities to initiate procedures for a preliminary review of such. She deems that the gap in the law interferes with the rights of local communities since all residents living in the local community, i.e. also those who belong to a social minority, have to be guaranteed the right to impede a referendum if they are affected thereby. As guardians of constitutionality and legality, municipal authorities should have the possibility to prevent an unconstitutional referendum.

6. On 16 April 2004, the Islamic Religious Community and its member Nevzet Porić (hereinafter referred to as the petitioners) lodged a petition to review the constitutionality of the LSGA. On 23 April 2004, they also lodged a petition to review the constitutionality of the Order Calling the Referendum and supplemented the previously lodged petition for the review of the constitutionality of the LSGA. The petitioners deem that they demonstrated legal interest to challenge the Order Calling the Referendum concerning the construction of the mosque. The challenged Order allegedly directly interferes with their rights and interests and, in particular, with the position of the Islamic Religious Community, which for thirty years has been trying to build a place of worship and cultural centre. In this regard, they assert that the Constitutional Court has already recognised legal interest to challenge acts calling a referendum.

In Order No. U-I-29/91, dated 24 October 1991, it allegedly recognised such legal interest to an individual citizen, and in Decision No. U-I-144/94, dated 15 July 1994 (Official Gazette RS, No. 45/94, and OdlUS III, 95), it recognised such to a group of citizens and the Citizens' Initiative of Slovene Istria, based in Koper. In order to protect the constitutional rights and freedoms of entitled petitioners, the Constitutional Court allegedly has to recognise their right to challenge an act calling a referendum.

Concerning such, it should allegedly also consider the fact that the legislation does not enable a preliminary constitutional review of an initiative to call a referendum at the local level, and thus not even a minimum level of protection of the constitutional rights and freedoms of the individuals or groups that are directly affected by a referendum is provided.

7. The petitioners emphasise that the case at issue concerns a conflict between the initiators of the referendum and the Islamic Religious Community.

In deciding, the Constitutional Court should allegedly consider the position taken by the German Constitutional Court in the *Lüth* case. According to such, the constitution is a direct source of law that, as such, applies not only in relations between the individual and the state, but also in mutual relations between individuals and social groups.

From the reasoning of the initiative to call the referendum, media reports, and public communications that the initiators of the referendum directed at the voters, it allegedly clearly follows that the calling of such a referendum entails a violation of constitutional provisions, particularly Articles 14, 39, 41, 42, 61, and 63 of the Constitution.

8. The petitioners propose a review of the constitutionality of the LSGA for the same reasons as the applicant. They emphasise that also a local referendum might lead to a violation of constitutional principles and rights.

The reasons for which the initiators of the referendum oppose the construction of a mosque are allegedly explicitly constitutionally inadmissible. They allegedly concern the prevention of religious activity, which the majority of the population is not entitled to prevent nor is it entitled to impose its opinion on the members of a religious community. The intolerance that was already evident during the collection of the signatures to support the initiative to call the referendum allegedly even increased during the referendum campaign. Unconstitutional consequences would allegedly occur due to the rejection of the Ordinance [in the referendum]. The construction of a mosque, which Muslims have been awaiting for decades, would again be postponed for an indefinite time.

9. The Municipal Council of the Urban Municipality of Ljubljana informed the Constitutional Court that it supported the Mayor's request. It did not, however, reply to the petition of the Islamic Religious Community and Nevzet Porić to review the constitutionality of the Order Calling the Referendum.

10. The National Assembly did not reply to the request to review the constitutionality of the LSGA.

11. The Government asserted in its opinion, which was *inter alia* communicated to the Constitutional Court, that the LSGA does not give a municipal council the possibility to request the constitutional review of a request to call a referendum. Thus, a municipal council cannot oppose the calling of a referendum even if it is of the opinion that the posed question is not consistent with the Constitution and the law.

Therefore, it would allegedly be reasonable to amend the LSGA with regard to this issue.

12. The first signer among the initiators of the initiative to lodge a request to call a referendum, Mihael Jarc, deems that the Constitutional Court has no jurisdiction to review the Order Calling the Referendum for reasons that he already stated in the reply submitted to the request of the Municipal Council of the Urban Municipality of Ljubljana in cases No. U-II-2/04 and No. U-I-76/04. In the cited cases the Constitutional Court held that it had no jurisdiction to decide. He stated that the rejection of the Ordinance in a referendum would not result in an unconstitutional situation, as this would entail that such unconstitutional situation already exists. The rights of the Islamic Religious Community would allegedly only be violated if the religious community did not have any place of worship and if it could not perform its religious rites at all.

He asserts that the Islamic Religious Community owns thirteen places of worship in Slovenia and is thus able to perform religious rites in more modest circumstances. Only if the construction of a mosque were rejected in several repeated referenda and the Islamic Religious Community did not have other possibilities to perform religious rites would it be possible to assert that its rights were violated. He emphasised that the initiators of the referendum "do not explicitly oppose a mosque but its currently envisaged dimensions and location, namely for a number of especially substantiated reasons which have nothing in common with religious intolerance." He warns that in the Ordinance that is to be submitted to the referendum the mosque is not even formally mentioned and therefore if in the referendum the Ordinance were approved the Islamic Religious Community would have to obtain the land in an appropriate public tender procedure wherein also other religious communities in the Republic of Slovenia could compete.

B – I

13. The Constitutional Court joined the request and the petitions for joint consideration and decision-making. By Order No. U-I-111/04, dated 28 April 2004 (Official Gazette RS, No. 51/04), the Constitutional Court suspended the implementation of the Order Calling the Referendum.

14. The applicant challenges the Order Calling the Referendum. Hitherto the Constitutional Court has always considered an act by which a referendum is called to be a regulation and has reviewed it as such.[3] The Order Calling the Referendum is thus a regulation of a local community. According to the fifth paragraph of Article 33 of the LSGA, if a mayor considers a general act of a municipality to be unconstitutional, he or she suspends the publication of the act and proposes that the municipal council decide on it again at its next session, whereby the mayor must state the reasons for the suspension. If the municipal council confirms its original decision, the general act is published and the mayor may lodge a request for the review of its conformity with the Constitution with the Constitutional Court. As [in the case at issue] the Mayor suspended the publication of the Order Calling the Referendum and the Municipal Council voted on it again and decided to publish it, the procedural pre-conditions for the review of the Order Calling the Referendum

determined by the fifth paragraph of Article 33 of the LSGA are fulfilled. Thus, on the basis of the fourth indent of the first paragraph of Article 160 of the Constitution, the Constitutional Court is competent to review its constitutionality.

15. Due to the position adopted in Order No. U-I-257/03, dated 26 January 2004, according to which, due to the special regulation of the preliminary review of the constitutionality of a referendum question in accordance with Article 16 of the [Referendum and Popular Initiative Act], the Constitutional Court declared as inadmissible the request of a group of Deputies to review the constitutionality of an order by which a subsequent legislative referendum had been called, it was necessary to examine whether the Mayor's request was admissible from this point of view.

Therefore, the Constitutional Court had to answer the question of whether with regard to local referenda the LSGA provides for the special legal remedy of a preliminary review, the non-exhaustion of which entails a procedural impediment.

16. The second paragraph of Article 47 of the LSGA authorises a mayor to require the initiator of a request to call a local referendum to remedy inconsistencies in the referendum initiative if such is not drafted in accordance with the first paragraph of Article 47 of the LSGA,[4] or if it is contrary to the law or the municipality's charter. If the initiator fails to do so, the initiative is deemed to not have been submitted, and, pursuant to the third paragraph of the same article, the initiator may require that the Administrative Court review the mayor's decision. The LSGA thus enables a mayor to review the legality of a request to call a referendum, and provides the initiators of the referendum with a legal remedy against the mayor's decision. However, it does not authorise a mayor to lodge a request for a preliminary review of the constitutionality of a referendum question. Accordingly, also from this point of view, the fulfilment of the procedural requirements for the review of the Order Calling the Referendum upon the Mayor's request is undisputable.

17. The procedural requirements for a review of the constitutionality of the Order Calling the Referendum upon the Mayor's request are thus fulfilled. Therefore, the Constitutional Court had to review the constitutionality of the challenged Order due to the reasons stated by the applicant. In light of such, the Constitutional Court did not have to address the issue of whether the petitioners demonstrated legal interest for a review of the constitutionality of the Order Calling the Referendum. As the petitioners did not allege anything new that the applicant had not already claimed, the Constitutional Court accepted their petition and, as the conditions under the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA) were fulfilled, proceeded to decide the case on the merits.

B – II

18. In accordance with the first paragraph of Article 74a of the LSGA, the act calling a referendum determines the content of the question to be decided on in the referendum, the day the referendum is called, the referendum area, and the day of voting. In contrast to general acts calling elections at the state or local level, where

the act calling the elections only determines the date of the calling of the elections and the day of voting,[5] the LSGA explicitly determines that the content of an act calling a referendum must also include the "content of the question to be decided on in the referendum." An act calling a referendum is namely a general act by which eligible persons are called on to express on a certain day their will regarding the content of the referendum question.[6] If only the legality of the content of a referendum question is disputed, the mayor must proceed in accordance with the second paragraph of Article 47 of the LSGA, and the initiators of the referendum can protect their right [in this regard] by means of a legal remedy filed before the Administrative Court in accordance with the third paragraph of Article 47 of the LSGA. However, if the constitutionality of its content is questioned, as a constitutive part of a regulation it is subject to constitutional review.

19. Point 2 of the Order Calling the Referendum determines the following:

"The question submitted to the referendum reads as follows: Do you agree with the implementation of the Ordinance Amending the Ordinance on the Adoption of Spatial Planning Conditions for the V2 Trnovo – Tržaška Cesta Planning Unit (for the VR-2/6 Ob Cesti Dveh Cesarjev Planning Area)?"

20. The essential subject of this review is thus the issue of whether Point 2 of the Order Calling the Referendum is inconsistent with the Constitution for the reasons asserted by the applicant.

B – III

21. The aim of spatial management is to enable coherent spatial development through consolidation of economic, social, and environmental aspects of development.[7] By means of their spatial management competences, municipalities determine the use of land and spatial arrangements of local importance in conformity with the fundamental provisions of the SMA-1 and the directions contained in strategic spatial acts adopted by the State.[8] Spatial arrangements are determined and planned by spatial acts.[9] Until the entry into force of the spatial orders of municipalities, the spatial management conditions,[10] which can be amended or supplemented according to the same procedure pursuant to which they were adopted, remain in force. The ordinance that is the subject of the Order Calling the Referendum is such an act. The first paragraph of Article 46 of the LSGA explicitly only prohibits referenda on the budget and the final balance of accounts of a municipality and on general acts by which, in conformity with the law, municipal taxes and other duties are levied. Thus, in accordance with the law, spatial management decisions that lie in the competence of municipalities may in principle be put to a referendum.

22. The Ordinance that is the subject of the referendum under review amends and supplements the Ordinance adopted in 1988 (Official Gazette SRS, Nos. 6/88, etc.). It envisages the construction of new buildings intended for religious and cultural activities (i.e. the type and purpose of the spatial modification) on land comprising two plots that belong to the VR 2/6 Ob Cesti Dveh Cesarjev, m. e. 4C planning area (Article 3 of the Ordinance). From the text that determines the height of the buildings

(the prayer room and the minaret) in relation to their surroundings, it follows that the building will be intended for Islamic worship (i.e. a mosque).[11] Such is also confirmed by the reasoning of the Proposal of the Ordinance (No. 3521-13798-38, dated 13 October 2003), which states that the proposed building was the result of the Islamic Religious Community's efforts to obtain a proper location for the construction of an Islamic religious and cultural centre in Ljubljana. The reasoning also contains positions concerning the comments submitted during the period for public disclosure and discussion of the draft of the Ordinance. In the reasoning, the body that proposed the Ordinance stated that in addition to expert opinions (regarding the location of the structure, its exposure, the threat of flooding, the size and height of the structure, traffic solutions, and noise) and complaints made by garden allotment holders and immediate neighbours, numerous anonymous comments that expressed general opposition to the construction of a mosque were submitted.

23. In the introductory part of its reasoning, the request to call a referendum emphasises that the "religious and cultural centre" will be intended for "a group of almost ten thousand people." From the reasoning it follows that the initiators believe that the question of what buildings are appropriate for practicing religion should be decided on by the majority. Concerning such, they emphasise that they do not oppose that the Islamic Religious Community be ensured proper conditions for exercising their constitutional right to freedom of religion, but at the same time they deem "that they cannot be ensured this right only by means of one large building for the whole country, but by a number of territorially equally distributed places of worship." They assess "that there is no need to build a large cultural and religious centre at this location, as several prayer rooms in Ljubljana would ensure followers of the Islamic way of life a more complete religious service, particularly due to the dispersion of places of worship and better accessibility of such with regard to traffic and other aspects that such dispersion would bring about."

24. The mentioned opinions and positions from the reasoning of the request to call a referendum also featured in the campaign seeking supporters for the request to call a referendum. From numerous materials attached to the request, particularly from the records of television and radio discussions and from newspaper articles, it follows that the referendum was to decide on the question of whether the Islamic Religious Community and its members should be allowed to build a place of worship (a mosque) or not. Although also other reservations (e.g. as to the appropriateness of the location and the technical aspects of the building) were expressed, what prevailed was evidently and undoubtedly the argumentation that was already expressed in the reasoning of the request to call the referendum – namely that the Islamic Religious Community does not need such a large building to satisfy its religious needs as several so-called prayer rooms would suffice.[12] Therefore, the referendum on the Ordinance would not only entail deciding on the construction of a certain building in a particular environment, but it would also concern deciding on the question of whether the Islamic Religious Community should be ensured the right to practice its religion in a mosque or not.[13]

25. In light of the above, the Constitutional Court had to review the constitutionality of Point 2 of the Order Calling the Referendum from the perspective of opposition to the construction of a mosque. Concerning such, the issues of the location, size, and design of the building and its constitutive parts, access to the building, etc., cannot be

the subjects of this review as, in accordance with spatial planning legislation, these issues have to be resolved already within the procedure for planning the construction of a building or within the relevant procedures for issuing a building permit.

B – IV

26. Article 44 of the Constitution determines that every citizen has the right, in accordance with the law, to participate either directly or through elected representatives in the management of public affairs. This right is a classic universal constitutional right, the essential characteristic of which is that it guarantees to all citizens the possibility to participate in the management of public affairs in accordance with the law. It is most directly exercised at the level of local communities and by referenda and statutory initiatives, and indirectly through elections; the manner of exercising this right is determined by law.[14] However, it does not directly follow from the mentioned constitutional provision that the law should give priority to direct decision-making over representative democracy. Legal theory has emphasised that direct decision-making can be disputable when the protection of minorities and their constitutional rights is at issue.[15] With regard to local referenda, the Constitution does not contain any provision equivalent to the second paragraph of Article 90 of the Constitution, which under certain conditions guarantees the right to decide by legislative referendum as a constitutional right. The right to decision-making in a local referendum as one of the forms of direct decision-making is ensured by Article 44 of the LSGA. In deciding on the case at issue, the Constitutional Court did not have to adopt a position regarding the question of whether such entails that the right to decide by local referendum is only protected as a statutory right or whether, with regard to Article 44 of the Constitution, it enjoys constitutional protection equal to that of human rights or fundamental freedoms. Already in Order No. U-II-3/03, dated 22 December 2003, the Constitutional Court namely emphasised that the Constitution is also binding for citizens when they exercise power directly (the second paragraph of Article 3) by deciding on a certain statute in a referendum (Article 90 of the Constitution). The same has to apply to instances of direct decision-making in local referenda. The Republic of Slovenia was established as a constitutional democracy, the essence of which is that the values protected by the Constitution, including, in particular, fundamental human rights and freedoms (the preamble to the Constitution), can prevail over the democratically adopted decisions of the majority.[16] With regard to such, in reviewing the admissibility of a referendum the Constitutional Court must take into consideration that decisions that would be inconsistent with the Constitution may not be put to a referendum.

27. The first paragraph of Article 41 of the Constitution guarantees the free profession of religion in private and public life. Already in Decision No. U-I-68/98, dated 22 November 2001 (Official Gazette RS, No. 101/01, and OdlUS X, 192), the Constitutional Court held that freedom of religion ensures individuals that they may freely profess their religion, by themselves or together with others, publicly or privately, through teaching, the fulfilment of religious duties, worship, and the performance of religious rites, which are [collectively] designated as the so-called positive aspect of freedom of religion. Thereby the Constitution does not only protect the individual but also the profession of religion within a community. The right to

religious freedom is also protected by numerous international instruments that, in comparison with Article 41 of the Constitution, determine the content and scope of this human right in greater detail. The Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948, determines that this right includes the freedom to change one's religion as well as its free, public, and private profession, either individually or in community with others, through teaching, the fulfilment of religious duties, worship, and the performance of rites. The content of the right to profess one's religion is similarly determined by Article 18 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, MP, No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the Covenant) and Article 9 of the ECHR.[17] It is established case law of the European Court of Human Rights that Article 9 of the ECHR guarantees religious freedom not only to individuals, but also to religious communities that are "capable of having and exercising the rights contained in the first paragraph of Article 9." [18] Traditionally, religious communities exist in the form of organised structures. In a democratic society they are thus an indispensable constitutive part of pluralism, and therefore, according to the position of the European Court of Human Rights, they are even the central subject of protection under Article 9 of the ECHR.[19]

28. It is crucial for the exercise of the right to the free profession of religion that religious communities be allowed to build religious buildings in a manner that is traditional for the profession of a particular faith, their religious rites, and customs. Thereby it is necessary to take into consideration that the profession of a certain religion is not necessarily only focused on religious worship and the performance of religious rites, but that it can also be connected with social, educational, and cultural activities. The profession of a religion in a manner that is usual and generally accepted for the profession of the relevant religion is a precondition for the exercise of the free profession of religion, individually or in community with others, and therefore enjoys constitutional protection. Such a position is also confirmed by international instruments. In addition to providing the general definition of this right in Article 1 (the right to have a religion or whatever belief of one's choice, and the freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice, and teaching), the United Nations' Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by Resolution No. 36/55, dated 25 November 1981,[20] also defines the broader content and meaning of this right in Article 6. Thus, in point a) it determines that the right to freedom of thought, conscience, religion, or belief includes the freedom "to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes," and in point e) the freedom "to teach a religion or belief in places suitable for these purposes." The Concluding Document of the Vienna Meeting of the Conference for Security and Co-operation in Europe in 1989 (hereinafter referred to as The Concluding Document of the Vienna Meeting of the OSCE)[21] mentions the importance of places of worship for the profession of a religion and the functioning of religious communities. The fourth paragraph of Article 16 of the Document determines that the freedom to profess one's religion also entails that religious communities be allowed to establish and maintain freely accessible places of worship or assembly.[22]

29. It follows from the above-stated that the right to freely profess a religion includes the right of individuals and religious communities to profess a religion, individually or in community with others, in places of worship that are usual and generally accepted (i.e. traditional) for the profession of their religion and the performance of their religious rites.[23] This aspect of the right to freedom of religion follows not only from the first paragraph of Article 41 of the Constitution, but also from the second paragraph of Article 7 of the Constitution, according to which religious communities pursue their activities freely.[24] In light of such, the conviction of the initiators of the request to call the referendum that building places of worship in a manner that is traditional for the profession of an individual religion is not a constitutive part of the right to freedom of religion is erroneous.[25] It is certainly necessary to take into consideration that the construction of such buildings must be planned and realised in conformity with existing legal regulations on spatial planning and construction. However, as already mentioned (Paragraph 25 of this reasoning), that is not the subject of this constitutional review.

30. Already in Opinion No. Rm-1/02, dated 19 November 2003 (Official Gazette RS, No. 118/03, and OdlUS XII, 89), by which it decided on the constitutionality of certain provisions of the Agreement between the Republic of Slovenia and the Holy See on Legal Issues, the Constitutional Court emphasised that the state must allow the free functioning of religious communities as concerns the exercise of the constitutional right to freedom of conscience, and that it must enable individual and collective religious freedom. It follows from the second paragraph of Article 7 of the Constitution that religious communities enjoy equal rights and that they may pursue their activities freely.[26] It follows from the principle of the separation of the state and religious communities (the first paragraph of Article 7) that the state must not identify with a particular religious or other ideology.

B – V

31. The Constitutional Court had to answer the question of whether in the case at issue deciding on the implementation of a spatial planning act in a referendum interferes with the right determined by the first paragraph of Article 41 of the Constitution. Thereby it took into consideration the fact that the casting of votes by those entitled to vote on the content of the referendum question does not merely entail the exercise of freedom of expression (Article 39 of the Constitution), as the referendum does not have a merely consultative character.

A decision reached in the referendum would be binding. If a majority voted against the implementation of the Ordinance, the Islamic Religious Community would be prevented from building a traditional place of worship (a mosque), which is (as already explained) a constitutive part of the human right to freely profess one's religion. Therefore Point 2 of the Order Calling the Referendum interferes with the right determined by the first paragraph of Article 41 of the Constitution. In reviewing whether there has been an interference with this right, the Constitutional Court did not accept the argument of the initiators of the referendum that the human rights of the Islamic Religious Community would be violated only if the construction of a mosque were rejected in several repeated referenda and this religious community did not have any other possibilities to perform religious rites. Each of these cases would

namely concern completely the same legal situation. Furthermore, the assertions that the case concerned the issue of the location of the building and that several prayer rooms would suffice[27] for adherents of the Islamic religion and they do not need a mosque in order to freely profess their religion were not taken into consideration.

32. With regard to the above-stated, a review of the constitutionality of Point 2 of the Order Calling the Referendum is, from the viewpoint of opposition to the mosque, a review of the admissibility of an interference with the right to the free profession of religion determined by the first paragraph of Article 41 of the Constitution. In instances in which the norm-framer limits human rights, the Constitutional Court reviews the admissibility of such limitations on the basis of the so-called strict test of proportionality. Such proceeds from the premise that there must exist a constitutionally admissible legitimate aim for an interference with a constitutional right, which follows from the third paragraph of Article 15 of the Constitution, according to which human rights are only limited by the rights of others and in such cases as are provided by this Constitution (i.e. the test of legitimacy).[28] If the interference with a human right is intended to ensure the exercise of the rights of others, the Constitutional Court also evaluates whether it is an excessive interference from the perspective of the general principle of proportionality determined by Article 2 of the Constitution (see, e.g., Decision No. U-I-127/01, dated 12 February 2004, Official Gazette RS, No. 25/04).

33. In Decision No. U-I-68/98 the Constitutional Court adopted a position according to which it deemed an interference with the right under the first paragraph of Article 41 of the Constitution (the positive aspect of the freedom of religion) admissible due to the protection of the negative aspect of the freedom of religion (the second paragraph of Article 41 of the Constitution). Such concerned a case in which, in the framework of school lessons (compulsory primary school education or the creation of opportunities for citizens to obtain a proper education; the second and third paragraphs of Article 57 of the Constitution) attended by pupils in public schools, the operation (and, as regards primary schools, also the financing) of which must be ensured by the state, there was a conflict between both aspects of this constitutional right. In the case at issue, however, there exists no conflict between the two aspects of the mentioned right, as the decision to visit a building that is the place of worship of an individual religious community is a matter of an individual's free will. The mere fact that a place of worship that also displays external religious characteristics is located on land that is, in accordance with spatial legislation, intended for the construction of religious buildings cannot by itself interfere with the negative aspect of the freedom of religion. Thus, in the case at issue, the protection of the negative aspect of the freedom of religion cannot constitute a legitimate aim that could justify an interference with the right determined by the first paragraph of Article 41 of the Constitution.

34. A precondition for the admissibility of an interference with a human right is that the aim pursued by means of such interference is legitimate, i.e. objectively justified (the third paragraph of Article 15 of the Constitution). The Order Calling the Referendum (together with the actual voting) would entail the exercise of the right to a local referendum, which, as already mentioned, is guaranteed by Article 44 of the LSGA if the statutory conditions for such are fulfilled. It was already clear from the request to call the local referendum and the campaign that the initiators launched when they began collecting signatures that the initiators of the request to call the

referendum wanted the persons entitled to vote to reject the construction of the mosque. As was already mentioned, the case at issue does not concern the location of a building in the environment, but the prevention of the construction of a building that is traditional for the profession of the Islamic faith and which its followers are entitled to in accordance with the first paragraph of Article 41 of the Constitution.[29] The goal of the referendum is thus to prevent members of the Islamic Religious Community from professing their religion, individually or in community with others, in a building that is usual and generally accepted (i.e. traditional) for the profession of their religion and the performance of their religious rites.

35. Accordingly, it is possible to conclude that the aim that the challenged regulation pursues is the limitation of the right determined by the first paragraph of Article 41 of the Constitution. In accordance with the third paragraph of Article 15 of the Constitution, according to which human rights can only be limited by the rights of others (and in such cases as are provided by the Constitution), this aim is inadmissible as it is only intended to limit a right, and not at the same time to also protect the rights of others.

Therefore, Point 2 of the Order Calling the Referendum is inconsistent with the right to freely profess one's religion. Thus, the interference is considered to be constitutionally inadmissible already on the basis of the test of legitimacy, and the Constitutional Court did not have to review its proportionality.

36. As the Constitutional Court found that Point 2 of the Order Calling the Referendum was inconsistent with the first paragraph of Article 41 of the Constitution, it annulled it. It chose annulment as it suspended the Order's implementation after its implementation had already begun. As a result of such annulment, the text of the other points of the Order Calling the Referendum became superfluous, and therefore the Constitutional Court also annulled them.

37. As the Order Calling the Referendum had to be annulled already for the above-stated reasons, the Constitutional Court did not have to review the other alleged inconsistencies with the Constitution. Therefore, the Constitutional Court did not have to clarify in what cases a request to call a referendum could be considered inconsistent with the first paragraph of Article 63 of the Constitution, which, *inter alia*, prohibits any incitement to religious discrimination and to religious or other hatred.

B – VI

38. The Mayor [i.e. the applicant] requested a review of the constitutionality of the LSGA. On the basis of the seventh indent of the first paragraph of Article 23 of the CCA, a request for a review of constitutionality and legality can only be lodged by representative bodies of local communities if there occurred an interference with the rights of a local community. The Mayor failed to submit an authorisation from which it would follow that she is entitled to lodge a request on behalf of the City Council. She could also have filed the request on the basis of Article 91 of the LSGA on behalf of the City of Ljubljana, if the Charter of the Urban Municipality of Ljubljana authorised her to do so (Official Gazette RS, No. 26/01). As the Charter does not provide for such authorisation, the Constitutional Court did not have to address the issue of

whether the Mayor, by asserting that there exists a legal gap in the LSGA that interferes with the rights of citizens and prevents the local authorities from obtaining a preliminary review of a referendum question, demonstrated that the constitutional position and the rights of the local community as an independent entity under public law were interfered with.

39. In light of the above, the Constitutional Court rejected the applicant's request for a review of the constitutionality of the LSGA. It also rejected the petition to initiate proceedings for the review of the constitutionality of the LSGA.

The Constitutional Court annulled the Order Calling the Referendum. The calling of a referendum is inadmissible on the basis of this decision, and thus the potential establishment of the unconstitutionality of the LSGA would not improve the petitioners' legal position. Therefore, the petitioners failed to demonstrate legal interest for a constitutional review thereof.

C

40. The Constitutional Court adopted this Decision on the basis of Article 25 and the second paragraph of Article 45 of the CCA and on the basis of the second indent of the third paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 93/03 and 98/03 – corr.), composed of: Dr Dragica Wedam Lukić, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr Ciril Ribičič, and Jože Tratnik. Judge Dr Mirjam Šrk was disqualified from deciding in the case. The decision was reached by seven votes against one. Judge Čebulj voted against.

Dr Dragica Wedam Lukić
President

Notes:

[1] Written and visual materials were attached to the request to confirm this assertion.

[2] See A. Teršek, *Pravna praksa*, No. 1/2004, enclosure, pp. I-XXXII.

[3] E.g. Decision No. U-I-114/91, dated 28 January 1993 (Official Gazette RS, No. 8/93, and OdlUS II, 9), Decision No. U-I-144/94, and Decision No. U-I-279/96, dated 10 September 1996 (Official Gazette RS, No. 51/96, and OdlUS V, 126).

[4] The provision of the first paragraph of Article 47 of the LSGA reads as follows: "An initiative for voters to lodge a request to call a referendum may be submitted by every voter or political party in a municipality or the council of a narrower part of a municipality. The initiative must contain a request to call a referendum, which has to include the clearly expressed question that is to be the subject of the referendum, and a statement of reasons. The charter of a municipality can determine that an initiative must be supported by the signatures of a certain number of voters, which have to be provided on a list containing the following personal data of the signers: name and surname, date of birth, and address of permanent residence."

[5] 1. The first paragraph of Article 16 of the National Assembly Elections Act (Official Gazette RS, Nos. 44/92, etc.) determines the following: "In an act calling elections,

the day the elections are called and the day of voting shall be determined." 2. The first paragraph of Article 28 of the Local Elections Act (Official Gazette RS, Nos. 72/93, etc.) determines the following: "In an act calling elections, the day the elections are called and the day of voting shall be determined."

[6] 1. Hitherto the Constitutional Court has already reviewed orders calling referenda on the introduction of mandatory contributions by residents to co-fund local infrastructure projects on the merits if the procedural conditions for their consideration were fulfilled. Article 7 of the Act that regulates mandatory contributions by residents to co-fund local infrastructure projects (Official Gazette RS, No. 35/85 – official consolidated text) namely determined the content of an act calling a referendum on the introduction of mandatory contributions by residents. 2. By Decision No. U-I-114/91, it annulled two orders calling referenda on the introduction of mandatory contributions by residents to co-fund local infrastructure projects as they did not contain all the elements prescribed by law (e.g. the determination of the total amount required for the implementation of the project, the determination of the manner in which the funds would be used). 3. By Decision No. U-I-269/96, dated 7 November 1996 (Official Gazette RS, No. 66/96, and OdlUS V, 146), it abrogated two orders calling referenda as they were inconsistent with the statutory provision determining the persons who may and who must participate in the referenda and who are thus obliged to pay the contributions. The Constitutional Court deemed that this fundamental inconsistency with the law was in itself a sufficient reason to abrogate the challenged acts. Furthermore, it held the following: "A referendum performed contrary to the law and a mandatory contribution determined contrary to the law cannot constitute the basis for introducing obligations for residents."

[7] See the first paragraph of Article 3 of the Spatial Management Act (Official Gazette RS, Nos. 110/02 and 8/03 – corr. – hereinafter referred to as the SMA-1).

[8] See the first paragraph of Article 12 the SMA-1. See also Article 29 of the LSGA.

[9] The first paragraph of Article 17 of the SMA-1.

[10] The first paragraph of Article 173 of the SMA-1.

[11] 1. *Slovenski pravopis* [Slovene Orthography], Slovenska akademija znanosti in umetnosti and Znanstveno raziskovalni center SAZU [The Slovenian Academy of Sciences and Arts and the SASA Scientific Research Centre], Ljubljana 2001, in its dictionary section defines the following terms: "*džamija – muslimanska molilnica*" [mosque – a Muslim place of prayer], "*mošeja – muslimanska molilnica; minaret*" [mosque – a Muslim place of prayer; a minaret], "*minaret – stolp pri džamiji*" [minaret – the tower of a mosque], pp. 522, 884, and 869. *Veliki slovar tujk* [The Great Dictionary of Foreign Words], M. Tavzes (Ed.), Cankarjeva založba, Ljubljana 2002, defines the following: "*džamija – večja muslimanska molilnica*" [mosque – a large Muslim place of prayer], "*mošeja – (... from Arab. masjid shrine, from saged to pay reverence, worship) a Muslim building intended for religious rites, a shrine*", "*minaret – (Turk. minare from Arab. manara beacon, from nana to beam) a slim high tower next to a Muslim mosque from which a muezzin calls believers to prayer*"; pp. 246, 761, and 739. 2. In French, the established expression is mosque (*mosquée*) designating a religious building of Islam; it is essentially a place of worship. Depending on its importance, it is called *djami* (mosque-cathedral) or *masdjid* (the mosque of a quarter or district). A minaret is the tower of a mosque, from the top of which a muezzin daily calls out the call to prayer. See *Dictionnaire général pour la maîtrise de la langue française, la culture classique et contemporaine*, Larousse, Paris 1993, pp. 1045 and 1019. 3. In English, the established term is mosque, which means a building in which Muslims worship their god; a minaret is a high narrow

tower, usually a part of a mosque, from which Muslims are called to prayer. Oxford Advanced Learner's Dictionary, Sixth Edition, Oxford University Press, Oxford 2000, pp. 863 and 843.

[12] 1. For example, "*Islamski verski in kulturni center v Ljubljani, NSi: Mošejo na referendum* [The Islamic religious and cultural centre in Ljubljana, NSi: The mosque submitted to a referendum], Delo, 9 December 2003. 2. "As more prayer rooms in Ljubljana would enable members of the Islamic way of life more complete religious service and better accessibility of such with regard to traffic and other aspects," taken from a statement of the first signer of the referendum initiative, Mihael Jarc, in *Dnevnik* [The News] on TV Slovenija, 23 December 2003 (a recording of the internet version). 3. On the television show *Trenja* [Clashes] on POP TV on 11 December 2003 the viewers were asked the following question: "Do you support the building of an Islamic religious and cultural centre in Ljubljana?" (a recording of the internet publication). 4. On the television news *24 ur* [24 Hours] on POP TV on 20 February 2004, a discussion was held on whether the referendum question was clear enough in light of the fact that the initiators of the referendum were collecting signatures under the slogan: "We are collecting signatures to call a referendum against the mosque" (a recording of the internet publication).

[13] Cf. the Decision of the Federal Constitutional Court of the Federal Republic of Germany, dated 12 March 2004 (1 BvQ 6/04). In that case, the complainant, who had been denied a request to assemble with others, asserted that the assembly was not against the building of a synagogue as such, but against the spending of public funds for that purpose. The Federal Constitutional Court decided that the public interest in prohibiting such assembly and association prevailed over the complainant's right to a public gathering. It assessed that the slogan of the public gathering pursued the aim of aggressively inciting the exclusion of Jewish citizens of Germany, and that such could not be changed by the subsequently submitted financial-political slogan. According to the Court, the complainant simply wanted to prevent the construction of the synagogue. Although the new slogan did not in fact incite the masses to hatred, given the existence of the previous slogan, it did not change the public perception.

[14] See J. Čebulj in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, Commentary on Article 44 of the Constitution, Points 3 and 4, pp. 490–491.

[15] The following positions can, for example, be found in academic literature: 1. "A balanced conclusion seems to be this: the referendum is neither better nor worse than representative democracy. The sad fact is that both direct and representative institutions of democracy can be used to enact legislation which discriminates against minorities. This is why we need constitutional courts and Bills of Rights. Minorities are always vulnerable and need special protection." 2. "[...] Issues like religion, language and nationality, especially when combined, arouse emotions which make compromise impossible [so] that referenda on these issues ought to be avoided, at least if we maintain that consensus government and the protection of minorities are goals in themselves." 3. "Referenda are theoretically least likely to lead to oppressions of minorities in large jurisdictions, as an increasing number of citizens increases the probability that the various majorities cancel each other out. [...] Therefore minority-threatening referenda would tend to be unsuccessful in larger polities than in smaller ones. There is empirical evidence which supports this interpretation. [...] Even this percentage is unacceptable, and a vivid illustration of the need for constitutional courts, which can rectify the citizens' and legislatures' sins of

commission on this issue." See *A Comparative Study of Referendums, Government by the People*, Mads Qvortrup, Manchester University Press, 2002, pp. 14, 19, 158.

[16] "The adjective "constitutional" in the concept of constitutional democracy is not merely a decorative addition or a modest change in the meaning of the noun democracy (...). The adjective "constitutional" in the concept of constitutional democracy entails a genuine interference with the noun itself. It determines no less and no more than the limits of the principle of democracy; it expresses the idea that the assessment of whether majority decisions are correct is hence subject to a basic reservation, namely the reservation of whether such decisions are in conformity with the constitution." The Vice President of the Constitutional Court of the Federal Republic of Germany W. Hassemer in his paper "Constitutional Democracy", *Pravnik*, No. 4–5/2003, Vol. 58, p. 214.

[17] The provision determines the following: "1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance. 2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

[18] Council of Europe, European Commission of Human Rights, Decisions and Reports, 16, Strasbourg, December 1979, Application No. 7805/77, *X and Church of Scientology v. Sweden*, p. 68.

[19] See the Judgment in *Hasan and Chaush v. Bulgaria*, <http://hudoc.echr.coe>, Application No. 30985/96. Regarding the significance of this decision of the European Court of Human Rights, see also L. Šturm, *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Commentary on Article 7 of the Constitution, point 29, pp. 130 and 131; and M. Orehar Ivanc, in: *ibidem*, Commentary on Article 41 of the Constitution, point 24, p. 451.

[20] *Človekove pravice, Zbirka mednarodnih dokumentov, I. del, Univerzalni dokumenti* [Human Rights, Collection of International Documents, Part I, Universal Documents], Društvo za Združene narode za Republiko Slovenijo, Ljubljana 1995, p. 96.

[21] Conference for Security and Co-operation in Europe, Follow-up Meeting 1986–1989, Vienna, 4 November 1986 to 19 January 1989, Concluding Document; accessible at: http://www.osce.org/docs/english/1973-1990/follow_ups/vienn89e.htm.

See also the Declaration that the National Assembly adopted on 2 March 2001 to mark the 25th anniversary of the OSCE (Official Gazette RS, No. 16/01). Therein the Republic of Slovenia emphasised "the consistent commitment and dedication of our state to the fundamental values, principles, and goals of the OSCE, and expressed its decision to cooperate more actively in their implementation."

[22] The second indent of the first paragraph of Principle 16 reads as follows: "establish and maintain freely accessible places of worship or assembly".

[23] With regard to the fact that it is also essential for the free profession of one's religion that religious communities are allowed to build, hire, or own buildings that correspond to their manner of worship and their religious (and social) practice, see also *Religious Human Rights in Global Perspective, Legal Perspectives*, Edited by Johan D. van der Vyver and John White, Jr., Martinus Nijhoff Publishers; W. Cole Durham, JR, *Perspectives on Religious Liberty: A Comparative Framework*, pp. 37–40.

[24] The free pursuit of the activities of religious communities is a particularly emphasised constitutional right within the general freedom of natural persons and legal entities to act determined by Article 35 of the Constitution. It is ensured to religious communities not only in private life and on private premises, but in public life as well. See L. Šturm in: *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Commentary on Article 7, points 11 and 12, p. 125.

[25] The Council of Europe Commissioner on Human Rights, Alvaro Gil-Robles, also highlighted the significance of this in the Report on his Visit to Slovenia (11–14 May 2003), wherein he stated the following: "Almost 48,000 persons declared themselves as Muslims at the 2002 official census, making Islam the second most widespread religion in Slovenia. However, despite the efforts by the Slovenian Muslim community over the past 30 years, there is no Mosque or Islamic Cultural Centre in Slovenia. As a result, Muslim worshippers have to meet in apartments, garages and other private premises. The Minister for Foreign Affairs with whom I raised this issue, noted that the authorities had no objection to the building of the mosque, and that the mayor of Ljubljana had indeed already taken the decision to allow the construction of the Mosque, a decision supported by the Government. While a location has been identified, the Minister invoked resistance by the local population towards building the Mosque. I welcome the decision allowing the construction of the Mosque, and would like to urge the authorities not to give in to the pressures exerted by some parts of the population against the building of the Mosque. Having a place to worship is an integral part of one's right to freely exercise his or her religion. In this context, I would like to refer to the Recommendation by the European Commission against Racism and Intolerance which called upon member States to 'ensure that the Muslim communities are not discriminated against as to the circumstances in which they organise and exercise their religion'."

[26] "The principle of the equality of religious communities entails that religious communities are in this aspect equal to all other non-state communities. In this respect, they enjoy full equality. The state must demonstrate respect for diversity and religious and ideological neutrality towards all religious communities, which is the origin of the prohibition on privileging persons or communities that hold a particular ideological or religious belief, as well as the prohibition against the exclusion of religious communities or believers, or persons with different beliefs. In this context, the principle of the equality of religious communities is a defensive right against state interferences, but it also obliges the state to actively create conditions for the implementation of this constitutional right." See L. Šturm in: *Komentar Ustave Republike Slovenije*, [Commentary on the Constitution of the Republic of Slovenia], the Commentary on Article 7 of the Constitution, point 8, pp. 124–125.

[27] It does not follow from the documents submitted to the Constitutional Court what the persons who lodged the request to call a referendum mean by the term prayer room. The premises that were inspected by the Council of Europe Commissioner on Human Rights, which by their nature are garages or apartments, probably cannot be considered prayer rooms in the true meaning of the word.

[28] Moreover, the above-cited international instruments determine more precisely the reasons for which the right to freedom of religion may be limited. The third paragraph of Article 18 of the Covenant determines that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. The already cited second paragraph of

Article 9 of the ECHR determines even stricter conditions. Furthermore, Point 17 of The Concluding Document of the Vienna Meeting of the OSCE determines the conditions under which the rights defined by that document may be limited. Only such limitations are admissible as are provided by law and are consistent with the states' obligations under international law and with their international commitments. In accordance with this principle, the states must ensure in their laws and regulations and in the application of such the full and effective exercise of the freedom of thought, conscience, religion, or belief.

[29] *Cf.* the decision of the Federal Constitutional Court of the Federal Republic of Germany cited in note 13.