

D E C I S I O N

At a session held on 10 September 1996 in a proceeding to review constitutionality and legality, instituted by the initiative of the submitters of a request for the call of a referendum as to the National Assembly elections, the Constitutional Court

d e c i d e d:

1. Item 3 of the Decree on Calling the Statutory Referendum as to the elections to the National Assembly (Official Gazette of the RS, No. 44/96) is abrogated.
2. Item 4 of the Decree on Calling the Statutory Referendum as to the elections to the National Assembly is not consistent with the Constitution and the statute.
3. The National Assembly is to set a new date of calling the referendum as to the questions, contained in the Decree cited in Item 1 of this holding, within seven days after this decision will be delivered.

R e a s o n i n g:

A.

1. Initiators - 43.710 voters as submitters of the request for a call of the referendum as to the electoral system, represented by Janez Janša - made a motion to the Constitutional Court to find Items 3 and 4 of the Decree on Calling the Statutory Referendum as to the Election to the National Assembly (hereinafter: OdRZRV) inconsistent with the Constitution and the Referendum and Popular Initiative Act (Official Gazette of the RS, No. 15/94, 38/96 and 43/96 - dec. CC; hereinafter: ZRLI), and abrogate them ab initio.
2. According to the initiators' opinion, Item 3 of the OdRZRV is allegedly inconsistent with Article 19 of the ZRLI, which clearly prescribes time limits for calling a referendum. An interpretation, that the National Assembly can arbitrarily postpone the carrying-out of the referendum infinitely, would be pursuant to their opinion contrary to the purpose of these time limits prescribed for making a Constitutional Court decision and calling the referendum after having the Constitutional Court decision on the constitutionality of the request for calling the referendum received. Due to its inconsistency with Article 19 of the ZRLI, Item 3 of the OdRZRV is allegedly contrary to Article 153, Para. 3 of the Constitution, providing that all by- laws and other general acts are to be in accord with the Constitution and statutes.
3. The initiators allege that the implementation of Item 3 of the OdRZRV would cause irreparable consequences for 43.710 submitters of the request for calling a referendum, since it allegedly annuls the constitutional provision with respect to the right to participate directly in managing public affairs (within statutory prescribed time limits). Thereby their clearly expressed will to choose the system of elections, voting accordingly in these or any next elections to the National Assembly, is thus finally outwitted. Besides, the same item allegedly opens also different possibilities of abusing the procedure.
4. Due to a mutual connexion, the petitioners argue the same reasons alleging the inconsistency of Item 4 of the OdRZRV with the Constitution and ZRLI, as in the case of Item 3 of the same Decree. Therefore, they propose to the Court to abrogate ab initio both.
5. For it is allegedly clear, according to the initiators, that in the case at hand the National Assembly is not willing to respect the Constitution, ZRLI, and Court's decision in the case U-I-265/96 (Official Gazette of the RS, No. 43/96), they propose that the Constitutional Court fixes of the date from which the time limits as to the acts necessary for carrying-out the referendum start running, and the date of holding the referenda concerning the elections to the National Assembly. Only in this way it is possible to prevent irreparable consequences of the contested decree.

6. On 12 August 1996, the Court sent the initiative to the National Assembly for its reply. On 16 August 1996, the National Assembly responded with the materials discussed at its 49. extraordinary session when adopting the OdRZRV. According to its opinion, it follows from these materials (draft OdRZRV, report of the National Assembly's Committee for Internal Politics and Judicature, and voice-record of the session) that the majority of questions raised by the initiators were debated at the National Assembly's session. Enclosed to the materials is the draft resolution proposed to the National Assembly by deputy dr. Ciril Ribičič in the time of adopting the OdRZRV.

This resolution provided for the National Assembly to charge the Government with preparing the amendments to the ZRLI until 15 September 1996, solving thereby the questions on a voting's manner and finding the results in the case where there are more than one competitive referenda called for the same day.

B. - I.

7. The Constitutional Court decided with decision U-I-265/96 from 31 July 1996 on the National Assembly request for review of the constitutionality of questions raised in the requests for calling a referendum submitted by the National Council and 43.710 voters. The Court established that the question raised in the National Council request is not inconsistent with the Constitution, as is the case with Subpara. 5 of the question contained in the request submitted by the group of 43.710 voters. Therefore, the Court charged the National Assembly by the afore-cited decision to call the referendum on the remaining part of the question, contained in the request of the voters, and on the question raised by the National Council request.

8. The National Assembly called a provisional statutory referendum on four questions from the OdRZRV, this coming into force on 10 August 1996. It is provided in Item 3 of the OdRZRV that the date for calling the referendum, which makes time limits as to the acts necessary for carrying-out the referendum running, is the ninetieth day after constituting a new National Assembly. Whereas Item 3 of the decree provides that the referendum is to be held on the first Sunday after thirty days from the day of calling the referendum expire.

B. - II.

9. The Constitution in Article 3, Para. 2 provides that supreme power is vested in the people. Citizens exercise that power directly and at elections. It is provided in Article 44 of the Constitution that each citizen shall be entitled, pursuant to the statute, to participate directly or through his elected representatives, in managing public affairs.

10. Statutory referendum is regulated by Article 90 of the Constitution providing in Para. 2 that: "The National Assembly may call such a referendum on its own initiative, but it must call such a referendum if the same is demanded by no less than one third of all elected deputies of the National Assembly, by the National Council or by no less than forty thousand voters." This provision of the Constitution thus prescribes an obligation of the National Assembly to call a referendum, if so requested by the National Council, at least one third of the deputies, or 40.000 voters.

11. The ZRLI, regulating the realization of a statutory referendum, contains certain procedural provisions valid only for the provisional statutory referendum. Such provisions are Articles 17, 18 and 19. The latter prescribes a time limit for the National Assembly to call a provisional statutory referendum. This time limit is thirty days from the day of submitting a request or seven days from a Constitutional Court decision on the merits made in a possible proceeding for review of the constitutionality as to the request for calling a referendum. In such a proceeding the Constitutional Court is to decide in thirty days (Article 16).

12. Regarding the act on calling a referendum, the ZRLI requires proper contents (Article 30). The act on calling a referendum defines the type of referendum, the act being decided at the referendum, text of the question given to the referendum, the day of calling the referendum and the day of voting at the

referendum. From the day determined as the day of calling the referendum time limits, put as to the acts necessary for carrying-out the referendum, start running (Article 31).

13. The ZRLI prescribes the time period that must and can respectively elapse between the day of calling and the day of carrying-out the referendum (Articles 33 of the ZRLI). The referendum is to be called in such a manner not to have less than 30 days and more than 45 days elapsed between the day of calling the referendum and the day of its carrying-out.

B. - III.

14. In the case considered, the National Assembly was according to Article 19 of the ZRLI obliged to call a referendum not later than in seven days after a Constitutional Court decision was delivered, holding (in the decision) that the requests of a group of 43.710 voters (except Subpara. 5 of the question included in their request) and the National Council are not unconstitutional. Following the Constitutional Court decision and Article 30 of the ZRLI, the National Assembly passed the act on calling the referendum (OdrZRV) determining thereby also the day of calling the referendum and the day of voting at the same.

15. The National Assembly determined the ninetieth day after constituting a new National Assembly as the day for calling the referendum. This means the day at least 180 days removed from the day when the act for calling the referendum (OdrZRV) comes into force. The authorization from Article 30, Para. 1 of the ZRLI providing that the day for calling the referendum could be also determined in the act of calling the referendum, was considered by the National Assembly as giving it discretion to determine this date, delaying thereby indirectly the day of carrying-out the referendum for the time it finds appropriate.

16. For various acts done between the submitting of a request for calling the referendum and carrying-out the voting the ZRLI prescribes the following time limits: time limit for a Constitutional Court decision on constitutionality of the question raised by the request (30 days), time limit for calling the referendum (30 and 7 days respectively) and time limit between the day of calling the referendum and the day of its carrying-out (30 to 45 days). The analysis of these time limits shows that the ZRLI does not allow the carrying-out of the referendum to be delayed without the basis provided in the Constitution or the statute. The provisions including such words as "the day for calling a referendum" or "a day determined as the day for calling the referendum", cannot be interpreted in the manner authorizing the National Assembly to set the time between the promulgation of the act for calling the referendum and the day of calling the referendum, which is not reasonably proportioned to other time limits prescribed in the ZRLI.

17. The provisions of the ZRLI providing for a special "day determined as the day of calling a referendum" were mechanically adopted from the Election to the National Assembly Act. In both statutes these provisions have merely technical or instrumental meaning. These provisions from the ZRLI cannot be interpreted as an authorization given for delaying the day of carrying-out the referendum. Their purpose could only be to inform proposers of a referendum and organs competent for carrying-out the referendum of the act's (on calling the referendum) contents.

Their aim could also be found among other reasons of instrumental or technical nature, e.g. in a need to set the day of voting pursuant to Article 32, Para. 1 of the ZRLI (on Sunday or any other off days) or in a need to set the voting on the day enabling a rational and economical realization of the referendum (e.g. together with elections or outside the period of longer holidays, vacation etc.). The time limit, expiring through the period from the act's (on calling the referendum) promulgation until "the day set as the day for calling (the referendum)", has the meaning and effect of *vacatio legis* - the period of time that must elapse from the day of promulgation until the day of a general legal act's coming into effect.

18. Since the ZRLI sets relatively short time limits for all actions during the proceedings between the submitting of a request for calling the referendum and carrying-out the same, the National Assembly cannot abuse the institute of "vacatio legis" in passing an act on calling the referendum, neither can abuse the authorization (similar to this institute) conferred to determine the day of holding the

referendum for an unreasonable delay of the referendum. Since the ZRLI does not include an explicit provision on what time should or could elapse from the act's on calling the referendum promulgation until the day set as the day of calling the referendum, the constitutionally determined presumptive *vacatio legis* of 15 days appears to be a reasonable time limit. This means that the sum of both *vacatio legis* set in the act on calling the referendum and the time from the coming into effect of this act until the day set as the day of calling (the referendum) as a rule should not exceed the aforementioned time limit. From the promulgation of an act on calling the referendum until the day set as the day of calling (the referendum), more than 15 days must not exceed, save well grounded reasons of technical or instrumental nature, described in the previous point, exist.

19. Item 3 of the OdRZRZV is due to the afore-cited reasons inconsistent with Article 30 in connection with Articles 19 and 33 of the ZRLI. Although this inconsistency has already existed from the coming into effect of the OdRZRZV, the consequences of illegality are unable to be removed retrospectively, since the time (at least 30 days) for preparing the referendum and its campaign is to be guaranteed. Thus, the Constitutional Court did not abrogate the OdRZRZV *ab initio* but prospectively. For the violation of the ZRLI is not thereby abrogated *ab initio*, or for the abrogation of Item 3 of the OdRZRZV caused the situation, as it was at coming to a decision in case U-I-265/96, the Constitutional Court on the basis of Article 40, Para. 2 of the Constitutional Court Act (Official Gazette of the RS, No. 15/94 - hereinafter: ZUstS), applying sensibly Article 19 of the ZRLI, charged the National Assembly to set the day of calling the referendum in seven days after this decision is delivered, i.e. to pass a new Item 3 of the OdRZRZV consistent to the ZRLI.

20. In Item 4 of the OdRZRZV the National Assembly set the time limit for carrying-out the voting at the referendum. In doing this it followed Articles 32 and 33 of the ZRLI, so this is not inconsistent neither with the ZRLI nor with the Constitution.

Item 4 of the OdRZRZV referring to the previous Item 3 of the same act lost, of course, its meaning with the abrogation of Item 3. When the National Assembly replaces the abrogated Item 3 of the OdRZRZV, this deficiency will be removed; Item 4 will refer to the new Item 3.

21. In this, the National Assembly has within a statutory framework (30 to 45 days, having the voting on Sunday) a possibility to change also Item 4. The National Assembly can determine the day of calling the referendum (within the limits set in points 17 and 18 of this reasoning), and the time limit between this day and the day of voting, having the referendum(s) held together with the elections to the National Assembly. Such a solution would be pursuant to the Constitutional Court's opinion in accord with the legal principles of rationality and economy.

C.

22. The Constitutional Court made this decision on the basis of Article 21 and Article 40, Para. 2 of the ZUstS, composed of: dr. Tone Jerovšek, President, dr. Peter Jambrek, mag. Matevž Krivic, mag. Janez Snoj, dr. Janez Šinkovec, dr. Lovro Šturm, Franc Testen, dr. Lojze Ude and dr. Boštjan M. Zupančič, the Judges. Item 1 of this holding was reached by eight votes in favor to one against (Judge Krivic), Item 2 was reached unanimously, and Item 3 by seven votes in favor to two against (Judges Krivic and Ude). Dissenting opinions were announced by Judges Krivic and Ude, and a concurring opinion by Judge Jambrek.

President of the Constitutional Court:
dr. Tone Jerovšek