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CONSTITUTIONAL COURT OF  
THE REPUBLIC OF SLOVENIA

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*Selected Decisions*

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1991–2015

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Twenty-five years have passed since Slovenia adopted the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (hereinafter referred to as the BCC) and declared itself to be a sovereign and independent state. In Decision No. U-I-109/10 the Constitutional Court held that: “Human dignity is also at the centre of the constitutional order of the Republic of Slovenia. Its ethical and constitutional significance already proceeds from the BCC, which is not only the constitutional foundation of Slovene statehood, as also certain principles that demonstrate the fundamental legal and constitutional quality of the new independent and sovereign state are outlined therein. In its Preamble the BCC first proclaimed the fact that the Socialist Federal Republic of Slovenia (hereinafter referred to as the SFRY) did not function as a state governed by law and that within it human rights were grossly violated, while Section III, as the antipode to the above-mentioned, emphasized that the Republic of Slovenia would guarantee the protection of human rights and fundamental freedoms to all persons in the territory of the Republic of Slovenia irrespective of their national origin, without any discrimination whatsoever, in accordance with the Constitution of the Republic of Slovenia and the treaties in force. This new constitutional quality of the new state is even more clearly demonstrated in the Declaration of Independence (Official Gazette RS, No. 1/91), which was adopted together with the BCC (on 25 June 1991), and in which the former Assembly of the Republic of Slovenia emphasized the commitment of Slovenia to respect human rights and fundamental freedoms and its orientation towards joining international organisations which are based on respect for human dignity and which in their acts determine the fundamental international standards of human rights protection. Thus, by adopting these independence documents not only the fundamental the fundamental relationship entailing state sovereignty between the Republic of Slovenia and the SFRY was severed, but there was also a fracture with the fundamental value concept of the constitutional order. [...] Differently than the former SFRY, the Republic of Slovenia is a state governed by the rule of law whose constitutional order proceeds from the principle of respect for human rights and fundamental freedoms already on the basis of the basic constitutional documents. From the BCC, the Preamble to the Constitution, and numerous constitutional provisions there proceeds the fact that human dignity is the fundamental value which permeates the entire legal order and therefore it also has an objective significance in the functioning of authority not only in individual proceedings but also when adopting regulations. In its substance, human dignity entails the presumption that every human being has equal and absolute inner worth because he or she is a human being. Respect for human dignity therefore entails the protection of the inherent worth of the individual against unjustified interferences by and requirements of the state and society.”

The above-outlined premises provided the basis upon which the Constitutional Court of the Republic of Slovenia began to carry out its work as the highest authority for the protection of constitutionality and legality and the protection of human rights and fundamental freedoms in our sovereign state. The new Judges were elect-

ed by the first National Assembly to have been elected in free multiparty elections. Only the values upon which the new sovereign state of the Republic of Slovenia was founded and which established our state as a constitutional democracy allowed for the Constitutional Court to assume the position of supreme guardian of the Constitution and protector of human rights and fundamental freedoms. It is therefore quite appropriate that we celebrate the adoption of the mentioned acts as the beginning of the functioning of the Constitutional Court of the Republic of Slovenia. Although Slovenia already had a Constitutional Court while still a constituent part of the Yugoslav Federation, that court functioned within the framework of the socialist single-party social and political order, in which, as established by the BCC, human rights had been grossly violated and which did not function as a state governed by the rule of law. The adoption of the independence documents marked a break with the fundamental value concept of the constitutional order. In contrast to the former SFRY, the Republic of Slovenia is a state governed by the rule of law whose constitutional order proceeds from the principle of respect for human rights and fundamental freedoms already on the basis of the basic constitutional documents.

The break with the fundamental value concept of the former constitutional order first required the deconstruction of the communist legacy and the establishment of a democratic state that is governed by the rule of law and a social state. The Constitutional Court played a crucial role in this process and the selection of the most important Constitutional Court decisions from the past 25 years is intended to illustrate this role. The Constitution is namely more than merely a collection of articles; its full substance is, to a large extent, the result of the work of the Constitutional Court. Without it, the Constitution would lead a “rather constricted life,” as the decisions of the Constitutional Court supplement the Constitution and give it meaning, thus making it a living instrument and an effective legal act.

The process of interpreting the Constitution, as well as developing and strengthening democracy and the rule of law, is an ongoing endeavour. Every composition of the Constitutional Court has thus been confronted with new issues and every Constitutional Court decision entails another piece in the mosaic of the rule of law and in the consolidation of constitutional democracy, as well as with regard to the protection of human rights and fundamental freedoms. During the past 25 years, 29 judges have contributed to this mosaic. The first composition of the Constitutional Court undoubtedly played a particularly important role as it carried out pioneering work and adopted numerous decisions that are still relevant today. However, the commitment of the first composition to the fundamental value premises of the independence documents has been confirmed and continued by all subsequent compositions.

Throughout its functioning, i.e. the entire twenty-five years since the Republic of Slovenia became a sovereign and independent state, the Constitutional Court has been committed to the Constitution and the values enshrined therein. Through the introduction of modern standards of constitutional review, the judges of the Constitutional Court put the Republic of Slovenia on the map along with other modern constitutional democracies in Europe and throughout the world. In our young

state in transition, the Constitutional Court played a central role in establishing the principle that the individual must be the measure of the functioning of state power. Its constitutional case law essentially contributed to the transition from the former non-democratic regime to the new socio-political system, which is harmonised with European and international legal standards and based on the rule of law and the protection of individuals and their dignity.

This collection of the most important decisions of the Constitutional Court over the past twenty-five years of its functioning is convincing evidence of its commitment to the Constitution and the values enshrined therein.

A handwritten signature in dark ink, reading "M. Mozetič". The script is fluid and cursive, with the first letter 'M' being large and prominent. The signature is positioned above the printed name and title.

*Mag. Miroslav Mozetič*  
*President*



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## I. INTRODUCTION

On 25 June 1991, with the promulgation of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia<sup>1</sup> and the entry into force of the Constitutional Act implementing this Charter, the Republic of Slovenia became a sovereign and independent state. As the common federative state of Yugoslavia disintegrated, Slovenia re-acquired all the rights and obligations that under its previous constitution as a constituent republic and under the constitution of the former Socialist Federal Republic of Yugoslavia had been transferred to the authorities of SFR Yugoslavia. As a result, the Constitutional Court of the Yugoslav Federal Republic of Slovenia, which had functioned as such since January 1964, became the Constitutional Court of the sovereign state of the Republic of Slovenia. The Basic Constitutional Charter proclaimed that the state shall be governed by law and guarantee the protection of human rights and fundamental freedoms (hereinafter referred to collectively as human rights).<sup>2</sup> Half a year later, a new Constitution was adopted<sup>3</sup> that established a legal basis for a different social order, one based on respect for free human beings, on the rights they enjoy in accordance with the Constitution, on the principles of a democratic and social state governed by the rule of law, and on the separation of powers. The Constitution defined the Constitutional Court as one of the central authorities of the state, whose task is to ensure that the legislative, executive, and judicial powers, as well as local authorities, observe the Constitution.<sup>4</sup> Thereby, not only was a change in the position of the Constitutional Court in the institutional sense due to the establishment of the sovereign state enacted, but its transformation into a guardian of the Constitution and of the values contained therein was made considerably more important. It is precisely this transformation that qualitatively changed the constitutional case law of the last twenty-five years in this state proclaimed to be a constitutional democracy<sup>5</sup> and that brought about a turning point in the more than fifty years of existence and development of the constitutional judiciary in the Slovene territory.

The first composition of the Constitutional Court in the new sovereign state was the one that started to create the constitutional case law on the basis of these new foundations. Beyond a doubt, they carried out pioneering work. Although the initial period of establishing the new social order was distinctly marked by so-called transitional issues, and despite the fact that the starting points (which are mostly self-evident

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1 The Constitutional Court of the Republic of Slovenia (hereinafter referred to as the Constitutional Court) characterised this basic constitutional act as “a permanent and inexhaustible constitutional source of the statehood of the Republic of Slovenia,” Opinion No. Rm-1/09, dated 18 March 2010, Point I of the operative provisions.

2 The Preamble to and Section III of the Basic Constitutional Charter.

3 The Constitution of the Republic of Slovenia (hereinafter referred to as the Constitution).

4 See indents one through six of the first paragraph of Article 160 of the Constitution.

5 See W. Hassemer, *Ustavna demokracija* [Constitutional Democracy], *Pravnik*, 4–5 (2003), p. 214, and A. Teršek, *Teorija legitimnosti in sodobno ustavnštvo* [The Theory of Legitimacy and Modern Constitutionalism], *Univerza na Primorskem, Univerzitetna založba Annales, Koper* 2014, pp. 402 and 407–408.

today) of certain fundamental preconditions of constitutional case law had to be developed from the start (which, naturally, took some time), the first composition also succeeded in making an important contribution to respect for human rights and the implementation of constitutional principles. Several milestones can be highlighted in the initial development of the constitutional case law, *inter alia*, the introduction of the constitutional complaint (and consequently also the Constitutional Court's supervisory function over the judiciary regarding respect for human rights) and the first preliminary opinion on the conformity of a treaty with the Constitution, both of which are completely new competences vested in the Constitutional Court by the Constitution, as well as numerous significant steps that were taken in the interpretation of constitutional provisions. The constitutional judges from subsequent compositions of the Constitutional Court have in some sense continued on the basic path of the new constitutional case law, while they have also further developed<sup>6</sup> and significantly expanded such.

The Constitutional Court interprets the Constitution and these interpretations have a legally binding effect.<sup>7</sup> It is only by these interpretations that the substance of the constitutional provisions is crystallised, as is codetermined, with due consideration given to constitutional principles, by the constitutionally regulated rights and obligations of individuals and legal entities, as well as by the competences of state and local authorities. The concise and general wording of constitutional provisions frequently comes alive only by means of interpretation, whether such concerns defining the substance of rights, the admissibility of the limitation thereof, rules on the harmonious coexistence of people in all forms of social life, or the functioning of the political system, i.e. the institutions of the state or local authorities. Let us thus take a closer look at the image of the Constitution drawn by the interpretations the Constitutional Court made in those key decisions adopted over the previous 25 years that are published in the present collection.

At the outset, the present overview closely examines the constitutional provisions that protect a human being as a *person*, namely his or her dignity and freedom. Everyone must be equal in this respect; the equal protection of rights must be ensured to everyone, and this is even more important when the rights in question are determined to be human rights. This will be followed by an examination of the fundamental political rights, i.e. the rights that transform a citizen as an object of politics into a subject of politics;<sup>8</sup> these rights are of key importance for the successful functioning of democracy. Freedom in the field of private property and free economic ini-

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6 The criteria for the admissibility of limitations of human rights, which are based on there being a constitutionally admissible objective for such limitation (the third paragraph of Article 15 of the Constitution) and on the proportionality of the limitation (Article 2 of the Constitution), and which were undoubtedly introduced in the middle of the 1990s by the first composition of the Constitutional Court, obtained their final form by Decision No. U-I-18/02 (dated 24 October 2003), to which the Constitutional Court has repeatedly referred ever since.

7 As already stated in Decision No. U-I-163/99 (dated 23 September 1999), Para. 9. of the reasoning.

8 O. Ihl, *Le vote*, Montchrestien, Paris 1996, p. 15.

tative are certainly two of the more important rights that distinguish the new constitutional order from the previous one. Even certain important rights stemming from the system of social security are (also) protected as a property right. The principle of the separation of powers was introduced precisely in order to safeguard human rights; it is intended to prevent the abuse of power, namely by means of the constitutionally designed system of checks and balances.<sup>9</sup> Every aspect of the functioning of the state and its institutions (as well as of the institutions of local communities) must be based on law; all that these institutions have not been authorised to undertake in advance by law or on the basis of a law determines the field of freedom of a person. The constitutional order ensures respect for international instruments in force in Slovenia in order to ensure the credibility of the state, namely as an equal member of the international community that fulfils *bona fide* the assumed international obligations, including those that it assumed in the framework of the transfer of the exercise of certain of its sovereign rights to the institutions of the European Union. The overview concludes by emphasising the binding force and certain legal effects of the decisions of the Constitutional Court, together with some final thoughts on the importance of constitutional case law. In a state governed by the rule of law, the decisions of the constitutional court must be respected, first and foremost by all other state (and local) institutions. This is necessary in order for people to have trust in the law and to freely and in an undisturbed manner follow the path they choose – because they are (must be!) protected by law.

## 2. A FREE PERSON AND HIS OR HER DIGNITY

At the centre of the constitutional order is human dignity, the legal-ethical foundation of a democratic state.<sup>10</sup> In its essence, human dignity entails that every human being has equal and absolute inner worth because he or she is a human being. Respect for human dignity therefore entails the protection of the inherent worth of the individual against unjustified interferences by and the requirements of the state and society.<sup>11</sup> As the fundamental value, it has a normative expression in numerous

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9 Since, as Pitamic stated as early as in 1927, “[a]nyone who holds power tends to abuse it; therefore, each branch of power must be limited by another. If the legislative power is not separated from the judicial and executive powers, then there is no freedom [...]”; L. Pitamic, *Država* [The State], Cankarjeva založba, Ljubljana 1996, p. 100.

10 Decision No. U-I-109/10 (dated 26 September 2011), Para. 6. of the reasoning. This standpoint was implied already in the Basic Constitutional Charter, which represents, together with other independence documents, a fracture with the fundamental value concept of the previous constitutional order (*ibidem*, Para. 7 of the reasoning). Grad stated that the new constitutional order entails a *caesura* (break) with regard to the previous one; F. Grad, *Razlike med zasnovno prejšnje in nove ustavne ureditve* [The Differences Between the Concepts Behind the Previous and the New Constitutional Order], in: *Ustava Republike Slovenije z uvodnim komentarjem dr. L. Ude, dr. F. Grada in M. Cerarja ml. in stvarnim kazalom* [The Constitution of the Republic of Slovenia with an Introductory Commentary by Dr. L. Ude, Dr. F. Grad, and M. Cerar Jr., and an Index], Uradni list Republike Slovenije, Ljubljana 1992, p. 24.

11 Decision No. U-I-109/10, Para. 8 of the reasoning.

provisions of the Constitution, in particular in those regulating human rights.<sup>12</sup> As a special constitutional principle, respect for human dignity is protected by Article 1 of the Constitution, which regulates the principle of democracy. The latter substantively defines the state as a constitutional democracy, i.e. as a state in which the acts of authorities are legally limited by constitutional principles and human rights, precisely because individuals and their dignity lie at the centre of its existence and functioning. Only such state order is truly democratic in which respect for human dignity is the principal guideline for the functioning of the state.<sup>13</sup> Although the bearers of power in representative bodies of the state and of local communities are elected in free and periodic elections, which is a prerequisite for democracy, they nevertheless are not given the right to act freely thereby. On the contrary, a duty is imposed on them to respect the boundaries that proceed from the constitutional order, whose central principle is precisely the principle of respect for human dignity when exercising their constitutional and statutory powers.<sup>14</sup>

Human life,<sup>15</sup> a person's physical and mental integrity<sup>16</sup> as well as dignity<sup>17</sup> are the highest values within the hierarchy of human rights.<sup>18</sup> The constitutional provisions that protect them are intended to protect individuals from the interferences of the state or its public officials with these rights.<sup>19</sup> In addition, the state has positive obligations with regard to the protection of human rights.<sup>20</sup> The first paragraph of Article 23 of the Constitution, which regulates the right to judicial protection, does not guarantee the right to a precisely determined type of judicial proceedings.<sup>21</sup> Therefore, it cannot be argued that, in the event a death occurs following the use of force by the police, the state must ensure the relatives of the deceased person the right to prosecute the perpetrators in a criminal procedure. It follows from Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR), as interpreted by the European Court of Human Rights (hereinafter referred to as the ECtHR), that in such instances the state must provide for an independent investigation that will lead to the establishment of all the relevant facts and circumstances of the death, and in which the relatives of the deceased can effectively participate.<sup>22</sup> The Constitution does not expressly regulate

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12 *Ibidem*, Para. 9 of the reasoning.

13 *Ibidem*, Para. 10 of the reasoning.

14 *Ibidem*.

15 Article 17 of the Constitution guarantees its inviolability.

16 *Inter alia*, Article 18 of the Constitution prohibits torture.

17 It is in particular protected in criminal procedures, as determined by Article 21 of the Constitution.

18 Decision No. Up-555/03, Up-827/04 (dated 6 July 2006, hereinafter referred to as Decision No. Up-555/03), Para. 24 of the reasoning.

19 *Ibidem*, Para. 23 of the reasoning.

20 The first paragraph of Article 5 of the Constitution imposes on the state the obligation to protect human rights in its territory.

21 Decision No. Up-555/03, Para. 28 of the reasoning.

22 *Ibidem*, Para. 32 of the reasoning.

this right. However, with regard to their protection, the principle of the highest level of protection of human rights must always be observed, as is determined by the fifth paragraph of Article 15 of the Constitution, which ensures a constitutional level to a treaty that provides a higher level of protection of a certain human right than the Constitution.<sup>23</sup> The fourth paragraph of Article 15 of the Constitution expressly requires judicial protection of human rights. The mentioned provision must be understood in conjunction with Article 13 of the ECHR so as to also encompass the right to an independent investigation of the circumstances of an incident in which a person dies during an action carried out by the repressive authorities of the state.<sup>24</sup> Thereby, the procedural aspect of the right to life is protected.<sup>25</sup> The Constitution guarantees the latter right as an absolute right, hence it cannot be limited even on the basis of the third paragraph of Article 15 of the Constitution, i.e. not even when pursuing the objective of fighting the most severe forms of crime or terrorism.<sup>26</sup> If the state does not act in conformity with the mentioned constitutional obligations, the issue of its liability for damages arises. Article 26 of the Constitution guarantees the right to such damages as a human right. From this Article there follows the general prohibition of exercising power in an unlawful manner, regardless of which branch of power is concerned. The liability of the state to compensate for the damage entails liability for *iure imperii* conduct,<sup>27</sup> which requires that a specific form of liability be regulated, regarding which the standard rules of civil liability for damages are not appropriate.<sup>28</sup> The illegality is connected with the due conduct of the state, with regard to which the state is not only obliged to refrain from adopting measures by which it would interfere in an inadmissible manner with human rights, but must also protect these rights by its active conduct.<sup>29</sup> The procedural aspect of the right to life imposes on the state the burden of proof in demonstrating that it acted in conformity with the Constitution and the law. If the state does not prove that it has done everything in its power to prevent the death of a person, then its conduct was unlawful.<sup>30</sup>

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23 As stated in Order No. Up-43/96 (dated 30 May 2000), Para. 12 of the reasoning.

24 Decision No. Up-555/03, Para. 33 of the reasoning.

25 Decision No. Up-679/12 (dated 16 October 2014), Para. 9 of the reasoning.

26 *Ibidem*, Para. 8 of the reasoning.

27 This also includes liability for systemic deficiencies that can be attributed to the state or its apparatus as such, as well as liability in cases where there is no individualised relation between the bearer of authority and the affected individual. See Decision No. Up-1177/12, Up-89/14 (dated 28 May 2015), Para. 13 of the reasoning. However, it is not unconstitutional if before a domestic court an individual cannot claim damages from a foreign state for its *iure imperii* conduct, as jurisdictional immunity is an expression of the principle of the equality of states and of respect for the independence and integrity of the other state, and because damages can still be claimed from the foreign state before its national courts. See Decision No. Up-13/99 (dated 8 March 2001), Para. 21 of the reasoning.

28 Decision No. Up-679/12, Para. 11 of the reasoning.

29 *Ibidem*, Para. 12 of the reasoning.

30 *Ibidem*, Paras. 9, 13, and 14 of the reasoning.

The prohibition of torture, which is determined by Article 18 of the Constitution, is also an absolute right.<sup>31</sup> What follows therefrom, *inter alia*, is the obligation of the legislature to regulate the procedure for granting international protection in such a manner that respect for this right will be ensured, which also includes the right of an individual to not be returned to countries where they may face a certain danger, persecution, or where their life, personal integrity, or freedom is endangered in some other manner.<sup>32</sup>

As a general rule, the protection of other human rights is not absolute, which entails that they can be limited and the Constitutional Court will review such limitations as interferences with human rights. However, such interferences are only admissible under strict constitutional conditions – namely if they pursue a constitutionally admissible aim (the third paragraph of Article 15 of the Constitution) and are proportionate (Article 2 of the Constitution).<sup>33</sup> The right to personal liberty (the first paragraph of Article 19 of the Constitution) can certainly be included among the central rights of particular importance. Any interferences therewith must be carried out in accordance with the *lex certa* principle, i.e. the principle of legality, which is the primary element of a state governed by the rule of law and would apply as an imperative constitutional starting point even if the Constitution did not explicitly refer thereto.<sup>34</sup> The detention of an individual entails a severe interference with this right. The executive branch of power must bring the person deprived of liberty before a court without undue delay. In accordance with the first paragraph of Article 20 of the Constitution, the judiciary may only order detention if there exists a reasonable suspicion that the person concerned has already committed a criminal offence, i.e. that the person has already interfered with the constitutionally protected value at issue.<sup>35</sup> With regard to such, when detention is ordered due to the risk of recidivism, the danger to public safety can be constitutionally deduced only if the danger is causally connected to a criminal offence that is reasonably suspected of having been committed.<sup>36</sup> The public safety condition can also refer to criminal offences against property, but only

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31 Decision No. U-I-292/09, Up-1427/09 (dated 20 October 2011), Para. 13 of the reasoning.

32 *Ibidem*, Paras. 12 and 14 of the reasoning.

33 Cf. A. Barak, *Proportionality, Constitutional Rights and their Limitations*, Cambridge 2012, pp. 400–418. Regarding the tests created by constitutional courts for assessing the admissibility of limitations of human rights, see D. Robertson, *The Judge as Political Theorist*, Contemporary Constitutional Review, Princeton University Press, Woodstock 2010, pp. 33–34, 50–54, 200–204, 300–303, 326–344, and 368–369. Regarding the principle of proportionality and its development in the Slovene constitutional case law, see A. Novak, *Predpostavke načela sorazmernosti v ustavnosodnem odločanju* [Presuppositions of the Principle of Proportionality in Constitutional Decision-Making], in: M. Pavčnik, A. Novak (Eds.), *(Ustavno)sodno odločanje* [(Constitutional) Judicial Decision-Making], GV Založba, Ljubljana 2013, pp. 103–181.

34 Decision No. U-I-18/93 (dated 11 April 1996), Paras. 35 and 36 of the reasoning. This principle is also important when cases other than criminal cases are at issue. A limitation of a human right and the determination of the exercise of such right may only be prescribed by a law that is precise and clear. See Decision No. U-I-145/03 (dated 23 June 2005), Para. 25 of the reasoning.

35 Decision No. U-I-18/93, Para. 49 of the reasoning.

36 *Ibidem*, Para. 48 of the reasoning.

if such criminal offences are serious and interfere with the most important, constitutionally-protected interests of others.<sup>37</sup> The Constitution expressly requires that the interference be absolutely necessary, which entails that it also expressly underlines the principle of the proportionality of the interference.<sup>38</sup> It follows from Article 27 of the Constitution<sup>39</sup> that the burden of proof in criminal proceedings is on the state, that the state carries the risk of failing to provide proof, and that the rule *in dubio pro reo* applies. Consequently, the burden of proving the existence of a reasonable suspicion and the absolute necessity of detention also must rest on the state prosecutor.<sup>40</sup> In order for an independent court to be able to impartially decide on a motion for detention it has to hear both parties, therefore a hearing is absolutely necessary prior to deciding. If the court then orders detention, it has to give reasons for its decision.<sup>41</sup> What is at issue is not merely the constitutionality of the statutory regulation, but also the constitutionality of its interpretation in individual cases, which is what the Constitutional Court denotes as the procedural aspect of a state governed by the rule of law. The rule of law is also reflected in its institutions and primarily in the manner these institutions actually apply the law in their procedures.<sup>42</sup> Trust in the judiciary (the *habeas corpus* logic of the first paragraph of Article 20 of the Constitution, which determines the constitutional conditions for ordering detention) does justify a certain measure of discretion, as courts are independent and impartial by law and in fact (Article 23 of the Constitution).<sup>43</sup> Nonetheless, judges must at all times diligently assess whether the constitutional and statutory conditions for ordering detention are fulfilled and determine, in each case, whether an interference with personal liberty is admissible.<sup>44</sup> The interference must be appropriate for achieving the pursued, constitutionally admissible aim, and regarding this matter, i.e. detention, the legislature has actually already performed this assessment. Courts, however, must review whether an interference is necessary – absolutely necessary – in the sense that the aim cannot be achieved by any other means, i.e. by a milder measure, and whether it is proportionate (in the narrower sense)<sup>45</sup> with the aim, i.e. the value that the interference intends to protect.<sup>46</sup> In this regard, it must follow from the established particular circumstances that there is a real risk that the person concerned, if at large, might

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37 *Ibidem*, Paras. 53 and 54 of the reasoning.

38 *Ibidem*, Paras. 58, 59, and 60 of the reasoning.

39 This Article determines the presumption of innocence.

40 Decision No. U-I-18/93, Paras. 67 and 72 of the reasoning.

41 *Ibidem*, Paras. 69, 72–74, and 76 of the reasoning.

42 Decision No. U-I-18/93, Para. 20 of the reasoning.

43 *Ibidem*.

44 Decision No. Up-75/95 (dated 7 July 1995), Para. 19 of the reasoning.

45 The Constitutional Court considered home detention to entail a limitation of human rights which in its intensity and the manner of implementation constitutes an interference with personal liberty, and not only an interference with the freedom of movement determined by Article 32 of the Constitution. See Decision No. Up-286/01 (dated 11 December 2003), Para. 15 of the reasoning.

46 Decision No. Up-75/95, Para. 25 of the reasoning.

again commit a particular criminal offence.<sup>47</sup> Or there must exist a risk of absconding based on concrete and proven circumstances with regard to which there exists a high degree of probability that the interested person would flee.<sup>48</sup>

The principle of legality is expressly guaranteed by the Constitution as a special substantive constitutional safeguard relating to the determination of criminal offences (the first paragraph of Article 28 of the Constitution).<sup>49</sup> Constitutional obligations for the legislature follow therefrom, as only a law may regulate which acts are incriminated (*lex scripta*). The law must be precise, so that it is possible to distinguish between conduct that is criminal and conduct that falls outside the scope of criminal liability (*lex certa*); this is also the reason for the prohibition of *analogia legis* and *analogia iuris* already when criminal offences are determined in the law (*lex stricta*). The purpose of such substantive constitutional safeguard is that individuals know in advance which acts are incriminated. Only when they know where the border lies in terms of their general right to act freely, which is guaranteed by Article 35 of the Constitution, and acts that are incriminated, can they adjust their conduct. Thereby, they are able to predict what kind of consequences their conscious conduct may produce; for such reason, the legislature must not determine criminal offences retroactively (*lex praevia*).<sup>50</sup> What the legislature is prohibited from doing and what it is required to do also applies to the interpreter of the law. The courts are obliged to interpret laws in accordance with the Constitution,<sup>51</sup> which also entails that they must respect human rights.<sup>52</sup> The *lex scripta* requirement brings strictness into the relation between the legislature and the courts, as follows in general from the principle of the separation of powers – by interpreting the law, courts must not include anything in the scope of criminal liability that the legislature did not clearly and precisely include already at an abstract level. The interpretation by the court must remain strictly within the possible meaning of the wording of the statutory provision, which constitutes a constitutional law aspect of the principle of legality that the Constitutional Court has to review within the framework of the first paragraph of Article 28 of the Constitution.<sup>53</sup> If any of the statutory elements of the criminal offence determined by the legislature is not encompassed by the conduct of the person concerned, the conviction of a criminal offence entails a violation of the principle of legality. A violation also occurs in the event a court extends the scope of criminal liability when through its interpretation it itself determines that also conduct that the legislature did not include in the scope of criminal liability is criminal.<sup>54</sup> A court must

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47 *Ibidem*, Para. 26 of the reasoning.

48 Decision No. Up-185/95 (dated 24 October 1996), Para. 7 of the reasoning.

49 Decision No. Up-879/14 (dated 20 April 2015), Para. 17 of the reasoning.

50 *Ibidem*.

51 On the duty of the courts to ensure the constitutionally consistent interpretation of statutes, see M. Pavčnik, *Ustavnoskladna razlaga (zakona) [(Statutory) Interpretation in Conformity with the Constitution]*, in: M. Pavčnik, A. Novak, (Eds.), *op. cit.*, pp. 65–101.

52 Decision No. Up-879/14, Para. 18 of the reasoning.

53 *Ibidem*, Para. 20 of the reasoning.

54 *Ibidem*, Para. 23 of the reasoning.

define the content of individual facts within the framework of the legally relevant facts and compare them with what the legislature determined to be elements of the criminal offence at the level of the statutory definition of the criminal offence. Only after an assessment is made whether these legally relevant facts and elements of the criminal offence correspond is it possible to review whether the provision of the first paragraph of Article 28 of the Constitution has been respected.<sup>55</sup> With regard thereto, a court may not replace the concretisation of one of the statutory elements of the criminal offence with the concretisation of another statutory element of the criminal offence so that they merge with each other and thereby the realisation of the second statutory element automatically also entails the realisation of the first statutory element.<sup>56</sup>

In a criminal procedure, general constitutional procedural guarantees determined by the Constitution in Article 23 (the right to judicial protection), Article 22 (the right to make a statement, the equality of arms, and other rights that follow from the equal protection of rights), and Article 25 (the right to appeal) must be ensured. As a criminal procedure can entail an interference with personal liberty, it is not surprising that procedural guarantees in criminal proceedings are expressly determined by Article 29 of the Constitution. Among them, the Constitution guarantees individuals the right to present all evidence to their benefit (the third indent). However, such does not entail that a court is obligated to hear all the evidence proposed by the defence that could, merely by its content, benefit the defendant. The defence must first satisfy the burden of proof and substantiate the existence and legal relevance of the proposed evidence with the required degree of probability.<sup>57</sup> When in doubt, a motion for evidence submitted by the defence is deemed to benefit the defendant, and the court is obliged to take the evidence unless it is manifestly clear that it cannot corroborate the line of defence. There are no abstract rules that follow from the Constitution regarding the required degree of probability that must be demonstrated in order for a court to hear the evidence. In accordance with the principle of the free assessment of evidence, such is namely a matter to be decided by a court in a concrete case on the basis of a diligent and specific consideration of the evidence.<sup>58</sup> However, the evidence regarding an alibi is legally decisive. Therefore, if the defence demonstrates at least the likelihood of an alibi in its motion for adducing evidence, the court is required to fully verify its existence.<sup>59</sup>

Article 29 of the Constitution also ensures the right of the defendant to challenge incriminating statements in the procedure and to examine the author thereof with respect to such statements.<sup>60</sup> This right also extends to persons protected by the confidentiality of the sources of reports in order to guarantee anonymity to individuals who voluntarily collaborate with the police based on a relationship of trust and in secrecy,

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55 *Ibidem*, Para. 25 of the reasoning.

56 *Ibidem*, Para. 40 of the reasoning.

57 Decision No. Up-34/93 (dated 8 June 1995), Paras. 12 and 13 of the reasoning.

58 *Ibidem*, Paras. 14 and 15 of the reasoning.

59 *Ibidem*, Paras. 12 and 15 of the reasoning.

60 Decision No. U-I-271/08 (dated 24 March 2011), Para. 17 of the reasoning.

as well as to persons carrying out undercover investigative measures in pre-trial procedures, where even the identity of these persons is confidential information. It is only admissible to withhold such evidence from a defendant if this is necessary and if the interference with his or her right to the disclosure of important information is counterbalanced by appropriate proceedings before a court in which the requirements of adversarial proceedings and the equality of arms are respected and in which adequate safeguards for the protection of the interests of the defendant are ensured.<sup>61</sup> For such reason, the measure of not disclosing a witness's identity is necessary and proportionate only if a serious danger to his or her life or person exists or there are other substantial reasons in the public interest, while at the same time the possibility to examine such a witness upon the application of protective measures is ensured.<sup>62</sup> It follows from the first paragraph of Article 23 of the Constitution that a judge and not the executive branch of power must have the final say on this matter. Namely, only if the court knows the identity of a witness can it apply the mentioned protective measures and thereby, while diligently weighing the issues, balance the weight of the interference with the defendant's rights against the benefit of the constitutionally admissible aim.<sup>63</sup>

Interferences with the right to personal liberty, however, do not occur only in criminal proceedings. Involuntary commitment to a closed ward of a psychiatric hospital entails a severe interference with this right as well, which furthermore also constitutes an interference with the right to the protection of one's mental integrity (Article 35 of the Constitution) and with the prohibition of involuntary treatment (the third paragraph of Article 51 of the Constitution).<sup>64</sup> The inviolability of one's mental integrity, which in addition to the inviolability of one's physical integrity is guaranteed by Article 35 of the Constitution, entails, in particular, the prohibition of any interference with the freedom to make decisions, i.e. the right to self-determination.<sup>65</sup> A law may prescribe such an interference only if due to a mental disorder the patient is incapable of making by him- or herself a wilful and deliberate decision on treatment, due to which the deprivation of liberty and involuntary treatment are absolutely necessary because the patient poses a serious danger to him- or herself, or to others.<sup>66</sup> The safeguards guaranteed by the third paragraph of Article 19 that are applicable during the deprivation of liberty must also be ensured in such cases. This entails that such a person must have the right to the legal assistance of a counsel at the state's expense. He or she must be ensured the right to judicial protection,<sup>67</sup> as follows from the first paragraph of Article 23 and the fourth paragraph of Article 15 of the Constitution. The court must in any event enable the involuntarily committed person to make statements (Article 22 of the Constitution). If such a person is

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61 *Ibidem*, Paras. 14 and 18 of the reasoning.

62 *Ibidem*, Para. 26 of the reasoning.

63 *Ibidem*, Paras. 19 and 27 of the reasoning.

64 Decision No. U-I-60/03 (4 December 2003), Para. 7 of the reasoning.

65 *Ibidem*, Para. 9 of the reasoning.

66 *Ibidem*, Paras. 8, 11, and 22 of the reasoning.

67 *Ibidem*, Paras. 12–14 and 19 of the reasoning.

incapable of understanding and invoking his or her rights, the person must be provided appropriate representation.<sup>68</sup> The right of a person with a mental disorder to make a statement is so important that it cannot be automatically presumed that the person concerned does not have the capacity to consent, even if he or she has been deprived of legal capacity due to this disorder and he or she has a legal representative. Therefore, in order to place such a person in a secure ward of a social care institution, which entails an interference with the right to personal liberty, the consent of the person's legal representative does not suffice; namely, in each individual case it has to be separately determined whether the person consents (or is capable of consenting) to the deprivation of his or her personal liberty.<sup>69</sup>

The provisions of the Constitution that protect human dignity, personality rights, privacy, and safety hold a special position among human rights.<sup>70</sup> The right to personal dignity determined by Article 34 of the Constitution<sup>71</sup> guarantees a person recognition of the inherent worth he or she has as a human being and from which stems the person's ability to make independent decisions. It also follows from this human right that personality rights are guaranteed to everyone (Article 35 of the Constitution). Personality rights protect those elements of an individual's personality that are not protected by other provisions of the Constitution, rather it is only by all of them together that individuals are given an opportunity to develop freely and to live their lives as they decide. The general right to act freely is also included in the scope thereof – in a state governed by the rule of law a person is permitted to do everything that is not prohibited.<sup>72</sup> However, this does not entail that unlimited and abstract “natural” freedom is guaranteed; what is at issue is the legally determined freedom, which is subject to limitations, yet protected within such boundaries. Limitations that are necessary due to the interests of others and society as a whole do not entail an interference with the general right to act freely, but define its constitutionally protected substance.<sup>73</sup> The general right to act freely enables individuals to do what they will with themselves, to choose their own lifestyle, develop their personality, and live their personal life as they choose.<sup>74</sup>

The Constitution protects privacy as a general right to privacy as determined by Article 35 of the Constitution and by special rights that protect spatial (the first paragraph of Article 36), communication (the first paragraph of Article 38), and information privacy (the first paragraph of Article 38). The right to privacy establishes, for individuals, a sphere of their own intimate functioning in which they may decide by themselves – and this is guaranteed by the state – which interferences therewith they will allow. It is limited by the protection of the rights of others, often by the freedom

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68 *Ibidem*, Para. 21 of the reasoning.

69 Decision No. U-I-294/12 (dated 10 June 2015), Para. 18 of the reasoning.

70 Decision No. U-I-92/01 (dated 28 February 2002), Para. 24 of the reasoning.

71 This Article determines that everyone has the right to personal dignity and safety.

72 Decision No. U-I-218/07 (dated 26 March 2009), Para. 8 of the reasoning.

73 *Ibidem*, Para. 9 of the reasoning.

74 *Ibidem*, Para. 10 of the reasoning.

of expression, and by the behaviour of an individual in public. The less intimate the sphere of an individual's private life is, the smaller the scope of legal protection it enjoys when it comes into collision with the rights of others. Therefore, in the framework of the freedom of expression determined by the first paragraph of Article 39 of the Constitution and the right to free artistic endeavour determined by Article 59 of the Constitution, an author has the right to describe in his or her work, without their consent, the persons with whom he or she has come into contact and the events he or she has experienced therewith, if these are persons from public life or persons exposed to public interest in connection with a particular matter. However, an author may not, without the consent of the affected person, publish matters from their intimate or family lives.<sup>75</sup> The freedom of expression also includes the right to advertise for commercial purposes; however, such interferences with privacy are not admissible without the consent of the persons concerned.<sup>76</sup>

A person's privacy refers, in the context of a person's existence, to the more or less complete whole of his or her behaviours and involvements, feelings, and relations, for which it is characteristic and essential that the person shapes and maintains it alone or alone with those near to him or her with whom he or she lives in intimate community and that he or she lives in such community with a sense of being protected against intrusion by the public or any other undesired person.<sup>77</sup> Matters that may not be revealed include personal matters that the individual wishes to keep hidden and which by the nature of the matter or with regard to moral or otherwise established rules of conduct in society have such status.<sup>78</sup> The spatial aspect of privacy is protected where an individual justifiably expects to be left undisturbed, with regard to which it is not the space as such that is protected, but the individual's privacy in that space.<sup>79</sup> The communication aspect of privacy protects the individual's interest that the state or uninvited third persons do not learn of the content of a message that he or she transfers via any means that allows remote exchange or transfer of information. It also includes the individual's interest in controlling to whom, to what degree, and under which conditions he or she will transmit a certain message. In such context, both free and uncontrolled communication and thus the protection of the confidentiality of the relations into which the individual enters when communicating, as well as how the communication took place, who initiated it, with whom he or she initiated it, and whether it took place at all, are protected.<sup>80</sup> This entails that

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75 Decision No. Up-50/99 (dated 14 December 2000), Para. 7 of the reasoning.

76 *Ibidem*, Para. 9 of the reasoning.

77 Decision No. Up-472/02 (dated 7 October 2004), Para. 10 of the reasoning.

78 Decision No. U-I-40/12 (dated 11 April 2013), Para. 14 of the reasoning.

79 *Ibidem*, Para. 15 of the reasoning. In the event of a search of a lawyer's office it does not suffice to only observe the spatial aspect of privacy, as the privacy of such office is significantly characterised by aspects that are connected with the nature of the confidential relationship between the lawyer and his or her clients. Namely, lawyers have the duty to protect the professional secrecy and rights (including human rights) of their clients. Decision No. Up-2530/06 (dated 15 April 2010), Paras. 7 and 8 of the reasoning.

80 Decision No. U-I-40/12, Para. 16 of the reasoning.

also traffic data processed for the transmission of communications in an electronic communications network are protected; with regard to such data, the individual's expectation of privacy (which he or she clearly demonstrates outwardly) regarding particular data is important, as well as the legitimacy of such expectation, which is a reflection of the fact that society is willing to accept such expectation as legitimate.<sup>81</sup> An integral part of one's privacy is the right of a person to his or her own voice; the personality of a person is namely reflected in his or her words. Everyone may decide on their own on the appearance of their personality that they convey in communication with others, as well as on who may hear the content of his or her communication. Therefore, every person is entitled to decide whether his or her voice shall be recorded and thereby, through a sound carrier, transmitted to third persons, whereby the words and the voice become separated from the person and independent.<sup>82</sup> A recording gives power over another person, over his or her personal asset, as it enables repetition. Communication is safeguarded against the threat that words could be used as evidence against the person who uttered them.<sup>83</sup> Therefore, if a person's communication is recorded without his or her knowledge, this entails an interference with this person's privacy, which can be admissible under the general conditions under which limitations of human rights are admissible.<sup>84</sup>

Any collecting and processing of personal data entails an interference with the right to privacy, i.e. with the right of individuals to keep information regarding themselves private. An interference with information privacy is admissible if a law precisely defines which data may be collected and processed, the purpose for which it may be used, and prescribes control over the collection, processing, and use of the collected personal data, as well as protection of the confidentiality thereof.<sup>85</sup>

In certain instances, some of the rights that the Constitution guarantees to natural persons as human rights also need to be recognised to legal entities as their constitutional rights if the substance and legal nature of these rights can apply thereto. The right to free economic initiative (the first paragraph of Article 74 of the Constitution) belongs, as a human right, to individuals. In order to be able to exercise it, they have the right to establish legal entities. The possibility to establish legal entities in order to enable collective functioning in a field of common interests is also one of the aspects of the freedom of association (the second paragraph of Article 42 of the Constitution), which equally belongs to individuals. Therefore, legal entities are important also for exercising the human rights of natural persons, hence their constitutional protection is necessary, stemming from the need to protect natural persons.<sup>86</sup> The Constitution ensures legal entities equal protection of certain rights,

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81 Decision No. Up-540/11 (dated 13 February 2014), Paras. 13 and 14 of the reasoning.

82 Decision No. Up-472/02, Para. 10 of the reasoning.

83 *Ibidem*.

84 *Ibidem*, Para. 14 of the reasoning.

85 Decision No. U-I-92/01, Para. 27 of the reasoning, and Decision No. U-I-65/13 (dated 3 July 2014), Para. 16 of the reasoning.

86 Decision No. U-I-40/12, Paras. 17 and 18 of the reasoning.

e.g. protection in the field of property, freedom of expression, the general right to act freely, constitutional procedural guarantees, and free economic initiative. Other rights are provided a lower degree of protection, whereas some rights are not protected by the Constitution at all.<sup>87</sup> Legal entities enjoy the constitutional right to privacy adapted to their legal nature only in a narrower sphere in which they can expect to be left undisturbed and where only state interferences of such magnitude that they correspond to the term *search* referred to in the second paragraph of Article 36 of the Constitution are allowed.<sup>88</sup> Legal entities may also legitimately expect privacy as regards communications at a distance that they consider confidential.<sup>89</sup> Religious and other beliefs constitute another aspect of one's privacy.<sup>90</sup> From the freedom of religion (the first paragraph of Article 41 of the Constitution), taking into account also international human rights instruments binding on the state in accordance with Article 8 of the Constitution, there are three levels of this freedom that are guaranteed to individuals, namely the right to freely choose one's religion, or the right to freely change it, and the right to not have a religion. The freedom of religion enables individuals to profess their religion either alone or in community with others, in public<sup>91</sup> or in private, by teaching, performing religious duties, observance, and carrying out religious rituals, which is what constitutes the positive aspect of the freedom of religion. The right of individuals to associate with others in establishing religious communities is a special aspect of the freedom of association.<sup>92</sup> It is crucial for the profession of religion within a community that religious communities be allowed to build religious buildings in a manner that is traditional for the profession of a particular faith, their religious rituals, and customs. This aspect also follows from the second paragraph of Article 7 of the Constitution, which determines that religious communities may pursue their activities freely.<sup>93</sup> The freedom of their establishment, organisation, and performance of religious rites, and the enactment of other religious matters is guaranteed, even in public life, however, they must act in accordance with the general legal order.<sup>94</sup> This follows already from the first paragraph of Article 41 of the Constitution, although their autonomy is also ensured in particular as a fundamental constitutional principle by the second paragraph of Article 7 of the Constitution. Therefore, religious communities must be provided such

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87 *Ibidem*, Paras. 18 and 19 of the reasoning.

88 *Ibidem*, Para. 24 of the reasoning.

89 *Ibidem*, Para. 26 of the reasoning.

90 Decision No. U-I-92/01 (dated 28 February 2002), Para. 24 of the reasoning.

91 No one's freedom of religion can be affected just because the activities of a free democratic society also encompass a religious aspect, which is expressed by citizens who are committed to their own religions as adherents. Decision No. U-I-92/07 (dated 15 April 2010), Para. 83 of the reasoning.

92 In such manner, also religious communities are ensured their own freedom of conscience. In this respect, individuals also have the right to not join a religious community. Decision No. U-I-92/07, Paras. 87 and 89 of the reasoning.

93 Decision No. U-I-111/04 (dated 8 July 2004), Paras. 28 and 29 of the reasoning.

94 Decision No. U-I-92/07, Para. 106 of the reasoning.

legal forms that allow for the greatest possible autonomy in the exercise of religious freedom.<sup>95</sup> The funding of religious communities is not an obligation of the state that follows from the first paragraph of Article 41 of the Constitution, yet this does not entail that the state may not nevertheless provide such funding. However, funding may reach only the border delineated by the principle of the separation of the state and religious communities and in particular the guarantee of state neutrality, which prohibits the provision of such support that would entail the (even symbolic) identification of the state with a religion or a religious community.<sup>96</sup>

The right not to declare a religion is the negative aspect of freedom of religion (the second paragraph of Article 41 of the Constitution).<sup>97</sup> In a conflict between the positive and the negative aspects of freedom of religion, weighing must be carried out on a case-by-case basis and which aspect of this freedom must be given priority in accordance with the principle of proportionality must be reviewed.<sup>98</sup>

The state may not interfere with the freedom of conscience, hence it may not require anyone, either directly or indirectly, to accept a certain religious belief, and it may not use coercive measures or offer privileges for affiliation or non-affiliation with a specific religious or other belief.<sup>99</sup> Freedom of religion enjoys absolute protection against interferences by the state.<sup>100</sup> However, the state also has positive obligations. It must ensure tolerance among adherents of different beliefs, it must prevent unjustified differentiation on these grounds, it must enable access to religious care in certain situations, and it must allow religious communities to acquire a legal personality.<sup>101</sup> The principle of the separation of the state and religious communities determined by the first paragraph of Article 7 of the Constitution requires the neutrality of the state towards all religious communities and prohibits the state from identifying with a certain religious community and from introducing a state religion; it also prohibits the promotion or prohibition of ideological beliefs.<sup>102</sup> It entails the religious, i.e. ideological, neutrality of the state, the autonomy of religious communities in their own sphere, and the equal relation of the state towards all religious communities.<sup>103</sup> The principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution) is a specific expression of the general principle of equality before the law determined by the second paragraph of Article 14 of the Constitution.<sup>104</sup> The principle of the separation of the state and religious communities does not prevent

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95 *Ibidem*, Para. 116 of the reasoning.

96 *Ibidem*, Paras. 130 and 146 of the reasoning.

97 Decision No. U-I-92/01, Para. 17 of the reasoning, and Decision No. U-I-92/07, Para. 85 of the reasoning.

98 *Ibidem*, Para. 86 of the reasoning.

99 Decision No. U-I-92/01, Para. 18 of the reasoning.

100 Decision No. U-I-92/07, Para. 82 of the reasoning.

101 *Ibidem*, Para. 94 of the reasoning.

102 *Ibidem*, Para. 98 of the reasoning.

103 *Ibidem*, Para. 99 of the reasoning. See also Opinion No. Rm-1/02 (dated 19 November 2003), Paras. 18 and 20 of the reasoning.

104 Decision No. U-I-92/07, Para. 109 of the reasoning.

religious communities from performing activities in different areas of social life. However, due to the principle of state sovereignty, only the state may set the limits within which and the conditions under which the performance of tasks pertaining to the competence of the state may be entrusted to the private sphere. With regard to such, the state must ensure the basic equality of all citizens, irrespective of whether they are believers or not (the first paragraph of Article 14 and the first and second paragraphs of Article 41 of the Constitution).<sup>105</sup>

The first paragraph of Article 54 of the Constitution determines that parents have the right and duty to maintain, educate, and raise their children. This duty of parents corresponds to the right of children to be cared for and raised by their parents (the first paragraph of Article 56 of the Constitution). In this manner, the Constitution draws attention to the fact that parental care and the right of children to the independent development of their personality are intertwined.<sup>106</sup> The state may not, in principle, interfere with the relationship between parents and children; it must, however, adopt rules that will enable the actual establishment and protection of such relationships. The procedure for deciding on the exercise of parental care and the maintaining of contact between children and their parents who do not live together forms part of these rules. The affected persons must have the possibility to participate in such procedures in a manner that allows for the protection of their rights. In accordance with Article 22 and the first paragraph of Article 56 of the Constitution, children who are capable of forming an opinion also have the right to express their opinion in such proceedings.<sup>107</sup> A child is a person who must be respected as such also within the family circle, and therefore his or her will should be considered in accordance with his or her age and maturity, as long as such will is consistent with his or her best interests. This right of a child is based on his or her right to personal dignity determined by Article 34 of the Constitution, which corresponds to the duty of responsible parents to ensure respect for such rights of their children.<sup>108</sup>

### **3. EQUALITY AND CERTAIN CONSTITUTIONAL PROCEDURAL GUARANTEES**

Equality before the law as determined by the second paragraph of Article 14 of the Constitution entails that regulations shall apply to each individual in a non-arbitrary manner. In judicial proceedings, this implies that courts are required to treat equal situations equally without taking into consideration personal circumstances that are not determined to be decisive by the legal norm.<sup>109</sup>

The principle of non-discrimination on the basis of personal circumstances with regard to human rights (the first paragraph of Article 14 of the Constitution) requires substantive equal treatment and the enactment of the principle of equal opportunities. Within a certain scope and under certain conditions, this includes the prevention

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105 Opinion No. Rm-1/02, Para. 25 of the reasoning.

106 Decision No. U-I-273/98 (dated 1 July 1999), Para. 13 of the reasoning.

107 *Ibidem*, Para. 14 of the reasoning.

108 Decision No. Up-383/11 (dated 18 September 2013), Para. 16 of the reasoning.

109 Decision No. Up-333/96 (dated 1 July 1999), Paras. 8 and 9 of the reasoning.

of *de facto* or indirect discrimination when due to an apparently neutral regulation a person is placed in a less favourable position compared to other persons and is thus discriminated against. There exists an inequality in the effects of the legal regulation, not in the legal regulation itself.<sup>110</sup> In the event a regulation is discriminatory against a social group characterised by a certain personal circumstance, it is unconstitutional to refrain from determining an exception to the general norm, namely to prevent the marginalisation of that social group.<sup>111</sup> Consequently, in order to ensure *de facto* – substantive – equality to persons with disabilities, measures designed to ensure their independence, as well as social and occupational integration, must be adopted. Failure to adopt such is reviewed as an interference with the right to non-discriminatory treatment that follows from the first paragraph of Article 14 of the Constitution.<sup>112</sup> In instances that do not entail indirect discrimination, a regulation nevertheless interferes with the right to non-discriminatory treatment if it treats an individual with a certain personal circumstance differently, with regard to a human right, than a person not characterised by such personal circumstance, even though both individuals are in comparable positions with regard to essential actual and legal aspects.<sup>113</sup> Although not expressly mentioned therein, sexual orientation is one of the personal circumstances referred to by the first paragraph of Article 14 of the Constitution.<sup>114</sup>

The right to an adversarial procedure (Article 22 of the Constitution) guarantees parties that courts will treat them as active participants in proceedings and enable them to effectively defend their rights and thereby give them the opportunity to actively influence decisions in cases concerning their rights and interests, in such a manner that they are treated as ends and not means. In this regard, the right to an adversarial procedure is based on respect for human personality.<sup>115</sup> The corollary to the right of a party to make statements is the obligation of courts to take note of all the legal and factual allegations of the party and also to adopt a position in the reasoning of the judgment on those allegations that are admissible and significant for the decision.<sup>116</sup> The constitutional law significance of the reasoning of a judicial decision lies in providing insight into the reasons for the very decision, in particular for the party that was unsuccessful in the proceedings. This demonstrates the autonomous nature of the reasoning as an independent dimension of the right to a fair trial, which is also one of the aspects of the right determined by Article 22 of the Constitution.<sup>117</sup> However, this

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110 Decision No. U-I-146/07 (dated 13 November 2008), Paras. 15–17 of the reasoning.

111 *Ibidem*, Paras. 18 and 19 of the reasoning.

112 *Ibidem*, Para. 28 of the reasoning. By this Decision, the Constitutional Court established the unconstitutionality of the regulation of civil procedure that did not provide blind and partially sighted persons the possibility to review procedural materials in a form that is accessible to them. Today, courts can provide such persons documents in Braille printed at the state's expense.

113 Decision No. U-I-425/06 (dated 2 July 2009), Paras. 7 and 12 of the reasoning.

114 *Ibidem*, Para. 13 of the reasoning.

115 Decision No. U-I-164/09 (dated 4 February 2010), Para. 13 of the reasoning.

116 *Ibidem*.

117 Order No. U-I-302/09, Up-1472/09, U-I-139/10, Up-748/10 (dated 12 May 2011), Para. 8 of the reasoning.

right is not absolute, it is not always applied in the same manner; it depends on the nature of the decision and on the circumstances of the particular case – it is narrower in scope when it concerns decisions against which there is no legal remedy.<sup>118</sup>

Parties cannot effectively exercise their right to make statements unless they are previously given the opportunity to review the entire body of procedural materials. An essential element of the right to the equal treatment of parties in civil proceedings is the requirement of the equality of arms, which entails that the parties to proceedings before the court must be guaranteed equal procedural positions. The right determined by Article 22 of the Constitution is a central provision that guarantees a fair trial, a part of thereof being the right to use of one's own language and script in judicial proceedings, even though this right is specifically protected by Article 62 of the Constitution.<sup>119</sup>

The purpose of words delivered before the court by a party is to effectively exercise constitutional procedural safeguards and this constitutes an integral part of the right to make statements determined by Article 22 of the Constitution.<sup>120</sup> As regards judicial proceedings, it is by their very nature necessary that the manner and form of carrying out procedural activities, including making statements, be regulated and subject to certain formal requirements, *inter alia* also concerning the manner of making statements. The procedure may be regulated by law in such a manner that it prohibits parties from making statements in an offensive or defamatory manner.<sup>121</sup> The right to make statements does not give parties the right to make any kind of statement before the court, as this right is guaranteed in connection with the right to effective judicial protection and thus refers only to statements that are important for the decision in the judicial proceedings at issue.<sup>122</sup> Criticism of a court can always be stated, however, such criticism can always be stated in a manner that does not damage the reputation of the court or the entire judiciary, or entail a personal attack on a judge's capacity to perform judicial office.<sup>123</sup> The trust of the public in the judiciary and the reputation and authority of the judiciary are the reasons why the judiciary enjoys special protection, in comparison to the other two branches of power. Building such respect and trust is primarily a task of the judiciary itself, which it can accomplish by conducting proceedings lawfully and appropriately, by adopting substantively correct and lawful decisions, and by providing well-substantiated reasoning for its decisions.<sup>124</sup>

The right to judicial protection (the first paragraph of Article 23 of the Constitution) entails the right to obtain from the court a decision on the merits of the case and the right that the judgment be enforced.<sup>125</sup> An integral part thereof is the right to

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118 *Ibidem*, Para. 9 of the reasoning.

119 Decision No. U-I-146/07, Para. 12 of the reasoning.

120 Decision No. U-I-145/03, Para. 5 of the reasoning.

121 *Ibidem*, Para. 6 of the reasoning.

122 *Ibidem*, Para. 8 of the reasoning.

123 *Ibidem*.

124 *Ibidem*, Para. 9 of the reasoning.

125 Decision No. U-I-65/05 (dated 22 September 2005), Para. 7 of the reasoning.

an impartial judge, which requires that the judge is not associated with a party or the disputed subject in such a manner that could possibly cause or at least raise a justified suspicion that, concerning the dispute, the judge could no longer decide objectively, impartially, and by considering exclusively legal criteria.<sup>126</sup> In this regard, both the subjective and objective criteria have to be taken into account; the former concerns a determination of the personal beliefs of a judge, while the latter concerns a review of whether in the proceedings the judge ensured the implementation of procedural safeguards in such a manner that any justified doubt concerning his or her impartiality is excluded – so that also the appearance of the impartiality of the trial is guaranteed, in order to ensure the trust of the public in the impartiality of the courts in general as well as in the case at issue.<sup>127</sup> An essential part of the right to judicial protection is also the right to a trial without undue delay, which ensures everyone the possibility to assert his or her rights in judicial proceedings within a reasonable time.<sup>128</sup> In accordance with the fourth paragraph of Article 15 of the Constitution, this right must also enjoy judicial protection, which requires – in accordance with the fifth paragraph of Article 15 of the Constitution and the positions stated in the judgments of the ECtHR, which are binding even if they were not adopted in a case against Slovenia – that the state award appropriate satisfaction to persons whose right to a trial without undue delay was violated in judicial proceedings that have already been concluded.<sup>129</sup> Such entails compensation for the failure to fulfil the positive obligation of the state to ensure a judicial system that enables individuals to obtain a judicial decision within a reasonable time.<sup>130</sup>

#### 4. FUNDAMENTAL POLITICAL RIGHTS

The right of assembly and association (Article 42 of the Constitution) is a fundamental human right that allows for the free expression of opinion, the formation of one's political will, and self-organisation. It also encompasses the right to establish political parties and that they can carry out their activities. It is the starting point of a multiparty political system and includes ensuring equal opportunities for all political parties, comprising the right to establish an opposition and to participate therein in accordance with the Constitution.<sup>131</sup> Political parties may not be excluded from political life if they employ legitimate means to fight regulations or even specific constitutional institutions; their exclusion is only permitted if they intend to undermine the fundamental values of a free democratic constitutional state. Deciding whether their activities are unconstitutional falls under the exclusive jurisdiction of the Constitutional Court.<sup>132</sup>

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126 Decision No. Up-679/06, U-I-20/07 (dated 10 October 2007), Para. 41 of the reasoning.

127 *Ibidem*, Para. 42 of the reasoning.

128 Decision No. U-I-65/05, Para. 8 of the reasoning.

129 *Ibidem*, Para. 12 of the reasoning.

130 *Ibidem*, Para. 13 of the reasoning.

131 Decision No. Up-301/96 (dated 15 January 1998), Paras. 11 and 12 of the reasoning.

132 *Ibidem*, Paras. 16 and 18 of the reasoning.

The principle of democracy (Article 1 of the Constitution) entails that public affairs are decided by the citizens directly (by referendum) or indirectly (through elected representatives). With regard to representative democracy in the field of elections, the principles of free, universal, and equal suffrage (the first paragraph of Article 43 of the Constitution), as well as the principles of direct and secret elections, derive from the principle of democracy; if the electoral system is in accordance with these principles and if periodic elections and the equal opportunity of all political parties in the state to compete at elections are guaranteed, elections are democratic.<sup>133</sup> It is not only the elections to the National Assembly, which is the general representative body, that are carried out in accordance with these principles, but also – on the basis of the right to vote and the right to stand for election determined by the second paragraph of Article 43 of the Constitution – the election of the members of the National Council, which is one of the constitutionally defined state authorities with competences in the legislative procedure.<sup>134</sup> The principle of universal suffrage entails that the right to vote and the right to stand for election are not restricted by conditions that are based on an individual's personal circumstances.<sup>135</sup> This principle does not prohibit the legislature from determining the conditions for candidacies. Such conditions ensure that only such candidates who have at least a minimal chance of being elected stand for election, the transparency of elections is ensured, presentations of political programmes and candidates as well as confrontations between the latter are made possible, and the splitting of votes is prevented.<sup>136</sup> Expressing support for a list of candidates enables the exercise of the voters' right to vote and, at the same time, the right of the candidates to stand for election.<sup>137</sup> A political party or other authorised person submitting a list of candidates is obliged to submit a complete (lawful) list in due time. However, such does not imply that he or she is required to verify the accuracy of the data contained in the confirmations issued as authentic instruments by the competent national authorities; he or she may justly rely thereon.<sup>138</sup> The principle of the equality of voting rights requires that each voter has the same number of votes and that these votes have the same value.<sup>139</sup> The special voting right of the members of the Italian and Hungarian national communities, to whom special rights are guaranteed by Article 64 of the Constitution,<sup>140</sup> entails a double vote

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133 Decision No. U-I-106/95 (dated 25 January 1996), Paras. 4 and 7 of the reasoning. In such manner, the Constitutional Court defined, many years before the Venice Commission did the same, the fundamental electoral principles that in accordance with the Code of Good Practice in Electoral Matters are considered to be a part of the European electoral heritage.

134 Decision No. Mp-1/12 (dated 21 February 2013), Para. 7 of the reasoning.

135 Decision No. U-I-106/95, Para. 8 of the reasoning.

136 Decision No. U-I-336/96 (dated 4 March 1999), Para. 5 of the reasoning.

137 Decision No. Up-2385/08 (dated 9 September 2008), Para. 5 of the reasoning.

138 *Ibidem*, Para. 7 of the reasoning.

139 Decision No. U-I-283/94 (dated 12 February 1998), Para. 34 of the reasoning.

140 The protection of national minorities is implemented also by the provision of special rights that only minorities are entitled to – by measures of positive discrimination, members of minorities are provided a high

that is provided by the Constitution as an instance of positive discrimination.<sup>141</sup>

The freedom of the press (the first paragraph of Article 39 of the Constitution) is one of the key institutional conditions for the effectiveness of the democratic process. The latter depends on fair elections at all levels and on public supervision of all three branches of power. The freedom to inform the public is required in order for the public to be able to supervise the authorities, and provides for the effective functioning of the political opposition.<sup>142</sup> The vital role played by the mass media in supervising the authorities means that it is crucial that it is permitted to function freely, including when monitoring the processes through which people establish state power (i.e. through elections) or directly exercise such power (i.e. by referendum). Elections or referenda can only be deemed fair when the true will of the people has been expressed and when the public has been extensively and comprehensively informed throughout the process.<sup>143</sup> During elections, the freedom of expression must be considered in light of the right to free elections, therefore it is of particular importance that in the period preceding elections opinions and information are permitted to circulate freely. Any restrictions on such are only admissible if this is necessary in order to ensure that the people are able to freely express their political will.<sup>144</sup>

The right to request a legislative referendum is an important constitutional right that in an established constitutional democracy enables individual issues to not be definitively decided on by an elected representative body, but that a law that such body has already adopted be referred to the voters in order to be confirmed or rejected.<sup>145</sup> If such right is successfully exercised, the voters decide on the entry into force of such law in a referendum, thereby exercising power directly by exercising the right to decide in a referendum.<sup>146</sup>

## 5. PROPERTY

The constitutionally guaranteed right to private property as a human right (Article 33 of the Constitution) grants an individual liberty with regard to property. Property is a basic human right that is closely linked to the protection of personal liberty. Its function is to enable everyone to shape his or her life freely and responsibly.<sup>147</sup> The legal order determines what the subject of the private property is and what the protected entitlements that arise from the property are, taking into account economic and social relationships. At the same time, the content of property as a legal concept depends on the functions assigned to it by the legal system. The right to property is composed

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degree of protection that is recognised to them by the majority, and which thereby emphasise the democratic character of the society. Decision No. U-I-218/04 (dated 20 April 2006), Para. 10 of the reasoning.

141 Decision No. U-I-283/94, Para. 35 of the reasoning.

142 Decision No. U-I-67/09, Up-316/09 (dated 24 March 2011), Para. 8 of the reasoning.

143 *Ibidem*.

144 *Ibidem*, Para. 12 of the reasoning.

145 Decision No. U-II-1/12, U-II-2/12 (dated 17 December 2012), Para. 21 of the reasoning.

146 *Ibidem*.

147 Decision No. U-I-60/98 (dated 16 July 1998), Para. 22 of the reasoning.

of various entitlements, the content of which must be regulated by the legal order. Therefore, the substance of the constitutional concept of property is only provided by statutory regulation.<sup>148</sup> Individuals cannot exercise the entitlements stemming from their property without any limitations, but must also take into consideration the interests of other members of the community, and the community as a whole. In accordance with the Constitution, the definition of property includes its social, economic, and environmental functions (the first paragraph of Article 67 of the Constitution).<sup>149</sup> The positive obligations of the state determined by the first paragraph of Article 5 of the Constitution also include the obligation to preserve the cultural heritage, which the Constitution placed on a par with the protection of human rights and general constitutional principles. The cultural heritage is in particular protected by Article 73 of the Constitution, which obliges everyone to protect cultural monuments classified as cultural heritage (the first paragraph); in addition to the state, local communities are also obligated to promote the preservation of the cultural heritage (the second paragraph). From the mentioned provisions there follows the obligation of the legislature to regulate the substance and scope of the cultural heritage, as well as the manner in which it is protected today, in order to be preserved for future generations.<sup>150</sup> The measures by which the legislature protects cultural objects also affect the substance of property enjoyed by the owners of elements of the cultural heritage.<sup>151</sup> The first paragraph of Article 67 and Article 73 of the Constitution authorise the legislature to define the content of the right to property by law and to regulate the manner in which it is acquired and enjoyed in order to ensure its social function – in this case, preserving the cultural heritage.<sup>152</sup> Deprivation of property rights as regards movable objects has no legal basis in Article 69 of the Constitution;<sup>153</sup> such is only admissible on the basis of a law under the conditions determined by the third paragraph of Article 15 (the test of legitimacy) and Article 2 (the test of proportionality) of the Constitution, and may only be carried out in individual procedures in which respect for private property and compensation for the deprivation of property rights are guaranteed.<sup>154</sup>

## 6. SOCIAL SECURITY RIGHTS AND THE FREEDOM OF TRADE UNIONS

The core of the right to a pension determined by the first paragraph of Article 50 of the Constitution, which includes a statutory reservation, is to ensure that individuals, on the basis of paid pension insurance contributions and provided that other reasonably determined statutory conditions are fulfilled, obtain and enjoy a pension

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148 Decision No. U-I-297/08 (dated 7 April 2011), Para. 27 of the reasoning.

149 Decision No. U-I-60/98, Para. 23 of the reasoning.

150 Decision No. U-I-297/08, Para. 28 of the reasoning.

151 *Ibidem*, Para. 32 of the reasoning.

152 *Ibidem*, Para. 39 of the reasoning.

153 This Article regulates the expropriation of real estate allowed under condition of providing compensation and the existence of a public interest.

154 Decision No. U-I-297/08, Para. 46 of the reasoning.

that provides them social security.<sup>155</sup> The pension has a dual nature. It is an economic category, as the rights arising from pension insurance depend mainly on how long the contributions were being paid and in what amount; in addition, it also includes elements of solidarity, which are relevant when determining the amount of the pension, but not for obtaining the right itself. The insurance aspect of this relationship is essential for obtaining the right.<sup>156</sup>

The third paragraph of Article 50 of the Constitution obliges the state to regulate special protection for victims of war violence in a manner that exceeds the rights arising from mandatory social insurance. Such special protection can be reflected in ensuring special rights or a broader scope of rights.<sup>157</sup> In order to define the term civilian victims, it is decisive that these are persons who were subject to violence due to war events without being actively involved on either side of the armed conflict.<sup>158</sup>

The freedom of trade unions determined by Article 76 of the Constitution is a special form of freedom of association guaranteed by the second paragraph of Article 42 of the Constitution. It is guaranteed as a human right whose purpose is to enable the association of workers directed towards setting standards for workers' socio-economic rights, as well as towards the implementation of and raising these standards.<sup>159</sup> It also protects the freedom of action of trade unions, one aspect of which is also the right to collective bargaining based on the free and voluntary conclusion of collective agreements, and on the autonomy of the parties to the agreement.<sup>160</sup> The regulation of workers' position by collective agreements mitigates the structurally subordinate position of workers when concluding employment contracts and, in such manner, enables the negotiated rights and working conditions to be relatively balanced. It contributes to securing social justice and social peace, which are embedded in the principle of a social state determined by Article 2 of the Constitution, and to raising the level of democracy of social regulation.<sup>161</sup> With regard to the employment relationships of civil servants, the state acts as the employer. However, the state is, at the same time, a bearer of authority and is required to protect the public interest. It must ensure that its competences are exercised effectively, and that the entire public sector functions effectively. Therefore, it must also ensure that the freedom of collective bargaining, which includes the possibility that a collective agreement is not concluded, does not seriously threaten the exercise of the aforementioned tasks, which accordingly narrows the aspect of the substance of the autonomy of collective bargaining

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155 Decision No. Up-360/05 (dated 2 October 2008), Paras. 5 and 6 of the reasoning.

156 *Ibidem*. The first paragraph of Article 50 of the Constitution provides the right to a pension only to citizens. Other persons are provided constitutional protection of this right within the framework of the right to private property (Article 33 of the Constitution); see Decision No. Up-770/06 (dated 27 May 2009), Para. 4 of the reasoning.

157 Decision No. U-I-266/04 (dated 9 November 2006), Para. 13 of the reasoning.

158 *Ibidem*, Para. 19 of the reasoning.

159 Decision No. U-I-249/10 (dated 15 March 2012), Para. 17 of the reasoning.

160 *Ibidem*, Para. 18 of the reasoning.

161 *Ibidem*, Para. 22 of the reasoning.

(in particular, with regard to the police, the military, and the civil service).<sup>162</sup>

**7. THE SEPARATION OF POWERS, THE LEGALITY OF THE FUNCTIONING OF THE STATE, AND LOCAL SELF-GOVERNMENT**

The principle of democracy (Article 1 of the Constitution) contains *inter alia* the requirement that the most important decisions be adopted by directly elected members of the parliament. As a result, the executive branch of power can only operate legally when working on the substantive basis of and within the framework of laws, and not on the basis of its own regulations or even on the basis of its own function within the system of the separation of powers.<sup>163</sup> The priority of laws plays an important role in delimiting the competences of the legislative and executive branches of power in accordance with the principle of the separation of powers (the second paragraph of Article 3 of the Constitution). The principle of a state governed by the rule of law (Article 2 of the Constitution) requires that legal relations between the state and its citizens be regulated by laws. Thereby, the functioning of the executive power becomes known, transparent, and foreseeable by the citizens, thus increasing their legal certainty. The principle of the protection of human rights (the first paragraph of Article 5 of the Constitution) requires that, in accordance with the principles of democracy and a state governed by the rule of law, these may only be limited by the legislature in the instances and to the extent allowed by the Constitution, and not by the executive power.<sup>164</sup> The second paragraph of Article 120 of the Constitution determines the principle that administrative authorities perform their work within the constitutional and statutory framework, and in particular in accordance with the constitutional and statutory basis, which makes the principle of legality in relation to the functioning of the state administration – due to its connection with the other mentioned principles – one of the fundamental constitutional principles.<sup>165</sup> Administrative authorities may not issue regulations that do not have a substantive basis in law, independently determine rights and obligations, or independently modify or regulate statutory subject matter. However, if the law provides for a substantive framework for issuing an implementing regulation, they may issue such even if the law does not determine an express authorisation to this end by means of an implementing clause.<sup>166</sup>

The fundamental constitutional principles and the constitutional order on the whole serve to protect individuals' freedom in relation to the state power. The concept of power that is limited by law, i.e. power that functions within the framework and on the basis of the Constitution and respects human rights in particular, is the highest constitutional and societal value, which must be the starting point of a review of the constitutional consistency of relations between the bearers of different offices of the

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<sup>162</sup> *Ibidem*, Para. 23 of the reasoning.

<sup>163</sup> Decision No. U-I-73/94 (dated 25 May 1995), Para. 18 of the reasoning.

<sup>164</sup> *Ibidem*.

<sup>165</sup> *Ibidem*.

<sup>166</sup> *Ibidem*, Para. 19 of the reasoning.

state power.<sup>167</sup> The relation between individual branches of power is a relation of the constraint and cooperation of equal branches of power such that each functions within the framework of its own position and its own competences. Their equality is the starting point of the regulation of the mechanisms of checks and balances between individual branches of power.<sup>168</sup> The significance of the principle of the separation of powers in a contemporary state is precisely in the independent role of the judicial power, whose task is to determine, in individual cases and in a binding manner, what the law is. The force of the judicial power is embodied through its judicial decisions, which are supported by legal arguments that are also rational and convincing. Therefore, it is essential that judges are bound only by the Constitution and laws, and as a result the functioning of the judicial power is of decisive importance for the implementation of the principles of a state governed by the rule of law.<sup>169</sup> The principle of the separation of powers establishes mutual dependency between individual branches of power and ensures that each of them exercises its own functions, with regard to which the system of checks and balances operates from both the functional and organisational points of view. From the organisational point of view of this principle, it holds true that, as a general rule, office holders in individual branches of power are not appointed to such positions by the branches themselves, but are appointed to such positions directly (members of parliament through elections) or indirectly by the people (representatives from the other two branches of power with various competences participate in such procedures).<sup>170</sup>

Article 149 of the Constitution is a procedural provision that regulates the legal form and power regarding the adoption of decisions on state borrowings and state guarantees for loans, which require a special decision by the National Assembly in the form of a law. The assumed obligations must be determined by law or at least determinable on the basis thereof. By such a law, the financial burden is actually or potentially transferred to the future, while at the same time the fundamental power of the National Assembly to decide on state revenues and expenditures is ensured, as well as the special disclosure of state borrowings and guarantees in accordance with the principles of a democratic state and a state governed by the rule of law.<sup>171</sup>

The significance of the constitutional prohibition of the retroactive effect of legal acts (the first paragraph of Article 155 of the Constitution) is to ensure the essential element of a state governed by the rule of law, i.e. legal certainty, and consequently trust in the law. Only a law may establish that certain of its provisions have retroactive effect if this is required in the public interest and provided that no acquired rights are infringed thereby (the second paragraph of Article 155 of the Constitution).<sup>172</sup> A regulation has retroactive effect when the moment of the beginning

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167 Decision No. U-I-159/08 (dated 11 December 2008), Para. 22 of the reasoning.

168 *Ibidem*, Para. 24 of the reasoning.

169 *Ibidem*, Para. 26 of the reasoning.

170 Decision No. Up-679/06, U-I-20/07, Para. 23 of the reasoning.

171 Decision No. U-I-178/10 (dated 3 February 2011), Paras. 24 and 25 of the reasoning.

172 Decision No. U-I-158/11 (dated 28 November 2013), Para. 20 of the reasoning.

of its application is a moment before its entry into force, or when it starts to be applicable after its entry into force, but some of its provisions have such effect that they retroactively interfere with legal situations or legal facts that were final when the previous legal norm was in force.<sup>173</sup> Retroactive effect can only be justified by a specific public interest, one that substantiates precisely the retroactive effect of the regulation without which the pursued aim of the particular regulation could not be achieved. With regard to the fact that such a public interest substantiates an exception to the constitutional prohibition of retroactive effect, it must be specifically established in the legislative procedure.<sup>174</sup> Such must be the case in particular in the field of taxation, not only due to the density and intensity of legal relations between the state and taxable persons, but also due to the asymmetry of tax law relationships, which entail an interference by the state with the property sphere of taxable persons without directly paying any compensation for such, as well as due to the general sense of justice. In fact, taxable persons must know that the legislation may change, however, they may legitimately expect that any changes will be made in such a manner that while making decisions they will be able to take these changes into consideration, which presupposes that they are informed thereof (the first paragraph of Article 154 of the Constitution).<sup>175</sup>

In Slovenia, local self-government is guaranteed (Article 9 of the Constitution). It follows from the constitutional concept of a municipality that local self-government is the right of local communities to manage common local affairs. In fact, the establishment of a municipality is an essential condition for the exercise of local self-government; however, the legislature may determine the conditions and the procedure for the establishment of a municipality. Therefore, Articles 138 and 139 of the Constitution<sup>176</sup> cannot be interpreted in the sense that they guarantee people the right to their own municipality, but only the right to exercise local self-government in a municipality that is established in accordance with the conditions and the procedure determined by law.<sup>177</sup> When establishing municipalities and changing their territories, the legislature is bound by the will of the voters expressed in a referendum (the third paragraph of Article 139 of the Constitution), unless respecting the will of the voters expressed in a referendum would lead to the establishment of a municipality that would not be in accordance with the constitutional and statutory provisions on municipalities, or if it were not possible to respect the will of the voters expressed in a referendum due to the conflicting results of referenda.<sup>178</sup>

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173 *Ibidem*, Para. 21 of the reasoning.

174 *Ibidem*, Para. 26 of the reasoning.

175 *Ibidem*, Para. 27 of the reasoning. In accordance with the first paragraph of Article 154 of the Constitution, regulations must be published prior to entering into force.

176 These two Articles regulate the exercise of local self-government and municipalities as self-governing local communities.

177 Decision No. U-I-137/10, Para. 10 of the reasoning.

178 *Ibidem*, Para. 13 of the reasoning.

## 8. RESPECT FOR INTERNATIONAL AND EUROPEAN UNION LAW

By reviewing the conformity of laws and other regulations with treaties (the second indent of the first paragraph of Article 160 of the Constitution), the Constitutional Court ensures the effectiveness of international law in the state. In accordance with Article 8 and the second paragraph of Article 153 of the Constitution, laws and other regulations must comply with principles of international law and with treaties that are binding on Slovenia. Ensuring respect for international law is an important constitutional value, which safeguards the international credibility of the state.<sup>179</sup>

The Constitutional Court is also entrusted with the task of preventing conflicts between the Constitution and treaties containing provisions that are inconsistent with the Constitution, which can occur in two different situations. The first situation concerns the provisions of treaties on human rights, with regard to which the Constitution itself introduced, in the fifth paragraph of Article 15, a special mechanism for resolving such conflicts. In accordance with this provision, the Constitution must give way to the provisions of treaties that guarantee a higher level of protection of a particular human right.<sup>180</sup> The provisions of such treaties are often also used as an interpretative tool when interpreting constitutional provisions.<sup>181</sup> In such framework, the provisions of the ECHR hold a special place as a result of the functioning of the ECtHR, which defines the substance of the Convention rights. The Constitutional Court must observe the case law of the ECtHR irrespective of whether it was adopted in a case in which Slovenia participated in the proceedings before the ECtHR.<sup>182</sup>

The second situation concerns the fact that the Constitutional Court prevents conflicts between the Constitution and international law by exercising a special power (the preliminary, *a priori* constitutional review of treaties; the second paragraph of Article 160 of the Constitution). Its purpose is to prevent, upon the ratification of a treaty, the state from assuming an obligation that would be inconsistent with the Constitution or that, after ratification, it would be forced to bring the obligation arising from international law in line with the Constitution.<sup>183</sup> The Constitution namely does not recognise the primacy of international law. An obligation arising from international law would be contrary to the Constitution if, upon its transposition into the domestic legal order, it created self-executing unconstitutional legal norms or obliged the state to adopt an internal legal act that would be contrary to the Constitution.<sup>184</sup> An opinion on the constitutionality of a treaty has the same legal effect as a decision of the Constitutional Court. It binds the National Assembly when ratifying a treaty, and it is also binding on all the other authorities of the state in the domestic legal order.<sup>185</sup>

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179 Decision No. U-II-1/12, U-II-2/12, Paras. 46 and 53 of the reasoning.

180 *Cf.*, e.g., Decision No. Up-555/03.

181 See, e.g. U-I-218/07 (dated 26 March 2009).

182 Decision No. U-I-65/05, Para. 12 of the reasoning.

183 Opinion No. Rm-1/02, Para. 8 of the reasoning.

184 *Ibidem*.

185 *Ibidem*, Para. 53 of the reasoning.

In the Slovene national constitutional order, the Treaty of Lisbon, by which Slovenia transferred to the European Union the exercise of some of its sovereign rights in conformity with Article 3a of the Constitution, has the status of a [regular] treaty. Such entails that the Constitutional Court has the jurisdiction, as determined by the second indent of the first paragraph of Article 160 of the Constitution, to decide on the conformity of laws with the Treaty of Lisbon.<sup>186</sup> In accordance with the third paragraph of Article 3a of the Constitution, all authorities of the state, including the Constitutional Court, must take into account, in the exercise of their competences, the primary and secondary legislation of the European Union and the case law of the Court of Justice of the European Union. Due to the mentioned constitutional provision, the fundamental principles that define the relationship between national law and European Union law (the principles of primacy, direct applicability, and the direct effect of European Union law, the principle of sincere cooperation, the principle of conferral of competences, and the principle of proportionality) are at the same time also constitutional principles that have the same binding effect as the Constitution.<sup>187</sup>

#### 9. THE LEGAL EFFECTS OF THE CASE LAW OF THE CONSTITUTIONAL COURT

The third paragraph of Article 161 of the Constitution determines that the legal consequences of Constitutional Court decisions are regulated by law, whereas the third paragraph of Article 1 of the Constitutional Court Act determines that the decisions of the Constitutional Court are binding. The binding nature of the decisions of the Constitutional Court follows already from fundamental constitutional principles – i.e. the principle of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (the second paragraph of Article 3 of the Constitution) – and would apply even if the Constitutional Court Act did not contain such a provision.<sup>188</sup> The binding effect of the decisions of the Constitutional Court does not have an unambiguous meaning. In particular, the question arises as to the binding force of interpretations of the Constitution by which the Constitutional Court reasons its decisions, i.e. how strong the *ratio decidendi* is, and who is bound by the positions stated by the Constitutional Court in the reasoning of its decisions. The Constitutional Court emphasised that when reviewing the constitutionality of regulations the operative provisions and reasoning of its decisions form a whole, therefore also the positions and reasons contained in the reasoning of a decision are binding, even if the Constitutional Court merely establishes in a declaratory decision that a regulation is inconsistent with the Constitution.<sup>189</sup> For a judge who must decide in judicial proceedings by observing a decision of the Constitutional Court, a declaratory decision<sup>190</sup> entails a duty to interpret the law in a constitutionally consis-

186 Decision No. U-I-17/11 (dated 18 October 2012), Para. 7 of the reasoning.

187 Decision No. U-I-146/12 (dated 14 November 2013), Paras. 32 and 33 of the reasoning.

188 Decision No. U-I-248/08 (dated 11 November 2009), Para. 12 of the reasoning.

189 Decision No. Up-624/11 (dated 3 July 2014), Para. 10 of the reasoning.

190 The Constitutional Court adopts such a decision if there is an unconstitutional legal gap where the law fails to regulate a certain issue that, in accordance with the Constitution, it should regulate, or regulates it in such

tent manner, which follows already from Article 125 of the Constitution.<sup>191</sup> A judge may still apply a provision whose unconstitutionality was established and was not abrogated, however, such application must not be contrary to the reasons that led the Constitutional Court to establish its inconsistency with the Constitution.<sup>192</sup>

Decisions of the Constitutional Court by which statutes are either abrogated or the inconsistency thereof established must also be observed after a judicial decision becomes final if extraordinary legal remedy proceedings or proceedings to decide upon a constitutional complaint have been initiated against such judicial decision.<sup>193</sup>

Thereby, the effectiveness of extraordinary legal remedies is ensured, which also applies in the event a declaratory decision has been adopted – in such context, the issue is not whether certain conduct was legal when it was performed, but whether it was in conformity with the Constitution.<sup>194</sup> If the Constitutional Court also determines the so-called manner of implementation of a decision, by which it temporarily, until the legislature responds thereto, legally regulates the individual question that was the subject of review, the addressees of the legal norms at issue must act in accordance with such manner of implementation until the legislature regulates that question in an equal or different manner.<sup>195</sup> This also holds for state authorities. Namely, in states governed by the rule of law, the decisions of constitutional courts are complied with, regardless of whether legal experts express doubts regarding such. State authorities are bound by the decisions of the Constitutional Court and cannot be absolved of this duty to comply by any concerns expressed by experts, even if these are justified.<sup>196</sup> However, in pending proceedings on extraordinary legal remedies, it must be taken into consideration that the manner of implementation determined by a decision of the Constitutional Court has the same legal power as a statute, and consequently its implementation and interpretation are subject to the established methods of interpretation of statutes.<sup>197</sup> Hence, failure to observe the determined manner of implementation during judicial decision-making can primarily entail a violation of a statute, but it may also reach the level of a violation of the Constitution; the reasons the unconstitutionality was established must, namely, be meticulously taken into consideration. Courts must observe the manner of the implementation of the relevant decision if deciding otherwise would constitute a violation of human rights.<sup>198</sup>

The Constitution and the decisions of the Constitutional Court are not binding only on the legislature, but also on citizens when they exercise power directly by

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a manner (legal drafting) that abrogation is not possible.

191 In accordance with this provision, judges are bound by the Constitution and laws when deciding in judicial proceedings.

192 Decision No. Up-624/11, Para. 10 of the reasoning.

193 *Ibidem*, Para. 12 of the reasoning.

194 *Ibidem*, Para. 13 of the reasoning.

195 *Ibidem*, Para. 14 of the reasoning.

196 Decision No. U-II-1/10, Para. 45 of the reasoning.

197 Decision No. Up-624/11, Para. 15 of the reasoning.

198 *Ibidem*, Para. 16 of the reasoning.

deciding on a particular law in a referendum.<sup>199</sup> In a legislative referendum it is inadmissible to decide whether to respect a decision of the Constitutional Court, because such would constitute a referendum on the authority of the Constitutional Court and on whether certain issues should even be regulated in a manner consistent with the Constitution.<sup>200</sup>

#### 10. THE SIGNIFICANCE OF THE CONSTITUTIONAL CASE LAW

The decisions of the Constitutional Court gathered in this collection represent only a narrow selection of the most important decisions, therefore they do not represent the whole picture of the hitherto constitutional case law. In fact, the latter is much broader. This is reflected in the twenty volumes of the *Collected Decisions and Orders of the Constitutional Court of the Republic of Slovenia*, in which the case law is (also) published. Due to the large number of decisions, it progressively became necessary to set limits regarding the publication thereof; in 2009, only a narrow selection of the most important decisions was published in a single volume, while more recently a volume containing a narrow selection of the most important decisions is published every two years. Nonetheless, it can be stated that the present selection is a sufficiently representative sample on the basis of which the content of important constitutional provisions as seen and interpreted by the Constitutional Court is presented, often also by referring to international law and the case law of the international courts that interpret it. The provisions of the Constitution, whose content is presented in the present volume after 25 years of constitutional case law, confirm that a free individual, his or her dignity, and the human rights that he or she as a human is inherently entitled to in accordance with the Constitution are established as the fundamental starting point of the constitutional order. The Constitutional Court cannot overlook these human rights even when interpreting the principles that guide the constitutionally defined relationships between the authorities of state power, such as the principle of the separation of powers, with regard to which the Constitutional Court has repeatedly emphasised that respect therefor is intended to ensure exercise of the freedom of a person and his or her human rights. In addition, a number of general principles are inherently connected with the protection of human rights, starting with the generally required protection thereof (the first paragraph of Article 5 of the Constitution), followed by the principle of proportionality applied as one of the principles of a state governed by the rule of law (Article 2 of the Constitution) or as a criterion for reviewing the admissibility of the limitation of human rights (the third paragraph of Article 15 of the Constitution). Some general constitutional principles can be implemented in an important manner when applied through the protection and exercise of individual rights; for instance, the principle of a social state (Article 2 of the Constitution) is implemented through the rights to social security (the first paragraph of Article 50 of the Constitution).

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199 Decision No. U-II-1/10 (dated 10 June 2010), Para. 19 of the reasoning.

200 Ibidem, Para. 45 of the reasoning.

The Slovene Constitution is a modern constitution and as such contains an extensive catalogue of human rights, divided into two chapters, i.e. a chapter on human rights and a chapter on economic and social relations. However, this catalogue does not constitute a closed list, as on the basis of the provision of the fifth paragraph of Article 15 of the Constitution it can conceptually and interpretatively encompass human rights not expressly regulated therein, but in the treaties that the state has ratified, as well as those human rights regarding which such treaties ensure a higher degree of protection than the Constitution. In its constitutional case law the Constitutional Court expressly uses such human rights as the major premise, while occasionally also interpreting the constitutional provisions by additionally “assigning” them the substance of a right regulated exclusively by a treaty (e.g. the right to hear an incriminating witness forms an integral part of the right to a defence determined by Article 29 of the Constitution, even though the wording of that provision does not mention such right expressly). There are a number of treaties on human rights; nevertheless, the ECHR has the central place among them due to the fact that an international court has been established on its basis and that the contracting states have agreed that their citizens may bring proceedings against them before that court on account of alleged violations of human rights. On the basis of the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union, with its relatively extensive catalogue of human rights, which Member States are to apply only when implementing European Union law, also entered the ranks of such treaties. This development may bring about specific difficulties regarding the protection of human rights when a court is involved in their protection in a manner such as applied by the Luxembourg Court.<sup>201</sup> A more extensive catalogue of human rights does not inherently entail a higher degree of protection of these rights.

Above all, any catalogue of human rights would remain merely ink on paper if its effectiveness were not ensured, which requires the enactment of human rights and their judicial protection on a daily basis in order for violations to be prevented. This is precisely the point where we can recognise that, by its decisions during these 25 years, the Constitutional Court has taken exceptionally important steps on the path from a state in which human rights were grossly violated (as stated in the Preamble to the Basic Constitutional Charter) towards a state in which human rights are not only empty words but have become real and effective for each individual person. It is not surprising that these steps have been made both in the framework of the review of the constitutionality of regulations as well as when deciding on constitutional complaints, as violations of human rights can occur either when a statutory regulation itself is unconstitutional or if a court gives it an unconstitutional meaning. It took many years for the courts to embrace the necessity of a constitutionally consistent interpretation of laws, which also entails the protection of human rights already at the first instance of judicial proceedings (or even before administrative

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201 For more detail, see J. Sovdat, *The Constitutional Court of the Republic of Slovenia and European Union Law*, *Hrvatska i komparativna javna uprava*, 3 (2013), pp. 895–927.

authorities where these are the first bodies to decide on rights, obligations, or legal benefits). Only in recent years have the courts become important interlocutors of the Constitutional Court by filing requests for a review of the constitutionality of individual laws they must apply in proceedings. It is obvious that time was needed for that to happen and that such shifts do not occur over night, because they require a qualitatively different perspective on judicial proceedings.

The question is, however, whether such a qualitative leap has already been made also by the public. It certainly has been made to a certain extent among the professional public, but not by the general public, which is bombarded by media that exaggerate with their sensationalist style and are not very interested in serious topics. Unfortunately, constitutional case law is (much) too often seen by the general public as comprising decisions that benefit a particular person, or even a political party or viewpoint, instead of there being a discussion about what a certain decision means from the standpoint of the content of a human right or the level of its protection as interpreted by the Constitutional Court. Is legal language really too difficult to comprehend? Have we, the judges of the Constitutional Court, done enough to ensure that our decisions are universally understood? Perhaps we have not, perhaps we will have to do more and thus contribute to improving the general and legal culture of public discourse.

Finally, there is another important issue that should be emphasised. While awareness of the human rights that people are entitled to has been progressively raised, it remains overlooked too often that human rights are mostly not absolute, that they are limited by the human rights of others. The Constitutional Court has often emphasised that some of these limitations are, due to the nature of the matter, an integral part of rights themselves. The Constitutional Court's emphasis that the general right to act freely allows one to do everything that is not prohibited, therefore, applies in particular to the relation of individuals towards the state. The state may interfere with an individual's freedom to act only when there is an express statutory basis for such. However, that does not entail that the freedom to act of an individual is unlimited. The Constitution sets boundaries at almost every step. Therefore, the requirement that they be exercised responsibly and with the awareness that we wish and must live in harmony with other people, whom we are obliged to show the same respect as we expect to receive therefrom, always goes hand in hand with human rights. Therefore, it is more than self-evident that a person's freedom extends only to where the freedom of another person begins.



*Dr Jadranka Sovdat  
Vice President*





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**PART I**

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Human Dignity, Human Rights,  
and Fundamental Freedoms



Decision No. **U-I-109/10**, dated 26 September 2011

## DECISION

At a session held on 26 September 2011 in proceedings to review constitutionality and legality initiated upon the petition of Lidiya Drobnič, Ljubljana, and others, represented by Radovan Cerjak, lawyer in Ljubljana, the Constitutional Court

*decided as follows:*

**Article 2 of the Ordinance on Determining and Changing the Names and Course of the Roads and Streets in the Territory of Ljubljana Municipality (Official Gazette RS, No. 44/09) is annulled.**

## *Reasoning*

### **A**

1. The petitioners challenge Article 2 of the Ordinance on Determining and Changing the Names and Course of the Roads and Streets in the Territory of Ljubljana Municipality (hereinafter referred to as: the Ordinance), which regulates the name and course of Titova cesta [hereinafter referred to as: Tito Street] in the territory of Ljubljana Municipality. Petitioner Jernej Vrtovec substantiates his legal interest by alleging that he lived under the communist regime in which human rights and fundamental freedoms were systematically violated. Naming the street after Josip Broz Tito therefore allegedly interferes with his right to personal dignity. Petitioner Lidiya Drobnič substantiates her legal interest by alleging that in 1949 and 1950 she was arrested as an opponent of the communist regime and on that account the competent authority recognized her status as a former political prisoner by a decision in 2000. As a victim of the former totalitarian regime, the petitioner feels that she has been punished once again due to the naming of a street after Josip Broz Tito. Petitioners Franci Slak and Ignac Polajnar are councillors in the Municipal Council of Ljubljana Municipality. They are convinced that Article 2 of the Ordinance is unconstitutional, and substantiate their legal interest to challenge such by the fact that as councillors they must act in accordance with the Constitution.

2. The petitioners substantiate the unconstitutionality of the challenged provision of the Ordinance by stating the same reasons. They allege that naming the street after Josip Broz Tito, who, in their opinion, personifies the former communist regime in the Socialist Federal Republic of Yugoslavia (hereinafter referred to as: the SFRY), entails a violation of the right to personal dignity determined in Article 34 of the Constitution of the victims of this regime as well as others who lived under this regime. Article 2 of the Ordinance, in their opinion, also violates Article 63 of the Constitution, which prohibits incitement to discrimination and intolerance and prohibits incitement to violence and war. This provision of the Constitution allegedly protects constitutionally guaranteed categories of equality, human dignity, and a democratic state governed by the rule of law. These values are allegedly the complete opposite of the values fostered in totalitarian regimes, which the communist regime in the former SFRY also was. The President of the SFRY and the leader of Yugoslav communists, Josip Broz Tito, allegedly personally controlled the communist regime and dictated its development. The petitioners are convinced that Josip Broz Tito was, regardless of certain positive elements, historically a negative person, a non-democrat, and a dictator. For him, human rights and fundamental freedoms were only empty words on paper. In the consciousness of many residents of Slovenia, he allegedly still today arouses fear and dark memories with regard to the people executed during the communist regime. In the opinion of the petitioners, naming the street after him therefore entails a particular kind of incitement to hatred and violence. The petitioners compare naming the street after Josip Broz Tito to naming a street after Adolf Hitler, Benito Mussolini, or Joseph Vissarionovich Stalin. Every such naming can violate the personal dignity of individuals and incite discrimination, intolerance, and violence. The challenged Ordinance allegedly once again humiliated people who during the communist regime were unjustifiably forced to the margins of society due to their political convictions and commitment to democracy and human rights. With reference to such, the petitioners draw attention to the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (Official Gazette RS, No. 1/91 – hereinafter referred to as: the BCC), the Preamble to which states, *inter alia*, that the SFRY did not function as a state governed by law and that within it human rights were grossly violated. In addition, they draw attention to the European Parliament resolution of 2 April 2009 on European conscience and totalitarianism (OJ C 137 E, 27 May 2010, p. 25), in which the European Parliament condemned all crimes against humanity and the massive human rights violations committed by all totalitarian and authoritarian regimes.
3. The opposing party – Ljubljana Municipality, represented by mayor Zoran Janković – in the response to the petition alleges that the petitioners did not demonstrate legal interest for the initiation of the procedure for the review of the constitutionality and legality of the Ordinance. Only individuals to whom Article 3 of the Act on Designating Areas and Naming and Marking Settlements, Streets, and Buildings (Official Gazette RS, No. 25/08 – hereinafter referred to as: the ADANMSSB) refers allegedly have legal interest therefor. Ljubljana Municipality opposes the allegations

that the challenged Ordinance is inconsistent with Articles 34 and 63 of the Constitution. It alleges that the disputed street was named after a historical figure who made an important mark on the period during World War II and the decades following the War. Josip Broz Tito was allegedly an important historical figure for Slovenes, as he was commander-in-chief of the Partisan army, which in 1945 liberated the territory of present-day Slovenia from fascist occupation. Testifying to his great historical role are also numerous medals and awards which Josip Broz Tito received from other countries as well as the fact that many cities around the world have streets or squares named after him. The opposing party adds that discussions on naming streets can be a matter of democratic dialogue, however, the final decision regarding such is the democratic right of the majority in the municipal council.

### B – I

4. The challenged Article 2 of the Ordinance is a regulation (i.e. a general legal act), which, in accordance with the ADANMSSB, determines that in Ljubljana a part of the existing Štajerska cesta [Štajerska Street] and a part of a newly planned street be named Tito Street and that its course be determined<sup>1</sup>. For the concretisation of this provision, thus for the naming of the determined road section Tito Street to take effect, the ADANMSSB and the Ordinance do not envisage the issuance of any further administrative decisions or other individual acts which would be necessary for its implementation. The naming of streets and roads by an ordinance of the local community takes direct effect, and thus not only in relation to state and other authorities which must respect such new fact *ex officio* (e.g. in various public records and registers), but also in relation to individuals and other legal subjects in their daily life and business activities. Naming public spaces does not only concern the residents of these areas, but such also has legal effect with

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1 The challenged provision of the Ordinance reads as follows:

“In the territory of Ljubljana Municipality, in the settlement of Ljubljana:

→ the name of the following street is hereby changed thusly:

A part of Štajerska cesta [Štajerska Street] in the part of the northern artery from the roundabout at the northern ring road at Tomačevo to the intersection with Zasavska cesta [Zasavska Street] and Dunajska cesta [Dunajska Street] is renamed Tito Street.

→ the following street is hereby newly named thusly:

A part of the planned “new Tomačevska cesta [Tomačevo Street]” from the roundabout at Plečnikove Žale to the intersection with Kranjčeva ulica [Kranjčeva Street] and in the extension of the newly planned northern artery to the north and northeast to the roundabout at the northern ring road at Tomačevo is hereby named Tito Street.

→ the course of the following street is determined and changed thusly:

The newly named Tito Street runs from the roundabout at Plečnikove Žale to the north and northeast along the route of the newly planned northern artery towards and over the Tomačevo roundabout to the intersection with Zasavska cesta [Zasavska Street] and Dunajska cesta [Dunajska Street].

The course of Štajerska cesta [Štajerska Street] is changed so that it runs from the intersection of Zasavska cesta [Zasavska Street] and Dunajska cesta [Dunajska Street] to the municipal border with Trzin Municipality.”

regard to everyone who encounters or apprehends such name. Such naming has an emphasized symbolic significance that also concerns everyone. Naming such road section Tito Street thus has *erga omnes* effects, which arise directly on the basis of the Ordinance on the day of its implementation.<sup>2</sup> Furthermore, in the case at issue questions are raised which refer to human dignity as the fundamental value and legal starting point of Slovene democracy. These concern the most elementary questions regarding the relation of the state or authorities towards individuals, regarding the position and significance of human beings and humanity in the state, and regarding the fundamental purpose of a free and democratic state in general. In the case at issue, the petitioner Lidija Drobnič undoubtedly demonstrated legal interest; she was recognized the status of former political prisoner by the decision of the Government Commission for the Implementation of the Redressing of Injustices Act of 17 October 2000, which was issued on the basis of the Redressing of Injustices Act (Official Gazette RS, No. 59/96). The Constitutional Court therefore did not have to decide whether other petitioners demonstrated legal interest.

5. The Constitutional Court accepted the petition for consideration and, in consideration of the fact that the requirements laid down in the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as: the CCA) are fulfilled, proceeded to decide on the merits.

## B – II

6. Respect for human dignity (German: *Menschenwürde*) is the legal-ethical foundation of contemporary states based on the concept of constitutional democracy, i.e. on the presumption that authority must be restricted by certain fundamental rights and freedoms humans are entitled to due to their inherent worth. The awareness that human dignity is the highest ethical value and that respect for human dignity must be a criterion of and limitation on the functioning of state authority, has gradually been strengthening throughout the centuries.<sup>3</sup> Human dignity was first recognised at the constitutional level as a universal value inherent to all individuals at the end of the 18<sup>th</sup> century following the adoption of the key constitutional documents in the period of the constituting of the independent United States of America and of

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2 With reference to such, it is not relevant that the ADANMSSB and the Ordinance envisage certain substantive acts after the naming is implemented – the Surveying and Mapping Authority of the Republic of Slovenia must register the change in the register of spatial units, the street must be marked by a street sign indicating the name of the street, while buildings along the street must be assigned house numbers (Sections VI and VII of the ADANMSSB, Article 5 of the Ordinance). The direct effect of the ordinance by which a street is renamed or newly named is also not influenced by the fact that the natural persons who reside on the street or legal entities which have their registered office thereon must consequently in relevant proceedings change or in some other manner adapt their personal documents or documents used in business operations.

3 Among the pivotal historical documents, certain key English documents must be mentioned, i.e. the *Magna Carta* (The Great Charter) of 1215, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689. The beginnings of the modern structure of human rights can be traced back to the Age of Enlightenment, to the legal-philosophical thought of numerous authors of the 17<sup>th</sup> and 18<sup>th</sup> centuries.

the French Revolution.<sup>4</sup> Following a certain standstill in the development of human rights in Continental Europe in the 19<sup>th</sup> and at the beginning of the 20<sup>th</sup> century, after World War II the principle of respect for human dignity developed as a special universal principle, first in some of the most important international documents, and later as the fundamental constitutional principle in the constitutions of new democracies, which, by codifying human rights, placed the individual at the centre of the constitutional order.<sup>5</sup> The Preamble to the Charter of the United Nations of 1945, for instance, stresses that it was adopted by the people of the United Nations, who were determined to reaffirm “faith in fundamental human rights, in the dignity and worth of the human person”. This was followed by the Universal Declaration of Human Rights of 1948, the Preamble to which opens by stressing that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, while the normative part already in Article 1 determines that “all human beings are born free and equal in dignity and rights”. Furthermore, the International Covenant on Civil and Political Rights of 1966 (which entered into force on 23 March 1976) in its Preamble emphasises that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and that the rights determined in this Covenant “derive from the inherent dignity of the human person”. The European Convention on Human Rights (hereinafter referred to as: the ECHR) does not explicitly mention human dignity, however, the contracting parties in the Preamble expressed “their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world” and looked for the inspiration for the adoption of the Convention in “a common heritage of political traditions, ideals, freedom and the rule of law”. In alliance with such spirit of commitment to human rights, also the European Court of Human Rights in its judgments clearly upheld that the very essence of the ECHR is respect for human dignity.<sup>6</sup> Also the Charter of Fundamental

4 The Virginia Declaration of Rights of 1776 can be deemed to contain the first definition of universal human rights in positive constitutional law. It was followed by the Declaration of Independence of the USA of 1776, the Constitution of the USA of 1787 – the Bill of Rights to the Constitution was adopted the same year, and the French Declaration of the Rights of Man and of Citizen of 1789. For more on the historical development of fundamental rights, see: L. Pitamic, *Država* [The State], Cankarjeva založba, Ljubljana 1996, pp. 188 – 207, and V. Simič, *Temeljne pravice kot pravnocivilizacijska dediščina* [Fundamental Rights as the Heritage of the Law and Civilisation], in: M. Pavčnik, A. Polajnar-Pavčnik, D. Wedam-Lukić (Editor), *Temeljne pravice* [Fundamental Rights], Cankarjeva založba, Ljubljana 1997, pp. 21 – 51.

5 Jens Meyer-Ladewig (*Menschenwürde und Europäische Menschenrechtskonvention*, Neue Juristische Wochenschrift, Year 57, No. 14 (2004), p. 982), stated that in the case of the Federal Republic of Germany, human dignity was “a symbolic formula of the new democracy”. Article 1 of the German Federal Constitution (i.e. *Grundgesetz* – the Basic Law) namely determines that human dignity is inviolable and that it is the duty of all state authorities to respect and protect it.

6 See, for instance, paragraph 65 of the reasoning in *Pretty v. The United Kingdom* (judgment dated 29 July 2002).

Rights of the European Union, which became binding law for the European Union<sup>7</sup> by the entry into force of the Treaty of Lisbon, in its Preamble states that “conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.” The Charter protects human dignity also as a special human right, as already in Article 1 it determines that human dignity is inviolable and must be respected and protected.

7. Human dignity is also at the centre of the constitutional order of the Republic of Slovenia. Its ethical and constitutional significance already proceeds from the BCC, which is not only the constitutional foundation of Slovene statehood, as also certain principles that demonstrate the fundamental legal and constitutional quality of the new independent and sovereign state are outlined therein. In its Preamble the BCC first proclaimed the fact that the SFRY did not function as a state governed by law and that within it human rights were grossly violated, while Section III, as the antipode to the above-mentioned, emphasized that the Republic of Slovenia would guarantee the protection of human rights and fundamental freedoms to all persons in the territory of the Republic of Slovenia irrespective of their national origin, without any discrimination whatsoever, in accordance with the Constitution of the Republic of Slovenia and the treaties in force. This new constitutional quality of the new state is even more clearly demonstrated in the Declaration of Independence (Official Gazette RS, No. 1/91), which was adopted together with the BCC (on 25 June 1991), and in which the former Assembly of the Republic of Slovenia emphasized the commitment of Slovenia to respect human rights and fundamental freedoms and its orientation towards joining international organisations which are based on respect for human dignity and which in their acts determine the fundamental international standards of human rights protection. Thus, by adopting these independence documents not only the fundamental the fundamental relationship entailing state sovereignty between the Republic of Slovenia and the SFRY was severed, but there was also a fracture with the fundamental value concept of the constitutional order.
8. Differently than the former SFRY, the Republic of Slovenia is a state governed by the rule of law whose constitutional order proceeds from the principle of respect for human rights and fundamental freedoms already on the basis of the basic constitutional documents. From the BCC, the Preamble to the Constitution, and numerous constitutional decisions there proceeds the fact that human dignity is the fundamental value which permeates the entire legal order and therefore it also has an objective significance in the functioning of authority not only in individual

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7 The Treaty of Lisbon refers to the Charter of Fundamental Rights of the European Union in the first paragraph of Article 6 of the Treaty on European Union, the first sentence of which reads as follows: “The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

proceedings but also when adopting regulations. In its substance, human dignity entails the presumption that every human being has equal and absolute inner worth because he or she is a human being. Respect for human dignity therefore entails the protection of the inherent worth of the individual against unjustified interferences by and the requirements of the state and society.

9. As the fundamental value, human dignity has a normative expression in numerous provisions of the Constitution; it is especially concretized through provisions which ensure individual human rights and fundamental freedoms; they are intended precisely for the protection of different aspects of human dignity.<sup>8</sup> Among them, those that are especially strongly connected with the individual as a person with absolute inherent worth can be pointed out: the prohibition of discrimination (the first paragraph of Article 14), the inviolability of human life (Article 17), the prohibition of torture (Article 18), the protection of personal liberty (Article 19), the protection of human personality and dignity in legal proceedings (Article 21), the legal guarantees in criminal proceedings (Article 29), the right to personal dignity and safety (Article 34), freedom of expression (Article 39), and freedom of conscience (Article 41).<sup>9</sup>
10. As a special constitutional principle, the principle of respect for human dignity is directly substantiated in Article 1 of the Constitution, which determines that Slovenia is a democratic republic. The principle of democracy (with which also other constitutional principles are most tightly connected, such as the principle of a state governed by the rule of law determined in Article 2 of the Constitution and the principle of the separation of powers determined in the second sentence of the second paragraph of Article 3 of the Constitution<sup>10</sup>) in its substance and significance exceeds the definition of the state order as merely a formal democracy in which laws and other regulations are adopted in accordance with the rule of the majority. On the contrary, the principle of democracy substantively defines the Republic of Slovenia as a constitutional democracy, thus as a state in which the acts of authorities are legally limited by constitutional principles and human rights and fundamental

8 This is precisely the reason why in constitutional theory human dignity is defined as the origin of human rights and as a precondition for respect for other human rights. See, for instance, L. Šturm in: L. Šturm (Editor), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 362.

9 The constitutional significance of human dignity is clearly evident also from Article 3a of the Constitution, which determines that the exercise of part of the sovereign rights can be transferred only to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law (the same applies for the state entering into a defensive alliance). The ratification of the Treaty of Lisbon and Slovenia's support for the Charter of Fundamental Rights of the European Union to become binding EU law thus also emphasised the commitment of the Republic of Slovenia to respect human dignity.

10 As regards the principle of the separation of powers, in Decision No. U-I-158/94, dated 9 March 1995 (Official Gazette RS, No. 18/95 and OdlUS IV, 20), the Constitutional Court stressed that its role is, *inter alia*, to protect and ensure the freedom of individuals.

freedoms, precisely because individuals and their dignity are at the centre of its existence and functioning. In a constitutional democracy the individual is a subject and not an object of the functioning of the authorities, while his or her (self) realization as a human being is the fundamental purpose of the democratic order. Only such state order is truly democratic in which respect for human dignity is the principle guideline for the functioning of the state. In a substantive democracy based on respect for human dignity of every person it therefore cannot be said, as was erroneously stated by the opposing party, that adopting regulations in representative bodies at the state or local level entails the exercise of “a democratic right of the majority” of the elected members of the representative body. The principle of democracy determined in Article 1 of the Constitution in fact envisages free and periodic elections to representative bodies, thereby, however, it does not grant rights to the elected majority, but imposes a duty on all authorities – first of all on those that issue general legal acts – to respect the boundaries which proceed from the constitutional order, whose central principle is precisely the principle of respect for human dignity, when exercising their constitutional and statutory powers.

11. Regardless of the above-described constitutional regulation, a firm and complete *a priori* definition of human dignity is not possible, as, in addition to constitutional and international standards, the notion is filled with historical and ethical substance that has been developing and expanding over time. The substantive openness of this principle (as well as individual human rights and freedoms) therefore entails that individual aspects of human dignity are realised in individual legal proceedings, whereby the courts and the Constitutional Court play a key role in determining the possible violations thereof. The boundaries of the admissible conduct of state authorities are developed through the decisions of the courts and the Constitutional Court, which take into consideration the specific circumstances of individual cases. In such manner an abstract but fundamental constitutional value becomes living law.
12. In the case at issue, the question is raised whether Article 2 of the Ordinance which reintroduced a Tito Street in Ljubljana<sup>11</sup> is inconsistent with the principle of respect for human dignity. With reference to such, the Constitutional Court stresses that the objective of these proceedings is not a review of the personality and individual actions of Josip Broz Tito, nor a historical review of facts and circumstances. The Constitutional Court is a guardian of the Constitution and consequently a guardian of the values on which the Constitution is based. Its task is to establish constitutionally important circumstances taking into consideration the constitutional order in force and on such basis decide on the constitutionality of the challenged regulation.
13. In the case at issue, a symbolic dimension of Article 2 of the Ordinance is constitutionally relevant. When reviewing the constitutionality of regulations of

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11 On 8 October 1991, the former Assembly of the City of Ljubljana renamed sections of Tito Street as Dunajska cesta [Dunajska Street], Štajerska cesta [Štajerska Street], and Slovenska cesta [Slovenska Street] (Articles 2 and 3 of the Ordinance on Determining, Changing, and Terminating Names or Courses of Streets and Squares in the Territory of the City of Ljubljana, Official Gazette RS, No. 21/91).

local communities by which streets, roads, squares, parks, or other public spaces are named, namely not only the practical (i.e. informative) purposes of such naming can be taken into consideration (e.g. to enable easier orientation, greater transparency and accessibility of data in public records and registers, and demonstrating residence or place of business). When naming public spaces the public interest is indeed in the foreground, so that easier everyday functioning in personal and public life is ensured. However, it cannot be overlooked that such naming also bears clearly evident symbolic significance and therefore demonstrates the manner of symbolic conduct of the public authority concerned. Naming public spaces always emphasises the significance of important historical events or historical figures,<sup>12</sup> and consequently inevitably emphasises or exposes social values that mark such events or figures. Due to the fact that naming public spaces is an official act, this entails that the authority gives such values recognition, supports them, or identifies with them.<sup>13</sup> Naming public spaces after certain individuals thus undoubtedly expresses public recognition of their work, achievements, or the values that they encouraged. Due to its symbolic expressive power, such naming can also contribute to spreading and strengthening certain opinions, ideas, and values.

14. It can be stated that a regulation or other act of the authorities which has symbolic significance is unconstitutional in cases in which such symbol, through the power of the authority, expresses values which are incompatible with fundamental constitutional values, such as human dignity, freedom, democracy, and the rule of law. Official acts of state and municipal authorities which have a symbolic significance can namely not be considered to be equivalent to a situation in which individuals or groups express different opinions and convictions; their right to express opinions and standpoints that can even be contrary to the fundamental constitutional values is within the framework of a free and pluralistic society supported in the constitutional provisions on freedom of conscience and freedom of expression. However, when authorities express certain values it is not a matter of freedom of expression, as it is in the nature of this human right that only individuals and associations are entitled to it, and not authorities. Authority must always act in the public interest, whereby it must respect the constitutional restrictions which proceed from constitutional principles and from human rights and fundamental freedoms. Due to the fact that expressing values that are contrary to the fundamental constitutional values cannot be in the public interest, the review of the constitutionality of the acts of authorities is not subject to the principle of proportionality (i.e. weighing between

12 The second paragraph of Article 20 of the ADANMSSB determines that the name of a street is determined in accordance with a geographical name, the name of an event or date connected to history, or after a person who significantly contributed to the development of the settlement or is important in the broader social environment, or in accordance with the cultural heritage.

13 Numerous historical experiences confirm this. During important social changes, foreign occupation, or changes of the state order, the names of streets, roads, squares, and other public spaces, as a general rule, were extensively changed, which was undoubtedly a direct consequence of the change in values which were expressed through these names and for which the authorities of relevant periods had preference.

the public interest and the affected constitutional values), but such acts are in and of themselves unconstitutional. From the constitutional point of view, there is a great difference if certain unconstitutional values are defended and supported by individuals due to their personal convictions or if authority identifies with such values through symbols.<sup>14</sup>

15. A symbolic dimension of Tito Street is inseparably connected with the symbolic significance of the name Josip Broz Tito, Marshal of Yugoslavia and later President for life of the SFRY. The name Tito does not only symbolize the liberation of the territory of present-day Slovenia from the Fascist occupation in World War II, as alleged by the opposing party, it also symbolises the post-war totalitarian communist regime, which was marked by extensive and gross violations of human rights and fundamental freedoms, especially in the decade directly following World War II. Historical facts recorded in numerous documents and scientific historical works bear witness also to extrajudicial post-war executions, political criminal proceedings,<sup>15</sup> executions of persons fleeing across the state borders, and to abuses of authority in order to preserve the one-party system and to prevent democracy. The fact that Josip Broz Tito was the leader of the former state entails that it is precisely his name that to the greatest extent symbolises the former totalitarian regime. Tito's symbolic significance cannot be divided such that only the significance of the actions that the opposing party attributes to his historical role and personality are considered. Once again naming a street after Josip Broz Tito, who is a symbol of the Yugoslav communist regime, can be understood as support not only for him as a historical figure or his individual actions, but also as support for the entire historical period of his rule and for his rule as such. Therefore, it is not important what the municipal authority wished to achieve by introducing Tito Street or which objectives it pursued; it is important that the challenged Ordinance must objectively be understood as a form of recognition conferred on the former undemocratic regime.
16. Authorities expressing recognition of the totalitarian regimes which in the 20th century shook Europe and led to millions of victims and systematic violations of human rights is contrary to promoting respect for human dignity, human rights and fundamental freedoms, and other values which contemporary European constitutional democracies share. In past years, various European institutions adopted documents condemning the totalitarian regimes, including those of Nazism, Fascism, and Communism. The following documents must be mentioned: Resolution No. 1481 of the Parliamentary Assembly of the Council of Europe of 26 January 2006 on the need for international condemnation of crimes of totalitarian

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14 Cf. The European Court of Human Rights in *Vajnai v. Hungary* (judgment dated 8 October 2008), in which the Court held that the prohibition on wearing the red star is an inadmissible interference with Article 10 of the ECHR, which guarantees freedom of expression. In its judgment the Court pointed out that there is an important difference if an individual wears such red star during a political speech or if a bearer of public authority when exercising power identifies with such symbol (paragraphs 48 and 49 of the reasoning).

15 The Constitutional Court dealt with this topic in Decision No. U-I-247/96, dated 22 October 1998 (Official Gazette RS, No. 76/98 and OdlUS VII, 195).

Communist regimes, and the European Parliament resolution of 2 April 2009 on European conscience and totalitarianism. In these resolutions the emphasis is most of all on honouring the memory and faiths of the individuals who in totalitarian regimes, including the communist regime under the leadership of Josip Broz Tito, experienced violations of human rights in criminal and other proceedings or were inflicted with great sadness and pain due to the unlawful suffering of those close to them. Authorities at all levels must show the victims of all totalitarian regimes, if not active sympathy, understanding, and recognition of their suffering, at least passive respect by refraining from acts which are not in compliance with the fundamental constitutional values and for which it can be foreseen and expected that they will cause new pain. Also the National Assembly of the Republic of Slovenia in its Declaration of awareness of the European Parliament resolution of 2 April 2009 on European conscience and totalitarianism (Official Gazette RS, No. 84/09) stated, *inter alia*, that by adopting this Declaration it expresses “respect for all victims of totalitarian regimes” and that it will “strive that the tragic acts and divisions during World War II and during the one-party socialist system following the War and their consequences be remembered as historical facts which should not cause new divisions, opposition, or hatred.”

17. The incompatibility of the former communist regime with the European standards for the protection of human rights and fundamental freedoms, to which the Republic of Slovenia is committed, has also been established several times by the Constitutional Court. In Decision No. U-I-69/92, dated 10 December 1992 (Official Gazette RS, No. 61/92, and OdlUS I, 102), the Constitutional Court held that the former state was “a state whose authorities of that period had after the war conducted mass executions of former military and current political opponents, legally unacceptable criminal trials followed by death penalties, illegal seizures of property, the obstruction and liquidation of political parties in violation of its own legal system, etc., thus making the injured parties afraid, with good reason, for their lives in case they resided in such a country.” In the same spirit, in Decision No. U-I-158/94, dated 9 March 1995, the Constitutional Court wrote that “the former Yugoslav system of constitution and government institutions, as well as the former Slovene system within its framework, did not put human rights in the first place and did not define any clear legal restrictions applying to state authorities and their violence. Thus, it made possible arbitrary government, and its Constitution was not a legal instrument in the full sense as understood by modern European legal civilization.” The Constitutional Court emphasized the difference between the former totalitarian regime and the new system, which is based on the protection of individual human rights as well as on free democratic elections, in Decision No. Up-301/96, dated 15 January 1998 (Official Gazette RS, No. 13/98, and OdlUS VII, 98) as follows: “Due to the painful experience of Slovene society during the period of governance by the former totalitarian system, one of the most fundamental goals of the Slovene Constitution is to prevent any attempt at restoring the totalitarian regime; this was included in its historical mission.” Furthermore, mention must be made of Decision No. U-I-248/96, dated 30

September 1998 (Official Gazette RS, No. 76/98 and OdlUS VII, 176), in which the Constitutional Court stressed that a free democratic society can be spoken of only in a system “which, by excluding any kind of violence and arbitrariness, represents the social order of a state governed by the rule of law which is grounded on the self-determination of its people respecting the will of the majority, freedom, and equality. In the basic principles of such an order at least the following key presuppositions should be included: respect for the human rights determined in the Constitution, the right of the individual to life, the inviolability of personality rights, the sovereignty of the people, the separation of powers, the responsibility of the Government and the lawful functioning of the executive branch of power, the independence of the courts, a multiparty political system, and equal opportunities for all political parties, including the right to form an opposition and participate therein according to the Constitution.” In complete opposition to the above-mentioned, the Constitutional Court continued in the Decision, in Slovenia the post-war authorities were ready to enforce their power “by also using violence, by violating the law in criminal proceedings, and by systematically and severely violating human rights. Statutes were not only applied with the intent to punish collaborationists, but also to destroy the class enemy, to assume power, and to consolidate the totalitarian system. A free social system was established in Slovenia only in 1990, after the first free elections to the multiparty parliament had been held.”

18. In Slovenia, where the development of democracy and free society based on respect for human dignity began with the break up with the former system, whereby this break-up is clearly evident also at the constitutional level (first with the amendments to the Constitution of the Socialist Republic of Slovenia and subsequently with the adoption of the BCC and the Constitution, as the fundamental constitutional documents), the glorification of the communist totalitarian regime by the authorities by naming a street after the leader of such regime is unconstitutional. Such new naming of a street no longer has a place here and now, as it is contrary to the principle of respect for human dignity, which is at the very core of the constitutional order of the Republic of Slovenia. Naming a street after Josip Broz Tito namely does not entail preserving a name from the former system and which today would only be a part of history. The challenged Ordinance was issued in 2009, eighteen years after Slovenia declared independence and established the constitutional order, which is based on constitutional values that are the opposite of the values of the regime before independence. Not only the victims or opponents of the former regime, but also other members of the public can understand such act of the authority at issue in the present time as newly emerged official support for the former communist regime. Such act is contrary to the values on which the Constitution is based.
19. On the basis of the above-mentioned, the Constitutional Court decided that Article 2 of the Ordinance is unconstitutional as it violates the principle of respect for human dignity. This principle is substantiated in Article 1 of the Constitution and entails a limitation on the deciding of democratically elected representative bodies. The Constitution binds the state as well as municipalities when exercising their

competences. The decision of the Municipal Council of Ljubljana Municipality that a street in Ljubljana be once again named after Josip Broz Tito is therefore subject to substantive limitations which proceed from the Constitution, especially if the case concerns the protection of the fundamental values of the constitutional order, among which human dignity holds the central position. As Article 2 of the Ordinance is inconsistent with the principle of respect for human dignity, the Constitutional Court annulled it.

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20. The Constitutional Court reached this Decision on the basis of the second paragraph of Article 45 of the CCA, composed of President Dr Ernest Petrič, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Penssa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. The Decision was reached unanimously. Judges Jadek Penssa, Korpič – Horvat, Sovdat, Petrič, and Zobec submitted concurring opinions.

*Dr Ernest Petrič*  
*President*

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#### CONCURRING OPINION OF JUDGE DR DUNJA JADEK PENSsa

I agree with the principles which case No. U-I-109/10 establishes. I am submitting this concurring opinion because I wish to express some thoughts that were motivated by the process of deciding in the case at issue and which refer to the following: (1) the scope of the message which is embedded in the disputable name Titova cesta [Tito Street], and (2) the need that authorities proceed from all known facts when adopting decisions and that they direct their acts towards ensuring tolerance in society proceeding from respect for human dignity.

1. Words in and by themselves have no reality.<sup>1</sup> If they are read in a one-dimensional way, without depth perspective, they hide ideas rather than communicate them.<sup>2</sup>
2. Naming a street by municipal ordinance serves the purpose of learning the state of the facts that does not directly proceed from the naming of an element of the public infrastructure (in the case at issue, a street). As the name in such an instance does not indicate the essence of such element (i.e. that it is a street) itself, it goes beyond the perception of this element of the public infrastructure. The informative value of the name by which such element (i.e. a street) is named, is thus not neutral.
3. Naming an element of the public infrastructure – after an important person – exceeds the informative purpose for which the naming of streets in towns is intended. This surpassing of the informative purpose of such naming is double. First, naming

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<sup>1</sup> E. Fromm, *Umetnost življenja* [The Art of Being], Mladinska knjiga, Ljubljana 2003, p. 24.

<sup>2</sup> *Ibidem*.

a street after a person by an official act informs one that this person is attributed special significance by the authority, that the authority confers recognition on such person. In this sense, the fact of *naming* the street itself as an official act bears a symbolic significance. And secondly, the name of a person who made an important mark on a certain historical period, due to the person having had a great influence thereon, exceeds connecting his or her name merely with the person as such.

4. The name of a person will symbolise<sup>3</sup> a certain historical period if the name is connected with a certain amount of information relating to the characteristics of such period. If this is true, the *name* itself operates in the field of associations, as it stimulates the formation of associations between the name (of the person) and a certain historical period. It is not necessarily for such associations of individuals to be the same.
5. The dispute at issue has its origin precisely due to the fact that the name Tito evokes different associations in the petitioners and the opposing party. The petitioners namely (*inter alia*) allege that regardless of certain positive elements which can be attributed to (Josip Broz) Tito, the disputable naming of the street after him recalls the period of violence, intolerance, and executions of people by the communist regime, as he personifies the communist regime. The opposing party also points out the historical significance of (Josip Broz) Tito. However, the opposing party focuses on his achievements (*inter alia*, on his role in World War II), which, in the opinion of the opposing party, contributed to creating the possibilities for the independence of Slovenia. As follows from the allegations of the petitioners and the opposing party, the name Tito (and the disputable naming of the street) incorporates messages that are opposing regarding values. It is not possible to distinguish between such messages in the disputable instance of naming.
6. Individuals' understanding of messages that are conveyed through the name of an important person is an expression of values and thereby necessarily subject to numerous and various subjective assessments. In addition, it is clear that meanings are not embedded in words (i.e. in the name of a person) but emerge and are perspicuous in the light of the background conditions of intelligibility<sup>4</sup> and are, understandably, different in the case of every individual. Therefore, it is not surprising that individuals have different ideas, opinions, value judgments, and beliefs regarding the same statements. In a democratic and pluralistic society it is usual that individuals, as a general rule, freely express such different, opposing, or even exclusive opinions and beliefs. Polemics are usual in a pluralistic society. As it is a characteristic of individuals' beliefs that they are not based on (all) the facts, facts (which do not support their beliefs) therefore cannot refute them.<sup>5</sup> It is

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3 "Thus a word [...] is symbolic when it implies something more than its obvious and immediate meaning." C. G. Jung, *Človek in njegovi simboli*, Mladinska knjiga, Ljubljana 2002, p. 22; translation taken from C. G. Jung *et al.*, *Man and His Symbols*, London: Aldus Books & Jupiter, 1974, p. 20.

4 Don't Know Much About the Middle Ages: Posner on Law and Literature (in) *Doing What Comes Naturally*, p. 295. Cited after T. Martino, *Trademark Dilution*, London Press Oxford, 1996, p. 87.

5 This thought is paraphrased from a novel by M. Proust, *V Swannovem svetu* [Swann's Way], Delo, d. d., Ljubljana 2004, p. 145.

precisely because of this that the beliefs of certain individuals, even if they are in the majority, are never a reliable enough criterion nor can they be the only argument for the decisions of authorities. It is also clear that the concept of “democracy” cannot be reduced merely to looking for an answer to the question of what the opinion of the majority is. In a pluralistic and democratic society it is thus necessary that the authorities in their functioning devote as much attention as possible to *all* the different views and conflicting standpoints of individuals, whereas when adopting decisions they should consistently take into consideration all the known facts and the value system in which respect for human dignity has the central role.

7. A *name* which evokes associations with a totalitarian regime inevitably also evokes associations with the victims of the violence of the authorities of this regime and their horrible and intolerable suffering. Naming a street such a name by an official act can be understood such that the authority is (at least) neglecting the horrible and intolerable suffering of these victims. This act of the authority (i.e. naming the street) which has such an effect and which therefore does not express due respect for *all* victims of violence within recent history is not in compliance with the requirement that the inviolability of human dignity be respected as the fundamental legal ethical and constitutional principle, which holds the central role in the formation of the value system of the Republic of Slovenia and which due to its daily implementation binds all authorities in their functioning. Such official act is also contrary to the basic guideline on the functioning of authorities, i.e. maintaining and promoting tolerance among residents, which is necessary for harmony.

*Dr Dunja Jadek Pensa*

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**CONCURRING OPINION OF JUDGE DR ETELKA KORPIČ - HORVAT  
JOINED BY JUDGE MAG. MARTA KLAMPFER**

1. I voted in favour of the Decision, as I agree with its operative provision that Article 2 of the Ordinance on Determining and Changing the Names and Course of the Roads and Streets in the Territory of Ljubljana Municipality (Official Gazette RS, No. 44/09) be annulled; I do not, however, agree with the entire reasoning of the Decision.
2. I voted in favour of the Decision primarily because an important informative value of the Decision of the Constitutional Court is that it deemed the interference with human dignity to be a violation of the fundamental constitutional principle determined in Article 1 of the Constitution, i.e. that *Slovenia is a democratic republic*. With reference to such, the Constitutional Court clearly explained that constitutional democracy in Slovenia does not merely entail that the formal state order of Slovenia is that of a republic, but that in its substance it also includes the protection of human dignity, which in a broader sense also includes other human rights from the catalogue of human rights and fundamental freedoms determined in the Constitution. The Constitutional Court, as a guardian of constitutionality, for the first time elaborated

the substance of Article 1 of the Constitution and attributed special significance and weight to the protection of human dignity. As stated in the Decision, in certain countries already the constitution framers determined the inviolability of human dignity to be a value and placed it among the general principles of the constitution. In the Republic of Slovenia this was now done by the Constitutional Court.

3. By the Decision at issue the Constitutional Court thus expressed that it would protect human dignity against all interferences by authorities. In the democratic state of Slovenia there is no place for any act by authorities that harms the dignity of individuals, even if such is adopted by a majority decision of a representative body. Therefore, Article 2 of the above-mentioned Ordinance does not belong in the present time, as some citizens were harmed because of injustices and suffering in the former system under the rule of Tito. Many have justifiably taken the name Titova cesta [Tito Street] as a provocation and can be injured.
4. The Decision of the Constitutional Court should be conciliating, namely in that the residents of Slovenia will be protected against such and any interferences with human dignity, which is the highest value of a human being. Therefore, the reasoning of the Constitutional Court should only be based on a constitutional review and not on an explanation and evaluation of the facts and circumstances of the relevant historical period, which is indeed stated in Paragraph 12 of the Decision, however, in my opinion, this is not respected most of all in Paragraphs 15 and 16 of the Decision and its scope is unbalanced in the reasoning on which the review is based. In addition, the main emphasis in the Decision is lost; namely that human dignity is a fundamental value already protected by the fundamental principle of Article 1 of the Constitution.
5. The Decision of the Constitutional Court should not harm those to whom Tito's name symbolises the positive aspects of his era. Recognition and respect for human rights is what unites us and not what divides us. This is the minimal consensus that we must reach in order to live in peace with each other.

*Dr Etelka Korpič – Horvat*

*Mag. Marta Klampfer*

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#### **CONCURRING OPINION OF JUDGE DR ERNEST PETRIČ**

1. I agree with the Decision of the Constitutional Court, not only with the operative provision, but also with the main logic of its reasoning. However, I wish to point out certain reasons that led me to such position, regardless of the fact that I might have reservations over individual positions in the reasoning.
2. First, I wish to point out that I see the essence of the decision therein in that it implements a constitutional position that that which – even if only on a symbolic level – expresses recognition and consequently approval of any totalitarian regime

and its “values” is contrary to the constitutional values of the present democratic order of our state, and thus contrary to the Constitution, which proceeds from respect for human dignity and fundamental human rights.

3. It is precisely respect for human dignity and fundamental human rights that is the value and legal-ethical essence of the constitutions of democratic states, including the Constitution of the Republic of Slovenia. Such respect arose and was consolidated in the historical process from the end of the 18th century until the adoption of the contemporary constitutions of democratic states, and has also been implemented at the international level in numerous documents dealing with respect for human dignity and the fundamental human rights proceeding therefrom. The implementation of these values was also an essential element – in addition to its aspirations regarding national liberation – of Slovenia’s efforts with regard to independence.
4. What totalitarian regimes, including the former Yugoslav communist regime, have in common is that in the name of some “great goal” (e.g. “a new order in Europe”, “a classless society”, “communism”) they brutally trampled human dignity and fundamental human rights. Regardless of the specific differences between them, they entailed the denial of those values and the legal-ethical principles on which the constitutional order of the Republic of Slovenia is based, and they caused violent death, torture, suffering, discrimination, and gross denial of fundamental human rights to millions of people. They harmed and strained the development and normal lives of numerous nations, especially in Europe – also that of the Slovene nation by it being tragically divided and other consequences as regards its development in the circle of other European nations.
5. The consequences of totalitarianism still burden numerous nations and European history. It is precisely for this reason that the Parliamentary Assembly of the Council of Europe emphasised the need for condemnation of the crimes of totalitarian regimes and these regimes as such, and the European Parliament expressed respect for the victims of all totalitarian regimes. Furthermore, in numerous decisions the Constitutional Court of the Republic of Slovenia pointed out the incompatibility of the former communist regime with contemporary European standards of protection of fundamental human rights.
6. The consequence of the above-mentioned was that official expressions of recognition of the “values” of the totalitarian regimes was deemed constitutionally unacceptable. Every glorification, also on a symbolic level, of the “values” inherent in totalitarian regimes by authorities is inconsistent with the principle of respect for human dignity as proceeds from Article 1 of the Constitution. The same applies for Article 2 of the reviewed Ordinance on Determining and Changing the Names and Course of the Roads and Streets in the Territory of Ljubljana Municipality, regardless of the intentions of those who voted in favour of the Ordinance and regardless of the fact that I do not claim that their intention was to glorify any totalitarian regime.
7. It is important that the Constitutional Court of the Republic of Slovenia did not enter into a review of the specific historical circumstances and specific roles of the

protagonists of these events, including J. B. Tito. It remained at the level of a review of whether the official recognition of “Tito” by naming a street after him, regardless of the various dimensions of his role in specific historical events, thus recognition of this symbol of the Yugoslav communist totalitarian order, which “Tito” undoubtedly was, thus entailed an interference with constitutionally protected values, specifically with human dignity, and thus with the Constitution that protects such values.

8. With regard to my support for the unanimous Constitutional Court decision, it is also important that the case at issue does not concern preserving a name from the former order and which is thus a part of history. The reviewed Ordinance was adopted in a period when new constitutional values had already been implemented which proceed from the dignity of human beings and are contrary to what “Tito” symbolises and contrary to the new naming of a street after him. The Constitutional Court did not interfere with the evaluation of history nor with what recalls the past periods and events and which at the same time calls to mind past evils. By the Decision that newly naming something after what symbolises any totalitarian order or other official recognition thereof is constitutionally unacceptable from the viewpoint of the Constitution and the values on which such is based and which it protects, the Constitutional Court has contributed to the prevention of divergences and future disputes in similar cases. In this I see the special value of the unanimous decision in the case at issue.
9. Allow me to particularly point out that regarding the decision of the Constitutional Court on the legal interest in the case at issue I join the argumentation of Judge Mag. Jadranka Sovdat in her concurring opinion. I only wish to add that although the protection of human values entails that we all have a duty to respect and protect such, this does not entail that everyone has a specific legal interest (*actio popularis*) in cases such as the case at issue. Recognizing legal interest to everyone would also entail a substantial departure from the hitherto case law of the Constitutional Court of the Republic of Slovenia, which recognises the legal interest to challenge general legal regulations only to individuals whose legal interests are direct and specific, if a successful challenge of such regulation would improve their specific legal position.

*Dr Ernest Petrič*

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#### **CONCURRING OPINION OF JUDGE MAG. JADRANKA SOVDAT**

1. I voted in favour of the Decision because I agree with the fundamental message which is conveyed in the argumentation of the Constitutional Court. However, I am of the opinion that certain parts of the reasoning require additional emphases, which I wish to point out in this separate opinion. The first part of my viewpoints that I wish to especially present refers to legal interest, whereas the second part refers to the essential reasons for the established unconstitutionality.

## I

2. There are several petitioners in the case at issue, however, not all of them, in my opinion, can be recognised legal interest. The Constitutional Court did not enter into a review of the legal interest of all the petitioners, as it recognised such to one of the petitioners. However, with reference to such, something must nevertheless be added regarding Paragraph 4 of the reasoning of the Decision. If the Constitutional Court had decided on the legal interest of the petitioners, it would have had to decide, in my opinion, that they did not have legal interest. What reasons lead to such a conclusion? In accordance with the established constitutional case law, legal interest to challenge the regulation of the municipality is not demonstrated by referring to the fact that the regulation is challenged by the councillors of the municipal council that adopted the challenged regulation. I have to agree with this. In addition, in my opinion, legal interest also cannot be recognised to a petitioner who claims that he lived in the former state in which human rights were violated. These three petitioners could have been recognised legal interest only if such had been recognised to everyone. From certain statements in Paragraph 4 of the reasoning of the Decision it could even be concluded that the Constitutional Court in fact recognised everyone's legal interest and that therefore the first and second parts of Paragraph 4 are in contradiction. However, I think that this is not the case.
3. I agree that naming elements of the public infrastructure, such as a public street, has legal effect with regard to everyone. I also agree that naming streets after historical figures has an emphasised symbolic significance. However, this does not entail that everyone who walks on such street or who lives in the country that has such a street has a legal interest to challenge the regulation that determines its name. A legal interest must namely be direct and specific, while the petitioner's successful challenging of the regulation before the Constitutional Court must affect his or her legal position. This cannot be said for the grounds offered by the above-stated petitioners. Furthermore, Paragraph 4 of the reasoning of the Decision states that in the case at issue questions are raised which refer to human dignity as the fundamental value and legal starting point of Slovene democracy. Such questions indeed are raised. However, this does not entail that anyone who raises such questions has a legal interest to initiate proceedings for the review of the constitutionality of the regulation. Recognizing everyone's legal interest already on the basis of the fact that in an individual case (also) a question of human dignity could be raised would namely entail that a direct and specific legal interest is replaced by a general interest. A general interest is the interest that everyone has, especially every citizen of this country, that laws and other regulations are in compliance with the Constitution, that they are in compliance with all its provisions and especially with the fundamental values on which the Constitution is based and which are as such a constituent part of the Constitution – that regulations are thus also in compliance with the fundamental value which is the starting point of the constitutional order in force, i.e. with the value of human dignity, which precisely in this Decision the Constitutional Court finds within the ambit of Article 1 of the Constitution. The

fact that a general legal interest is not sufficient to open the door to access to the Constitutional Court also undoubtedly proceeds from the established constitutional case law. If such had sufficed for the constitutional review proceedings to be initiated, this would have been a case of *actio popularis*. However, a petition is not such already according to the Constitution (the second paragraph of Article 162), and even less so according to the law (Article 24 of the Constitutional Court Act). However, this part in the reasoning, in my opinion, cannot be understood in this manner. Therefore, there is no contradiction in the reasoning. I understand this part of the reasoning precisely in connection with the reasoning of the recognition of the legal interest of the petitioner. I do agree that she demonstrated such.

4. The petitioner was recognised the status of a former political prisoner by a special act. The essence of this act is not that on its basis the petitioner has certain special (possibly also property) entitlements with which the challenged regulation could interfere. The decision on the recognition of the status of political prisoner is primarily and most of all intended to morally rehabilitate the petitioner, whose human rights were violated in the former state. Her right to freedom of expression was violated by punishment and humiliating deprivation of liberty (i.e. in a correctional camp). The symbolic significance of such rehabilitation in a democratic state is therefore an integral part of the petitioner's legal position that she was recognised by this special act. The allegations of the petitioner have to be considered in the light of the above-mentioned, namely that she experiences the naming of the element of the public infrastructure after the person who symbolises the regime in which her human rights were grossly violated as a new punishment for her political convictions, although her rehabilitation has already been recognised. Human dignity in this respect acquires direct and specific significance. And in the case at issue this suffices for the recognition of a legal interest.

## II

5. I agree with the basic starting point of the Decision, namely that the Constitutional Court in the role of guardian of the Constitution is not called upon to evaluate history. Therefore, it is also not called upon to review what kind of person Josip Broz was and what his significance or the significance of his actions in the history of the former state were. This evaluation is in the domain of historians. It may as well be in the domain of every individual, as the question of how an individual evaluates his role is a constituent part of individuals' right to freedom of expression (the first paragraph of Article 39 of the Constitution). By no means, however, does such evaluation fall within the competence of the Constitutional Court. Therefore, it cannot be sought in the Decision because it is not there.
6. It is a fact, however, that the additional name of Josip Broz, namely "Tito", represents a symbol (the same as a five-pointed red star) of the former federal state, which was established during the National Liberation War against the occupying forces and which after the War was first constituted as the Democratic Federal Yugoslavia, later as the Federal People's Republic of Yugoslavia, and finally as the Socialist Federal

Republic of Yugoslavia. I agree with this. Individuals may use this symbol, they may identify with it; also this is a constituent part of freedom of expression, which is a human right. If such symbol is used by public authority – either state or municipal or their bodies, the question arises whether the use of such a symbol is constitutionally admissible – whether it is in compliance with the Constitution.

7. I fully agree with the position stated in the Decision that public authority does not have rights, but has powers which are, in their legal nature, duties that are granted to public authority by the legal order.<sup>1</sup> All bearers of public authority, state and local alike, should be very well aware of this. They were given a mandate to perform these duties by democratic election. A fundamental duty in this regard is precisely to respect the Constitution. Respect for the Constitution especially entails respect for the human rights and fundamental freedoms of all (not only some!) citizens and other residents. Public authority cannot violate human rights under the guise of referring to rights to which it is not entitled. On the contrary, it must ensure that they are respected with regard to all, to which it is especially and explicitly bound also by the first paragraph of Article 5 of the Constitution. This provision is binding to the same extent also on local community authorities in the state. Precisely because public authority does not have rights but duties, it does not suffice for conduct to be deemed to be in compliance with the Constitution to refer to the fact that a decision was adopted by a democratically elected body in proceedings which are determined for adopting regulations and by the majority which is prescribed for the adoption of such regulation. If this were sufficient, every regulation adopted in such manner would have been in and of itself in compliance with the Constitution. Therefore, I agree with the emphasis that public authority is in a substantive sense bound by the Constitution, as otherwise human rights would be an illusion and the Constitution would be empty words on paper. And this is what the Constitutional Court reviewed in the Decision at issue. It did not review what kind of a person Josip Broz was; it reviewed whether it is in compliance with the Constitution that public authority, which is bound to respect the Constitution, prescribes that a public street be named after “Tito” considering the objective contents of this symbol of the former state. The annulment of the challenged regulation is an answer to this question and not to the question of what kind of a person Josip Broz was and what historical significance his actions had for the existence and development of the Slovene nation.
8. I agree that the significance of the symbol “Tito” cannot be divided, although such can also be multi-dimensional. I furthermore agree that he is a symbol of the former state, which the Preamble to the BCC, i.e. the fundamental constitutional document by which independent Slovenia was constituted, states gravely violated human rights. Citizens of Slovenia gave up this state in 1990 by an extremely convincing majority at a plebiscite. As I have already stated in my separate opinion to Decision No. U-II-2/11, dated 14 April 2011 (Official Gazette RS, No. 30/11),

<sup>1</sup> Pavčnik M., *Teorija prava, Prispevek k razumevanju prava* [Theory of Law, A Contribution to Understanding Law], Cankarjeva založba, Ljubljana 2007, p. 205.

the constitutional essence of the independence of the Republic of Slovenia can be found not only in the fact that as a former unit of the federal state we became an independent and sovereign state, but “most of all also in the fact that this independent state was established as a democratic state governed by the rule of law that recognises human dignity and the human rights and fundamental freedoms of every person. Therefore, independence and sovereignty will in our conscience always entail primarily also that the state was established on new value foundations, which, regardless of the fact that independence was achieved in a lawful manner, entail a fracture with the former undemocratic state in which grave and severe violations of human rights took place.” I can thus only agree with the fact that the Constitution of this state is based on the fundamental value of respect for human beings and their dignity. I furthermore agree that this fundamental starting point of the Constitution and as such contained in Article 1 of the Constitution and further concretised in a number of individual human rights. Precisely this is an essential difference between a democratic order and an order of this or that type of totalitarian state, regardless of the fact that there were (important) differences between them in different periods; however, their common essence was precisely in denying the dignity of human beings and their human rights and fundamental freedoms. Therefore, I agree that the use of this symbol by authorities is contrary to Article 1 of the Constitution.

9. I thus agree with the argumentation of the Decision that leads to the above-mentioned conclusion. However, I wish to particularly draw attention to the argument which the Constitutional Court stated in Paragraph 19 of the reasoning of the Decision and which was very important for me in reaching this decision. We were not dealing with the name of a street that has been retained still today as a part of history. We were dealing with the naming of a street after such symbol that happened today in a democratically elected representative body. The conduct of an existing public authority, which is bound to respect the Constitution, was thus reviewed. The situation would namely not have been the same if we had been dealing with the name of a street that was a part of the historical remains of the former state. This thus concerns a question whether the Constitutional Court by this Decision adopted a position that every use of this symbol in the legal order, even if such remained in force after the entry into force of the Constitution and had been determined before that, already entails an unconstitutionality. I think that the Constitutional Court in the Decision at issue answered this question. And the answer is: no, it did not adopt such position.
10. The implementation of the constitution of a democratic state, which the Constitution of the Republic of Slovenia is, after a change in the social and political system does not entail that such requires the removal of all symbols, for instance monuments which are a part of history. If the implementation of the Constitution entailed this, then a number of elements of the public infrastructure and monuments would be demolished, for instance also Napoleon's monument in front of Križanke. Napoleon certainly does not symbolize the values on which

the Constitution is based. How far back in history do we have to go? It is natural that upon a change in the regime from undemocratic to democratic or directly following its change the anger of people is directed towards the symbols of the former regime. This has always happened and is still happening, not only in Slovenia. This also indicates how important symbols are in the objective sense. However, such does not constitute conduct of the authorities and does not entail that a new, in this case democratic, system must demolish half of the elements of the public infrastructure in the country if they happen to display the historical facts of the former regime. This concerns elements of the public infrastructure built in the past. The case at issue, however, concerns the functioning of the authorities today. Precisely this distinguishing aspect is, in my opinion, important in the case at issue. What occurred in history should remain a part of history, even if we cannot be entirely or particularly proud of it, also as a part of the national cultural heritage, such as, for instance, monuments are. The Constitution requires the preservation of the cultural heritage (the first paragraph of Article 5). What occurred in history, occurred in the period in which public authority was not bound to respect the Constitution. Today, however, public authority is bound by the Constitution and all its obligations to act in a certain manner are reviewed in accordance with the Constitution. The state and local public authorities or their bodies must respect fundamental constitutional values and the human rights and fundamental freedoms of all its citizens, including the victims of the former undemocratic regime. It is not a coincidence that the European Parliament resolution on European conscience and totalitarianism requires that authorities ensure the victims of totalitarianisms at least passive respect by refraining from acts which are not in compliance with fundamental constitutional values and for which it can be foreseen and expected that they will cause new pain, as also stressed by the Decision. Human dignity is precisely this fundamental value. Also, therefore, there is an essential difference whether we are dealing with something that occurred in history and has been preserved in an objective sense as a part of history (e.g. the names of streets, squares, monuments) or if the matter concerns a situation in which public authorities today adopt active measures which, contrary to the above-mentioned, objectively cause new pain for the victims of the former political trials.

11. The message of the Decision of the Constitutional Court at issue is, in my opinion, clear. The Constitutional Court is not called upon to judge history and its figures. It is called upon to protect the Constitution, and in performing its fundamental duty there is a message: It is unconstitutional for public authority to prescribe the use of a symbol of the former undemocratic state which, by its significance, objectively expresses values that are incompatible with the Constitution – especially with its fundamental starting point: human beings and their dignity.

*Mag. Jadranka Sovdat*

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**CONCURRING OPINION OF JUDGE JAN ZOBEC**  
**JOINED BY JUDGE MAG. MIROSLAV MOZETIČ**

*“You are responsible as individuals.”*

*J. P. Sartre*

1. With this concurring opinion I wish to emphasize and explain my position that in the case at issue all petitioners and not only Lidija Drobnič have a legal interest. I agree with the position in Paragraph 4 of the reasoning that “naming public spaces does not only concern the residents of these areas, but such also has legal effect with regard to everyone who encounters or apprehends such name,” that “such naming has an emphasised symbolic significance that also concerns everyone”, that therefore the naming at issue has “*erga omnes* effects, which arise directly on the basis of the Ordinance on the day of its implementation” and that the case at issue concerns “the most elementary questions regarding the relation of the state or authorities towards individuals, regarding the position and significance of human beings and humanity in the state, and regarding the fundamental purpose of a free and democratic state in general.”
2. Precisely because of the general legal effect of naming a public space after someone who symbolises values that are completely opposite to the eternal, unchangeable, and inviolable core of constitutionality, i.e. human dignity, legal interest cannot be recognised only to those whose factual and real suffering is based on personal, direct experience of the repressiveness of a totalitarian regime. Is it really necessary for factual and real personal suffering that a petitioner himself or herself, directly, on his or her own skin (physically) felt and experienced what the petitioner Lidija Drobnič experienced? I am firmly convinced that it is not. If the Constitutional Court is to effectively protect human dignity as the cardinal constitutional value, then it must recognize the legal interest to file a petition to review the constitutionality of general acts which at least at the symbolic level violate such value, to everyone who could achieve a specific practical goal by the petition (i.e. a “casuistic cassation effect”) – in the case at issue, the abolishment of the naming of a public good after someone whose name symbolises the totalitarian regime. I accept with difficulty the idea that because of such acts of state or self-governing local authorities only those who had personal, direct experience of totalitarianism, which the challenged official act glorifies and for which it expresses support, would be recognised as having experienced procedurally relevant suffering. Is the question of humanity and democracy not something that directly touches upon every human being – simply because these questions are not limited only to (an ever) narrower circle of people, but because they *par excellence* concern everyone? We do not have, respect, and protect the fundamental constitutional values of humanity (i.e. human dignity) and democracy (only) because of the victims of totalitarianisms (of this or that colour), but first of all because of people, because of every single human being, here and now.
3. Denying procedural legitimacy to those who did not directly experience the horrors of totalitarianisms, while they are, however, aware of the deep unconstitutional nature

of the acts of the authorities that sympathise with totalitarian regimes, support them, glorify them, hold them up as an example, or offer them as a solution for this or that (political, social, economic) crisis and are affected because of that (which they express externally already by filing a petition with the Constitutional Court) would entail nothing other than legal unresponsiveness to the articulation of the individual's critical conscience and his or her historical memory – although precisely these two components of human conscience are the strongest remedies for the anti-totalitarian immune system. I ask myself what then when there is no one left who suffered directly and physically in the totalitarian regime (I hope that time and nature will take care of this, and not some person). After the death of the last victim of Nazi fascism, will it be constitutionally admissible to name streets, squares, and towns after persons who symbolize such regimes and to glorify their achievements (although with the excuse that they successfully dealt with unemployment and crime, that they provided pensions, built highways, encouraged economic growth, etc.) – if none of the statutorily determined privileged official and semi-official petitioners (in the case at issue, these are the National Assembly, one third of the deputies of the National Assembly, the National Council, the Government, and the Ombudsman for Human rights) defend human dignity, as they failed to do in the case at issue involving such naming?

4. Therefore, in my opinion, in cases such as the case at issue it cannot be otherwise than to accept the thesis with regard to the legal interest of every atomised bearer of human dignity that a petitioner does not need to particularly prove his or her direct, personal suffering – such is simply assumed; assumed already on the basis of the fact that he or she is entitled to human dignity as a human being and that by acts of official glorification of the symbols of totalitarianism (with this or that ideological-political connotation)<sup>1</sup> human dignity is jeopardised, hurt, humiliated – not yesterday, not tomorrow, but here and now. And that he or she is, being aware of his or her human essence, as a being endowed with reason and ethical sensibility, hurt because of it. I am wondering if also for challenging, for instance, laws on establishing concentration camps, on the execution of persons fleeing across the state border, on segregation, on secret political police, etc., legal interest would be recognised only to those who were or are directly personally hurt due to such (that is to say, concentration camp prisoners or shot, segregated, and monitored opponents of the regime). In order to challenge laws on establishing concentration camps for Jews or for persons holding different opinions, would a petitioner have to demonstrate that he or she is a Jew or holds different opinions? Would denying legal interest to an individual, a bearer of the sovereignty of the people, in such cases also entail denying his or her critical conscience and historical memory and thereby the right to control bearers of power (although such power naturally originates from him or her) – or would he or she be

1 From a constitutional perspective, totalitarianisms are entirely colourless and one-dimensional. It is utterly unimportant what nature any of them declares itself to be or what nature its opponents believe it to be – “left” or “right”, “progressive” or “reactionary”, “conservative” or “liberal”, religiously fundamentalist or fundamentalist atheistic. From the constitutional perspective, they are all the same – the same in their essence, entailing contempt for human dignity.

recognised such right only by casting a vote in an election every four years? Would this not entail a constitutional conceptualization of an individual as an apathetic, uninterested, static unit existing in limbo? Regardless of the fact that an individual (in addition to the courts) is the only one determined by the Constitution who can initiate proceedings before the Constitutional Court – other so-called privileged petitioners can initiate proceedings only if such is determined by a law.

5. Therefore, in my opinion, the presumption holds true that upon the acts of authorities against human dignity, even if such “merely” concern a symbolic glorification of a regime based on systematic violations of human rights, every individual, a bearer of human dignity, is directly (personally) injured and therefore has a legal interest to challenge such acts of the authorities (regarding which it is correctly stated in paragraph 4 that they have **legal** effect with regard to everyone who encounters or apprehends such symbolic glorification). Only because he or she is a human being and because of such is assumed to be sensitive with regard to what is imminent and inalienable in humans – i.e. human dignity. Regardless of the fact whether he or she has experienced in person, directly, what it means to be monitored, politically persecuted, incarcerated because of a different conviction, world-view, skin colour, etc., and regardless of the fact whether he or she at all belonged to a social group whose human dignity was violated by a totalitarian regime. The matter concerns the question of on what to build the interpretation of the notion “legal interest”: on an active citizen, on an individual, who is, as stated by Stéphane Hessel, a free and active participant in the complex system of social relations who is aware of and therefore also assumes responsibility for the existence of the fundamental ethical consensus in society, i.e. universal agreement on, acceptance of, and respect for human dignity;<sup>2</sup> or on the “sand of individuals” who are focused on their own narrow private, direct, tangible (more or less financial) interests and benefits, on the uninterested, indifferent, apathetic masses, permeated by a lack of concern, resigned to their fate, the fundamental particles of which have in common only the conviction that, no matter what, they cannot change anything – and which, sooner or later (at least that is what historical experience teaches), become an easy target of totalitarianisms.<sup>3</sup>
6. There will be as much rule of human dignity as there will be individuals who are aware of this highest constitutional and civilization values and as much as they themselves are willing to do to affirm it.

*Jan Zobec*

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2 Cf. The presentation of his booklet *Time for Outrage!* (French title: *Indignez vous!*) that was organised by Forum 21 in Ljubljana on 12 September 2011. On the active status of citizens, see also the German Federal Constitutional Court – R. Zuck, *Das Recht der Verfassungsbeschwerde*, C. H. Beck, München 2006, Marginal No. 9, 12, 13 and the cited decisions.

3 For more on such masses being like the humus from which totalitarianisms are born, see H. Arendt, *Izvori totalitarizma* (English title: *The Origins of Totalitarianism*), Claritas, Ljubljana 2003, pp. 388 *et sub*.

I join the concurring opinion of Judge Jan Zobec and I support it in its entirety. In cases which concern a question of fundamental values, especially human dignity, without the respect and protection thereof we cannot speak of real (true) democratic order and constitutional democracy, I cannot agree with the position that every human (citizen) is not called upon to protect these fundamental values, in the first place with all legal remedies, also with a petition for the review of the constitutionality of regulations that inadmissibly interfere with these fundamental values. Therefore, I strived for this to be clearly written in the Decision.

It is my deep conviction that the Constitutional Court is a guardian and guarantor of the constitutional order. In Decision No. Up-301/96, dated 15 January 1998 (Official Gazette RS, No. 13/98), the Constitutional Court stated that the historical mission of the Slovene Constitution includes its most fundamental goal, i.e. to prevent any attempt at restoring the totalitarian regime. The protection of this goal is also the task of the Constitutional Court. Naming a street after the most visible representative of the totalitarian system certainly does not (yet) entail an attempt at restoring such system. However, I completely agree with the position of the Decision at issue that in the new constitutional order, which is based on respect for human dignity, which is at the very core of the constitutional order of the Republic of Slovenia and is its foundation and one of the key reasons for Slovenia's independence, such new naming of a street no longer has a place. I deem that not only such new naming but also the existing names [of elements of the public infrastructure], if they bear such symbolic message, are determined to be unconstitutional in the Decision.

*Mag. Miroslav Mozetič*

I completely agree with and join the written opinion of Judge Mag. Miroslav Mozetič.

*Jan Zobec*

**DECISION**

At a session held on 20 March 1997, in proceedings to examine the petitions of Dr Aleksander Weingerl, Graz, Austria, and the *Most svobode* [Freedomsbridge] International Society, Maribor, represented by Ludvik Kolnik, attorney in Maribor, Adolf Arne Titus Perles from Cleveland, United States of America, represented by Bojan Ozimek, attorney in Ljubljana, Edeltraut Urbanc, Caracas, Venezuela, represented by Dr Anton Urbanc, Caracas, Venezuela, Martin Jaklič, Ljubljana, Karl Palm, Graz, Austria, represented by Aleš Vest, Ljubljana, Peter Krisper, Ljubljana, Peter and Nino Mihalek, Ljubljana, represented by Zdenka Štucin, attorney in Ljubljana, Carl Count de Villavicencio-Margheri, Ljubljana, and Anneliese Walsch, Schruns, Austria, represented by Dr Mirko Silvo Tischler, attorney in Ljubljana, and Maria Wogerer-Maclean, Knoxville, United States of America, represented by Dušan Ludvik Kolnik, attorney in Maribor, and in the proceedings to review constitutionality, initiated upon the petitions of Dr Aleksander Weingerl, Adolf Arne Titus Perles, Edeltraut Urbanc, Martin Jaklič, Karl Palm, Peter Krisper, Peter Mihalek, Nino Mihalek, and Maria Wogerer-Maclean, the Constitutional Court

*decided as follows:*

1. The provisions of the first and second paragraphs of Article 9 and the third paragraph of Article 63 of the Denationalisation Act (Official Gazette RS, Nos. 27/91 and 31/93) are not inconsistent with the Constitution.
2. The words “of the second paragraph” in the provision of Article 12 of the Denationalisation Act is abrogated.
3. The application of the provision of the second paragraph of Article 35 of the [Federal People’s Republic of Yugoslavia] Citizenship Act (Official Gazette DFY [Democratic Federal Yugoslavia], No. 64/45, and Official Gazette FPRY, Nos. 54/46 and 105/48) in proceedings for determining citizenship is not inconsistent with the Constitution.
4. The petition of Dr Aleksander Weingerl to review the constitutionality of the third paragraph of Article 9, and of Articles 10 and 11 of the Denationalisation Act, the petition of Arne Titus Perles to review the constitutionality of the third paragraph of Article 9 and the first paragraph of Article 10 of the Denationalisation Act, the

petition of Carl Count de Villavicencio-Margheri, and the petition of Anneliesa Walsch to review the constitutionality of the third paragraph of Article 6, the second paragraph of Article 9, the third paragraph of Article 63 of the Denationalisation Act, and the second paragraph of Article 35 of the FPRY Citizenship Act, and the petition of the Freedomsbridge International Society to review the constitutionality of Articles 9, 10, 11, and 12 of the Denationalisation Act are rejected.

5. Each party to the proceedings bears their own costs of proceedings.

### *Reasoning*

#### **A**

1. The petitioners, Dr Aleksander Weingerl and the Freedomsbridge International Society challenge Articles 9, 10, 11 and 12 of the Denationalisation Act (hereinafter referred to as the DenA). In the opinion of the petitioners, the cited provisions are not consistent with the provisions of Articles 14, 22, 23, and 26 of the Constitution and are contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. It is alleged that, by excluding certain groups of people from exercising their right to denationalisation due to their national affiliation, the DenA violated the principle of equality and the principle of equal legal protection. In Articles 9, 11, and 12 of the DenA, which allegedly restrict the pool of those entitled to denationalisation, the Act supposedly confirmed the AVNOJ [*Anitfašistični svet narodne osvoboditve Jugoslavije* – the Anti-Fascist Council for the National Liberation of Yugoslavia] Decree of 1944 on the transition of enemy goods to state property. As a result, this validated a decree that enacted a genocide against persons of German nationality. The petitioner, Dr Aleksander Weingerl, based his legal interest for challenging the cited provisions on the fact that the assets of his mother and his father (deceased at the time), both of German nationality, were nationalised in 1945 on the basis of the AVNOJ Decree. A negative decision on citizenship was issued to the petitioner, who was allegedly the only heir. The Freedomsbridge International Society bases its legal interest on the fact that its statutorily defined task is to ensure that human rights are in fact exercised, and the petitioner, Dr Aleksander Weingerl, is a member thereof. The petitioners' attorney demanded the costs of proceedings to be reimbursed.
2. The petitioner, Adolf Arne Titus Perles, challenges Article 9, the first paragraph of Article 10, Article 12, and the third paragraph of Article 63 of the DenA on the grounds of non-compliance with Articles 8, 14, 153, and 155 of the Constitution. In the opinion of the petitioner, Article 9 violates the principle of equality since, in addition to the conditions for obtaining the status of beneficiary under Article 3 of the DenA, it adds new conditions, allegedly failing to treat persons equally, which is contrary to the principle of fairness and the general principles of international law. It is alleged that the provision of Article 9 contradicts itself since, according to the first paragraph

of the article, the position of the beneficiary is tied to citizenship, but, according to the second paragraph, it is linked to records of citizens, thereby supposedly not treating persons of German nationality, whose assets were nationalised as Yugoslav citizens, to the same standard as the rest of the population. The nationalisation of assets is said to have taken place in 1945, whereas an amendment to the second paragraph of Article 35 of the FPRY Citizenship Act (hereinafter referred to as the CA) was implemented in 1948. In this way, the authority at the time retroactively revoked the citizenship of all persons of German nationality who were staying abroad, without first determining whether they had been disloyal. The second paragraph of Article 9 of the DenA is thus believed to have enacted, in conflict with the principles of international law, the retroactive effect of the second paragraph of Article 35 of the CA which was used to convict a specific group of individuals without due process and a court ruling, contrary to general principles of law. The provision of the third paragraph of Article 63 of the DenA is believed to be unconstitutional since it prevents the determination of (dis)loyal conduct. According to democratic principles, it should be admissible to present evidence, if it exists, of individuals not fighting on the side of the Fascists, or such facts would need to be determined by the relevant administrative authority. According to the provisions of the first paragraph of Article 10, Articles 11, and 12, the pool of beneficiaries was said to be determined in conflict with the principle of fairness and equality, thereby also making these provisions contrary to Articles 8 and 153 of the Constitution. The petitioner demonstrated his legal interest by the fact that he, as the legal heir of Pavlo Perles and Franc Perles, whose assets were nationalised based on the AVNOJ Decree owing to them being persons of German nationality, had an interest in annulling the challenged provisions, as they prevented him from inheriting the assets. A negative decision on citizenship was issued to both of the aforementioned persons, as well as to the petitioner's two uncles who were allegedly found not to have been citizens of FPRY as they had no right of domicile in the Kingdom of Yugoslavia as on 6 April 1941.

3. The petitioner, Edeltraut Urbanc, challenges the provisions of the second paragraph of Article 9, the third paragraph of Article 63 of the DenA, and the second paragraph of Article 35 of the CA. In the opinion of the petitioner, the last provision is contrary to the provisions of Articles 14, 32, 61, and 63 of the Constitution, and she therefore urges the Constitutional Court to prohibit its use. Similarly, she proposes the abrogation of the listed provisions of the DenA, as they explicitly provide for the application of the second paragraph of Article 35 of the CA. Persons of German nationality were allegedly forcibly displaced after the Second World War, with the Slovene legislature allegedly denying them the right to citizenship merely for reasons of national affiliation, since it made no distinction between loyal and disloyal citizens. This is allegedly contrary to the spirit of the Constitution and to the general principles of international law. Here, during the procedure for determining citizenship, the administrative bodies were allegedly using data from the population census, which was conducted in 1941, contrary to Article 38 of the Constitution. The petitioner, Edeltraut Urbanc, bases her legal interest on the fact that, according to the third paragraph of Article 63, she was

issued a negative decision in the proceedings on determining the citizenship for the reasons specified in the second paragraph of Article 35 of the CA, and that the assets of her father were allegedly confiscated in 1945.

4. The petitioners, Carl Count de Villavicencio-Margheri, and Anneliese Walsch, challenge the third paragraph of Article 6, the second paragraph of Article 9, and the third paragraph of Article 63 of the DenA, as well as the second paragraph of Article 35 of the CA. They argue that the challenged provisions are inconsistent with Articles 2, 14, 21, 22, and 25 of the Constitution. It is alleged that the aforementioned provisions are not consistent with Article 2 of the Constitution, given that the proceedings under the third paragraph of Article 63 of the DenA cannot serve as the basis for establishing that the affected persons whose assets were dispossessed being of German nationality did not commit any criminal offence, or that they could demonstrate solidarity with the liberation movement as anti-Nazis. The challenged provision was also contrary to the principle of the state governed by the rule of law as it limited evidence during the enforcement of rights, thus allegedly representing also inconsistency with Article 22 of the Constitution. The petitioners believe that the Decree, based on which the assets were dispossessed, was inconsistent with the principles of the state governed by the rule of law. The Constitutional Court had supposedly already abrogated such general acts in similar cases (in case No. U-I-6/93; OdlUS III, 33). In this case, the sanction was ostensibly founded on the national status of an individual, allegedly imposing it without bringing charges against the individual and without the individual being convicted. The petitioners believe that the assets were seized contrary to the provisions of Articles 2, 10, 11, and 17 of the Universal Declaration of Human Rights and the provisions of Articles 14, 15, 26, and 27 of the International Covenant on Civil and Political Rights (Official Gazette SFRY [- Socialist Federal Republic of Yugoslavia], MP, No. 7/71). They also refer to the provision of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 7/94 – hereinafter referred to as the ECHR) and draw attention to Article 4 of Protocol No. 4 and Article 1 of Protocol No. 7 to this Convention. This was allegedly a collective removal of citizenship, including expulsion, and the collective dispossession of assets, therefore a collective punishment. Therefore, this purportedly was an unlawful measure based on the grounds of race and nationality, and therefore contrary to Article 14 of the Constitution, Article 14 of the ECHR, and Article 2 of the aforementioned international covenant. The inability to prove loyalty during the Second World War is also said to be contrary to the protection of human personality and dignity – contrary to Article 21 of the Constitution. This provision allegedly deprived individuals of the right to be a subject in proceedings before a state authority; human dignity was said to be trampled over by establishing the presumption of Nazi collaboration without the possibility of demonstrating the truth. The provision is also allegedly contrary to Article 25 of the Constitution, since all the decisions issued on the basis of the challenged provision allegedly failed to contain the reasons supporting the decisive facts. As proof of their claims, the petitioners refer to the positions of the Constitutional Court in cases

Nos, U-I-20/92 (OdlUS I, 85), U-I-98/91 (OdlUS I, 101), and U-I-69/92 (OdlUS I, 102). They also refer to the practice of the European Commission of Human Rights and the case law of the Austrian Constitutional Court. In the opinion of the petitioners, the general provision of the third paragraph of Article 6 of the DenA is believed to be questionable as it enables discrimination. The possibility of discrimination lies in the fact that it does not determine the exclusions and limitations which should be taken into account, causing the provision to be indeterminable and allegedly open to arbitrary application. The petitioners also draw attention to the legal criticism of the decision of the Czech Constitutional Court, which ruled on a similar petition brought by Sudeten Germans.

5. The petitioner, Carl Count de Villavicencio-Margheri, bases his legal interest on the fact that he lodged a denationalisation claim and that a decision had been issued in proceedings on determining citizenship on the basis of the third paragraph of Article 63 of the DenA, establishing that the petitioner's father could not be deemed a Yugoslav citizen. The petitioner, Anneliese Walsch, bases her legal interest on the assertions that she lodged a denationalisation claim and that it was found during proceedings on determining citizenship that her parents were considered Yugoslav citizens. The procedure of denationalisation has yet to be completed, but the finding regarding citizenship under the third paragraph of Article 63 of the DenA is alleged to have come into question on account of the Act on Temporary, Partial Suspension of Assets Restitution (Official Gazette RS, No. 74/95).
6. The petitioner, Maria Wogerer-Maclean, similarly challenges the third paragraph of Article 63 of the DenA. She believes that the challenged provision is inconsistent with Articles 14, 27, and 61 of the Constitution. She alleges that the provision of the second paragraph of Article 35 of the CA is a retaliatory measure, alongside the AVNOJ Decree, directed at persons of German nationality. It supposedly punishes Yugoslav citizens of German nationality who, owing to their disloyalty and occasional criminal behaviour during the war, did not deserve Yugoslav citizenship. According to the explanation of the Ministry of the Interior, this provision is said to have applied retroactively from 28 August 1945, despite the administrative bodies allegedly determining whether a person was of German nationality and his absence from the state as on 4 December 1948. The Supreme Court is allegedly of the same opinion, and interprets the challenged provision as being a statutory fiction, implying that the disloyal behaviour requirement is a given for persons who are not registered in the record of citizens, and so an administrative authority is not required to determine this and the party at issue in the proceedings cannot challenge it. In the opinion of the petitioner, when the Supreme Court interpreted the challenged provision, it thereby accepted a position of presumed guilt, that the party to proceedings cannot challenge, and this is contrary to the provisions of Article 27 of the Constitution.
7. The petitioner, Maria Wogerer-Maclean, bases her legal interest on the fact that she requested the determination of citizenship on the basis of Article 29 of the Citizenship of the Republic of Slovenia Act (Official Gazette RS, Nos. 1/91-I, 30/91-I, and 38/92 – hereinafter referred to as the CRSA). Pursuant to the third paragraph of Article 63

of the DenA, the responsible authority issued a joint decision on her request and the application submitted subsequently by the body responsible for conducting the denationalisation procedure, in accordance with which the petitioner was deemed not to be a Yugoslav citizen.

8. The petitioners, Martin Jaklič, Peter Mihalek, and Nino Mihalek, challenge Article 12 of the DenA. Due to the restriction to the first line of succession, the petitioner, Martin Jaklič, challenges this Article as it puts other legal successors in an unequal position, thereby restricting the constitutionally protected right to inheritance under Article 33 of the Constitution. This petitioner substantiates his legal interest by stating he is one of the nephews who lodged a claim for the denationalisation of the assets confiscated from his aunt. She left Yugoslavia as an “exile” [optant] in the exodus of Gottscheers in 1942. The petitioners, Peter and Nino Mihalek, believe that the challenged provision is contrary to the principle of fairness and the principle of equality before the law because it refers only to persons of German nationality, and the petitioners are the legal successors of an Italian citizen of Slovene descent who was married to a Slovene and Yugoslav citizen and whose children are also Slovenes holding Slovene citizenship. The petitioners substantiate their legal interest by the fact that the competent authority rejected their denationalisation claims, stating in the reasoning that the challenged provision relates only to cases where the natural person referred to in the second paragraph of Article 9 of the DenA is not a beneficiary under the DenA.
9. The petitioners, Karl Palm and Peter Krisper, challenge the second paragraph of Article 35 of the CA for reasons of non-conformity with Article 14 of the Constitution. The petitioner, Karl Palm, believes that the challenged provision is contrary to the Constitution, as it retroactively interfered with the rights of persons who supposedly held Yugoslav citizenship pursuant to the Citizenship Act of 1945. In unlawful proceedings, the FPRY allegedly found the majority of citizens of German, Austrian or Hungarian nationality to be disloyal, before expulsing them and retroactively depriving them of their citizenship in 1948. The petitioner demonstrates his legal interest by the fact that, during the procedure for determining citizenship pursuant to third paragraph of Article 63 of the DenA, he was issued a negative decision on the grounds referred to in the second paragraph of Article 35 of the CA. The petitioner, Peter Krisper, believes that the second paragraph of Article 35 of the CA is also contrary to the freedom of movement referred to in Article 32 of the Constitution and the right to expression of national affiliation referred to in Article 61 of the Constitution. He bases his legal interest on the fact that his parent’s assets were confiscated pursuant to the AVNOJ Decree, as they were persons of German nationality and due to the negative declaratory decision on citizenship issued on the grounds stemming from the second paragraph of Article 35 of the CA, the restitution of assets within the denationalisation procedure became impossible.
10. The petitions were submitted to the National Assembly. The National Assembly replied to the petitions under Paras. 1 through 3 and Paras 8 and 9 of this reasoning. According to the position of the National Assembly, the challenged provisions are

not contrary to the Constitution, the generally valid principles of international law or treaties. The National Assembly believes that the CA dating back to the years after the Second World War cannot be subject to a review of constitutionality since it had already ceased to be valid for decades prior to the implementation of the Constitution; it would, however, be possible to review the constitutionality of only those provisions of the DenA which relate to the use of this statutory regulation in the procedures currently being conducted, i.e. the provisions of Articles 9, 10, and 11 and the third paragraph of Article 63 of the DenA. These provisions are allegedly also not contrary to the prohibition of retroactivity determined in Article 155 of the Constitution, since the DenA affects the already completed legal relations only from its enactment onward for the legitimate purpose of remedying injustices in favour of dispossessed assets beneficiaries. It is also alleged that the DenA is not contrary to the right to private property under Article 33 of the Constitution, given that it is only on the basis of this Act that private property with respect to socialised assets was established, meaning the Act does not seize assets, interfere with them and places no restrictions on them. The National Assembly believes that Article 9 of the DenA is not contrary to Article 14 of the Constitution, since the two conditions for determining the beneficiary status, i.e. the original ownership of the assets and Yugoslav citizenship, are defined equally for all beneficiaries. The Yugoslav citizenship criterion is supposedly founded on the principle of legal continuity and expressed in the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia by the fact that the Kingdom of Yugoslavia was not only a victim of the fascist coalition's aggression during the Second World War but was also occupied, as well as by the fact that the FPRY entered into a number of peace treaties with other states that oblige foreign states (Italy, Hungary and Austria) to compensate their citizens for the assets seized from them in Yugoslavia, which is also purportedly expressly regulated by the provision of Article 10 of the DenA.

11. The National Assembly is of the view that the second paragraph of Article 9 of the DenA does not make a distinction in terms of the right to denationalisation by nationality of the person affected, but by that person's position or activity during the war. This provision allegedly enables persons of German nationality who lived abroad to be beneficiaries if they had been interned or fought on the side of the anti-fascist coalition. In addition, the provision of the third paragraph of Article 63 of the DenA allegedly favours beneficiaries, since it allegedly prevents the aversion of the affected persons to the previous political regime from being considered as disloyalty. In the opinion of the National Assembly, all of those persons affected who require the determination of their Yugoslav citizenship in declaratory proceedings conducted by competent authorities, have the possibility of lodging legal remedies, including judicial protection in a judicial review of administrative acts procedure. Therefore, they should be guaranteed equal protection of their rights in accordance with Articles 22, 23, and 25 of the Constitution. The challenged provisions are supposedly not discriminatory but instead serve as exceptions to the basic criterion

for denationalisation eligibility, which are necessary given the different circumstances, status, and actions of potential beneficiaries. The National Assembly believes that the DenA does not recognise or tolerate genocide, nor does it restrict freedom of movement or the expression of national affiliation.

12. The provision of Article 12 of the DenA is not contrary to the Constitution, since, in the opinion of the National Assembly, the DenA does not regulate the issue of inheritance, but determines who denationalisation beneficiaries are, and in addition regulates this issue as a further exception in favour of the closest relatives (spouses and descendants) of the persons whose assets were seized, but were not Yugoslav citizens. The National Assembly believes that this statutory regulation is not contrary to the principle of equality nor to Article 67 of the Constitution, since the second paragraph of this article specifies that a law will determine the conditions and methods of inheritance, which in Slovenia and in other countries does not provide the same status and equal rights to all heirs, depending on their relation to the decedent.
13. The positions of the National Assembly were submitted to the petitioners who responded to its statements. All the petitioners insist on the alleged inconsistency of the challenged provisions, supplementing their statements in response to the National Assembly's position.
14. The petitioners, Dr Aleksander Weingerl and the Freedomsbridge International Society, further state that the seizure of assets was enacted when it was published in the Official Gazette DFY, dated 6 February 1945, and its entry into force was retroactively determined for 21 November 1944, when the AVNOJ resolution that all persons of German descent lose Yugoslav citizenship, all civil rights and all their assets are confiscated and converted to state property was allegedly adopted. An obligatory interpretation of point 2 of Article 1 of the AVNOJ Decree was published in the Official Gazette DFY, No. 39/45. The petitioners believe that the legislature overlooked the fact that person's assets were confiscated pursuant to the second paragraph of Article 1 only if that person was a Yugoslav citizen. The confiscation decisions supposedly always indicated that a Yugoslav citizen was involved. Therefore the citizenship of persons of German nationality was not deprived by the CA dated 28 August 1945, but no earlier than by the amendment to this Act in 1948, which cumulatively determined three conditions for deregistration from the register of citizens; in reality, only the absence of a person from the state was determined. According to the assertions of the petitioner, no examination of disloyalty took place, and German nationality was said to be determined via a subsequently composed list of *Kulturbund* members. This list was allegedly compiled in 1948 for expropriation purposes and was not identical to the original *Kulturbund* member lists, which supposedly had not been preserved in their entirety. By not applying one of the aforementioned cumulatively determined conditions, the regulation in fact became stricter, not more lenient. In addition, the second paragraph of Article 9 and the third paragraph of Article 63 of the DenA supposedly transferred the burden of demonstrating loyalty to the beneficiary, further restricting the beneficiary in the demonstration of loyalty to submitting evidence of internment or fighting on the side of the anti-fascist coalition.

15. The confiscation of assets was supposedly carried out in 1946, while the provision regarding registration in the record of citizens to which the second paragraph of Article 9 of the DenA refers, i.e. an amendment to the second paragraph of Article 35 of the CA, was promulgated no earlier than in the Official Gazette FPRY, No. 105/48. The second paragraph of Article 9 of the DenA allegedly explicitly determined that citizenship needs to be determined at the time the assets were dispossessed, with the entry in the register of citizens. The petitioners believe it should be noted that the registers of citizens were only introduced in 1947, whereupon the first entry made was based on permanent residence notifications and homeland registers. An individual deported after the war was therefore never entered in the register of citizens, and the amendment to the CA in 1948 supposedly only legalised the already implemented situation. The petitioners believe that the DenA re-enacts the application of the CA, thereby supposedly demonstrating the need to review the constitutionality of these provisions, and clearly expressing the legislature's intention in this regard for persons of German nationality to not enjoy the same rights as other beneficiaries. The petitioners reiterate that it is not possible to consider persons born in Slovenia as foreigners, thereby substantiating the alleged inconsistency with Article 14 of the Constitution. They also draw attention to the fact that the competent ministry uses the provision of the second paragraph of Article 35 of the CA retroactively, despite the amendment of 1948 not applying retroactively and, consequently, the application of this provision was not even consistent with the constitution valid at the time. The petitioners also believe that the procedures determining citizenship reveal that the third paragraph of Article 63 of the DenA is not used to the benefit of beneficiaries, but instead clearly to their detriment. The competent authorities' reference to national origin is allegedly also directly contrary to Article 14 of the Constitution.
16. The petitioners also state that, based on the treaty on implementing the provisions of the Austrian State Treaty, symbolic damages were only awarded to Austrian citizens who had Austrian citizenship prior to 1938 and those who regained it in April 1945; similarly, damages were supposedly also awarded to the citizens of the German Reich in the Federal Republic of Germany. However, damages were not awarded to persons whose properties were nationalised as Yugoslav citizens of German nationality. The petitioners believe that the principle of legal continuity, expressed in the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, has no direct connection with this issue and that the argument regarding the occupation of the Kingdom of Yugoslavia on the part of the fascist coalition is irrelevant in the legal sense. The petitioners believe that, in accordance with Article 2 of the Constitution, the challenged provisions need to be abrogated, given that the condition of Yugoslav citizenship is allegedly set only in order to exclude from the denationalisation process those persons of German nationality who were deported after the Second World War and now live abroad. The petitioners believe that the principle of equality is also binding on the legislature, which must ensure equal rights for everyone, and implies a general ban on discrimination that is not based on facts but instead on

personal characteristics such as race, sex, or even nationality. Even if it is not evident from the wording of a law itself, inequality is also said to exist whenever apparent inequality exists when applying a law. The petitioners believe it is also necessary to take into account that the first paragraph of Article 9 of the DenA does not make the beneficiary's status contingent on being a citizen of the Republic of Slovenia, but on the citizenship of some other state, as a result of which the legislature will not be able to base its different treatment on Articles 13 and 68 of the Constitution.

17. The petitioners believe that the challenged provisions are contrary also to the provisions of Article 14 of the EHCR and Article 1 of Protocol No. 1 to this Convention, dated 20 March 1952. Respect for property should not only be interpreted as the effective protection of property and the enjoyment of rights stemming from property, but also its restitution if the property has been dispossessed in an unlawful manner and contrary to Article 14 of the Convention. The petitioners also refer to the reasoning of the Decision of the Constitutional Court No. U-I-75/92, dated 31 March 1994 (OdlUS III, 27) regarding remedying the consequences incurred due to the implementation of the regulations that violated human rights and fundamental freedoms. The challenged provisions are said to have violated these rights by introducing a distinction on the grounds of nationality. They believe that fairness also requires the restitution of the assets at issue.
18. The petitioner, Adolf Arne Titus Perles, contests the claim of the National Assembly that the alleged retroactivity in the second paragraph of Article 35 of the CA is unfounded, as well as the claim that the provisions of Articles 9, 10, and 12, and the third paragraph of Article 63 of the DenA favour the beneficiaries. The provision of the third paragraph of Article 63 of the DenA allegedly prevents beneficiaries from knowing what type of disloyalty they have been accused of committing, and prevents beneficiaries from refuting this "conviction" or "qualification". The petitioner believes that it is clear from the very reasoning of the National Assembly that aversion to the previous regime alone was deemed to be disloyal. In the opinion of the petitioner, the National Assembly should also clarify how it is possible that a natural person whose assets were nationalised in 1945 was not entered in the register of citizens that year due to the grounds referred to in the second paragraph of Article 35 of the CA, which was implemented in 1948. The petitioner believes that the second paragraph of Article 9 of the DenA inadmissibly equates the citizenship status with the entry of persons in the records, whereas the individual was not informed as to whether he/she was entered in the records and did not have any legal remedy to appeal such decision.
19. The petitioners, Edeltraut Urbanc and Peter Krisper, further state that in the procedure for determining citizenship the competent administrative authority limits itself only to determining German nationality and residence abroad. By consistently denying persons of German nationality entry into the register of citizenship, the administrative authority is supposedly guilty of ethnic discrimination contrary to Article 14 of the Constitution and to treaties. The petitioner, Edeltraut Urbanc, believes that the second paragraph of Article 9 of the DenA confirms this discrimination, or even intensifies it when compared with the

second paragraph of Article 35 of the CA. The latter allegedly at least required a distinction between persons of German nationality to those who were loyal and those who were disloyal, whereas the Slovene legislature supposedly treated all these individuals the same. The challenged provisions are thus said to be contrary to Articles 16, 61 and 153 of the Constitution and contrary to Article 14 of the EHCR and Article 2 of Protocol 4 to this Convention. The petitioner, Peter Krisper, also believes that guaranteed judicial protection in judicial review of administrative acts procedure is of no help to a beneficiary precisely because of the provision of the third paragraph of Article 63 of the DenA.

20. The petitioner, Karl Palm, states that the competent authority issued him a decision of rejection regarding citizenship on the basis of the provision of the second paragraph of Article 35 of the CA, which the National Assembly claims is no longer valid. In the petitioner's opinion, it should be noted that also all the Slovenes who were deported on account of the communist revolution and to whom German nationality was supposedly ascribed by UDBA (state security agency) are categorised as persons of German nationality who were deported after the war. The petitioner was placed on this list out of personal revenge. The petitioner believes that the provision of the third paragraph of Article 63 of the DenA is detrimental to beneficiaries, since it significantly alters the original intention of the challenged provision of the CA. The Citizenship Act adopted in 1945 was intended to impose sanctions on those members of German nationality who, through their actions, harmed the interests of the nations and state of Yugoslavia, while the amendment of 1948 introduced sanctions against those persons of German nationality who, as victims of the terror imposed by the authority at the time, were supposedly deported from their homeland on account of their assets. The third paragraph of Article 63 of the DenA supposedly, by removing the loyalty condition, imposed sanctions on persons who were forcibly deported from Slovenia, who were allegedly attributed German nationality by repressive authorities, overlooking whether or not the individual was a criminal. The challenged provision of the CA, which the Ministry of the Interior uses with retroactive effect despite it being allegedly unclear from the amendment to the CA introduced in 1948 that this Act could be applied retroactively, allegedly allows the arbitrary use of this Act. This is said to be evident from the fact that citizenship is recognised for some persons and not for others in the same circumstances. The amendment to the CA of 1948 supposedly also introduced a review of citizenship (Article 35.a) which has been said to also allow for the retroactive removal of citizenship. The petitioner was supposedly entered in the electoral register with the Kranj Local Court Decision, dated 28 September 1945, which means that his citizenship was also recognised at the time. The petitioner was said to have been forcibly taken to a concentration camp in Maribor and deported to Austria in April 1946 based on a secret list of "Volksdeutsche" by the president of the Local National Committee. The petitioner believes that it is legally inadmissible that the authorities of the Ministry of the Interior repeat UDBA procedures from 1945 in terms of content and methodology for the purpose of changing facts that were legally attested by the Kranj Local Court in 1945.

21. In the proceedings examining the petition, clarifications regarding the petitions were also obtained from the Ministry of Justice and the Ministry of the Interior. The Ministry of Justice believes that the DenA does not take away property rights and that the right to denationalisation is not tied to personal circumstances but instead to citizenship. The issue with regard Article 12 and the first paragraph of Article 9 of the DenA is the suitability of the regulatory framework which is to be determined by the legislature. The Ministry of Justice believes that the second paragraph of Article 35 of the CA no longer applies as of 1 January 1965. In addition to not being able to determine disloyalty under the provisions of the third paragraph of Article 63 of the DenA, the systemic regulatory framework, according to which an administrative decision may be rendered void, allegedly enables that the confiscation of assets decisions are challenged in all cases where the previous owner was not in fact a German national. The Ministry of Justice lists the conclusion of agreements on global compensation which the former state entered into with other states in order to compensate for the damage sustained by the nationalisation of assets as the reason why foreigners are not eligible for denationalisation. The provision of the second paragraph of Article 9 and Article 12 of the DenA, as well as the provision of the first paragraph of Article 10 of the DenA, supposedly expand the pool of denationalisation beneficiaries; therefore, it supposedly cannot be considered a restriction or instance of unequal treatment. The provision of Article 11 of the DenA is said to be of a legally technical nature, as the assets of a deceased person cannot be nationalised, since the deceased loses ownership of the assets at the time of death.
22. The Ministry of the Interior explained that the first paragraph of Article 35 of the CA specifies that all persons who were domiciled in one of the Yugoslav municipalities as on 6 April 1941 obtained citizenship of the FPRY, since records of the rights of domicile were kept in the Kingdom of Yugoslavia, but no citizen records. The Ministry is not aware of the practice for determining citizenship prior to the introduction of the registers of citizens which were introduced with the Rules on Implementing FPRY Citizenship (Official Gazette FPRY, No. 98/46). The entries made in the register of citizens were not constitutive in nature, and records were never kept of negative declaratory decisions that could have been issued. The CA was supplemented in 1948 (Official Gazette FPRY, No. 105/48) with the second paragraph of Article 35, which is being challenged in these proceedings, with the provision having retroactive effect. In the opinion of the Ministry, the persons referred to in the second paragraph of Article 35 of the CA did not become citizens of the FPRY and could not be entered in the registers of citizens. When assessing the citizenship of persons who were discovered to have failed to become citizens of the FPRY based on the second paragraph of Article 35, the Ministry of the Interior took into account evidence of German nationality (origin, personal statements made at the beginning of the occupation in 1941 when the population census was conducted, deciding for the German Reich at the time of Slovenia's division, Kulturbund membership, Heimatbund or Volksbund membership if the person in question obtained permanent German citizenship based on the Nazi Decree of 1941) and of absence from the FPRY, at no

point assessing the disloyalty condition under the third paragraph of Article 63 of the DenA. The Ministry obtains evidence of German nationality from the Archives of the Republic of Slovenia, the Institute of Contemporary History, regional archives and museums, the archives of district courts and the Archives of the Ministry of the Interior. According to statements provided by the Ministry, the existence of disloyal behaviour was established immediately after the Second World War on the basis of checks performed by the secret services, which now cannot be verified retroactively owing to the substantial length of time that has elapsed. That is also the reason for the enactment of the provision of the third paragraph of Article 63 of the DenA. The Ministry of the Interior explicitly draws attention to the distinction made between the persons referred to in the third paragraph of Article 9 of the DenA (whose citizenship, which they held and obtained on the basis of the first paragraph of Article 35 of the CA, was revoked by way of a decision) and the persons referred to in the second paragraph of Article 35 of the CA, who never became citizens of the FPRY. The Ministry of the Interior believes that the regulations associated with the protection of personal data and the regulations regarding population censuses are irrelevant, singling out the provision of Article 39 of the CRSA, which ensures legal continuity with the previous legal orders, as being important.

#### **B – I**

23. The Constitutional Court joined the petitions mentioned in part A of the reasoning for their joint consideration and decision-making.
24. The Constitutional Court first examined whether it had the jurisdiction to assess the provisions of the second paragraph of Article 35 of the CA, and whether the petitioners had demonstrated a legal interest in challenging the individual provisions of the law. Pursuant to the provision of Article 24 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), anyone who demonstrates legal interest may lodge a petition to initiate proceedings. Legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority, the review of which has been requested by the petitioner, directly interferes with his rights, legal interests, or legal position.
25. The CA did not become a constituent part of the legal order of the Republic of Slovenia on 25 June 1995, as it was not in force at the time. In general, the Constitutional Court cannot decide on the constitutionality of a law which has ceased to be valid prior to the lodging of a petition. However, the Constitutional Court may review the constitutionality of such regulation if it is still in use and the petitioner requires constitutional court protection. The Constitutional Court already adopted such a position in Decision No. U-I-6/93, dated 1 April 1994 (OdlUS III, 33), and Decision No. U-I-67/94, dated 21 March 1996 (OdlUS V, 31). In this respect, the constitutionality of the regulation as such is not reviewed, but a review is made whether its use in ongoing individual legal proceedings could be constitutionally inadmissible. In accordance with the provision of Article 39 of the CRSA, when determining the citizenship of an individual it is necessary to apply the regulations

regarding citizenship from the individual's birth to the day of the determination of citizenship. This means that the competent authority may also apply the provision of the second paragraph of Article 35 of the CA in current proceedings, and issue a declaratory decision on the existence or non-existence of citizenship on this basis. A provision which does not apply in the formal legal sense is thus used in its entirety in current proceedings. Such application of a legal provision cannot remain beyond the scope of the review of the Constitutional Court, if a petitioner demonstrates a need for judicial protection of his or her rights or positions. The petitioners, Karl Palm, Peter Krisper, and Edeltraut Urbanc, demonstrate a legal interest to review the constitutionality of the use of this legal provision, since a negative declaratory decision was issued to them and to their predecessors, precisely on the basis of this statutory provision in proceedings for determining citizenship.

26. The petitioner, Edeltraut Urbanc, also demonstrates a legal interest to review the constitutionality of the second paragraph of Article 9 of the DenA and the third paragraph of Article 63 of the DenA, since the former provision regulates which persons who were not Yugoslav citizens under the second paragraph of Article 35 of the CA are nevertheless deemed beneficiaries, and the latter provision prevents the petitioner from putting forward the objection of loyalty in proceedings determining citizenship in connection with denationalisation according to the valid practice of the competent administrative authorities and case law of the Supreme Court.
27. The petitioner, Dr Aleksander Weingerl, fails to demonstrate a legal interest for challenging the provisions of the third paragraph of Article 9, Article 10, and Article 11 of the DenA. The provision of the third paragraph of Article 9 refers to persons whose assets were nationalised as a result of the termination of citizenship by way of revocation, while the provision of the first paragraph of Article 10 refers to persons from the Zone B region of the Free Territory of Trieste, to whom citizenship was recognised in 1947. The two cited provisions do not directly interfere with the rights of the petitioner. Their potential abrogation would not alter the legal position of the petitioner. Similarly, the provision of the second paragraph of Article 10 of the DenA does not alter the legal position of the petitioner. It is evident from treaties in which compensation for nationalised assets was agreed with individual foreign states (including Austria) that the compensation obligation was assumed by these states only for persons who were their citizens either prior to the war or at the time of the assets nationalisation at the latest. Even a possible abrogation of the provision of Article 11 of the DenA would not alter the petitioner's legal position, since according to his own statements, a negative decision was issued both for him and for his father, putting the petitioner in the same legal position, if it were deemed that the assets were transferred to the heirs on the day of his father's death and nationalised in relation to them, as though it were deemed that the persons to whom the decision regarding nationalisation was actually referring to were the beneficiaries.
28. For the reasons cited in the previous Paragraph of this reasoning, the petitioner, Adolf Arne Titus Perles, also fails to demonstrate his legal interest for challenging the provision of the third paragraph of Article 9 and the first paragraph of Article

10 of the DenA. The petitioner does not separately substantiate his legal interest in relation to the provision of Article 11 of the DenA, but it is possible to conclude from his other statements that he fails to demonstrate his legal interest. The determination of citizenship is said to have been requested for all his legal predecessors, thereby making it impossible to conclude that this provision interferes directly with the petitioner's legal position.

29. The Freedomsbridge International Society has not demonstrated its legal interest for challenging the provisions of the DenA. These provisions do not interfere with the rights or legal position that it holds as an association. The legal interest of this society for challenging the provisions which directly interfere with the rights or legal position of its members, however, cannot be recognised on the basis of its general endeavours for human rights and fundamental freedoms.
30. The petitioner, Carl Count de Villavicencio-Margheri, did not demonstrate his legal interest for challenging the provision of the third paragraph of Article 63 of the DenA. It is clear from the petitioner's assertions that he is challenging the mentioned provision in the part specifying that it is impossible to determine the existence of disloyal actions against the interests of the nations and state of the FPRY in proceedings determining citizenship for the purpose of a denationalisation procedure, i.e. the part in which the provision requires the modified use of the provision of the second paragraph of Article 35 of the CA in proceedings determining citizenship. It is evident from the decision of the Ministry of the Interior enclosed by the petitioner that, in determining the citizenship of the petitioner's predecessor, the provision of the second paragraph of Article 35 was not applied at all. According to the aforementioned decision, the petitioner's predecessor did not become a citizen of the then People's Republic of Slovenia and FPRY owing to the provisions of the first paragraph of Article 35 and Article 37 of the CA. Therefore, any possible abrogation of the provision of the third paragraph of Article 63 of the DenA in the part which refers to the use of the provision of the second paragraph of Article 35 of the CA, cannot directly affect the petitioner's legal position. His legal position was determined by the provision of the first paragraph of Article 35 of the CA and the first paragraph of Article 9 of the DenA, which the petitioner is not challenging. Therefore, the petitioner also does not demonstrate a legal interest to review the provision of the second paragraph of Article 35 of the DenA or to review the second paragraph of Article 9 of the DenA. The petitioner did not state how the potential abrogation of the provision of the third paragraph of Article 6 of the DenA could alter his legal position. Therefore, the legal interest to challenge such provision was also not demonstrated.
31. Similarly, the petitioner, Anneliese Walsch, failed to demonstrate a legal interest to challenge the second paragraph of Article 9, the third paragraph of Article 63 of the DenA or the second paragraph of Article 35 of the CA. The petitioner herself states that it was established during the procedure for determining citizenship of her legal predecessors that her parents were citizens of the People's Republic of Slovenia and FPRY and her assertions are confirmed by the documents enclosed

with her petition. The two decisions determining the citizenship of her mother and father were based on the provision of the first paragraph of Article 35 and Article 37 of the CA. Even in this case, as in the cases referred to in the previous Paragraph of the reasoning, the provision of the second paragraph of Article 35 of the CA was not applied. Therefore, any abrogation of the second paragraph of Article 9 and the third paragraph of Article 63 of the DenA in the part that is also challenged by the petitioner, or a potential ban on the application of the second paragraph of Article 35 of the CA, cannot bring about a change to her legal position, notwithstanding the provisions of the Act on Temporary, Partial Suspension of Assets Restitution, the constitutionality of which was decided by the Constitutional Court with Decision No. U-I-107/96 dated 5 December 1996 (Official Gazette RS, No. 1/97). Much like the petitioner referred to in the previous Paragraph of this reasoning, this petitioner also demonstrated a legal interest to challenge the provision of the third paragraph of Article 6 of the DenA.

32. The Constitutional Court dismissed in whole or in part the petitions for which the petitioners did not demonstrate a legal interest. The Constitutional Court accepted for consideration the petitions that challenged the first and second paragraphs of Article 9, Article 12, the third paragraph of Article 63 of the DenA, and the second paragraph of Article 35 of the CA, initiated proceedings to review constitutionality and, on the basis of the fourth paragraph of Article 26 of the CCA, immediately proceeded to decide on the merits of the case.

## B – II

33. The first paragraph of Article 9 of the DenA reads:

“The natural persons referred to in Articles 3, 4, and 5 of this Act are deemed beneficiaries if they were Yugoslav citizens at the time their assets were nationalised, and this citizenship was recognised after 9 May 1945 by law or treaty”.

This provision sets one of the fundamental rules for assessing whether a person whose assets were nationalised was entitled to denationalisation. This rule requires that the person held the status of a Yugoslav citizen at the time of nationalisation and that this citizenship was recognised after 9 May 1945 by law or treaty. As is evident from the materials for the adoption of the DenA in the legislative process, the intention of the legislature was to remedy within the framework of possibilities the injustices that were committed, particularly during the post-war period regarding the interference of the state in ownership relations on account of the so-called revolutionary transformation of society at the time and on account of dealing with enemies of the regime. To that end, the legislature adopted the premise that all disposessions of assets based on regulations and acts of the state and its authorities during a specific period that interfered with the private property of Yugoslav citizens were, as a rule, deemed injustices unless they received appropriate compensation (proposal to adopt the DenA, including the draft law, Gazette of the People's Assembly of the Republic of Slovenia, No. 7/91). Denationalisation is also intended to privatise that part of the social property which was created through the unjust nationalisation of private

property, by returning the assets to the owner or his legal successors as priority beneficiaries in the process of social property privatisation. The Constitutional Court agrees with the National Assembly's position that the DenA does not take possession over assets and does not interfere with property rights, but under specific conditions allows the acquisition of the title to property which until now had been social property. The DenA did not abrogate regulations and individual decisions, on the basis of which nationalisation was carried out during the post-war period. These regulations interfered with property rights at the time the assets were nationalised. Therefore, in this respect, questions cannot be raised regarding the constitutional admissibility of restricting property rights and so the challenged provisions of the DenA are not contrary to Article 33 of the Constitution and to Article 1 of Protocol No. 1 to the ECHR. Similarly, they are also not contrary to Article 155 of the Constitution, which invokes a ban on retroactive regulations. The Constitutional Court may therefore not assess the constitutionality of regulations which serve as the basis for denationalisation under Article 3 of the DenA but are now no longer valid or used, and may only assess the constitutionality of specific provisions of the DenA. Therefore, the Constitutional Court did not review the assertions of the petitioners in so far as they allege that the Decree which served as the basis for the dispossession of the assets was unconstitutional and which the DenA categorised among the legal bases for denationalisation.

34. The legislature enacted a distinction between persons whose assets were nationalised on the basis of regulations referred to in Article 3 of the DenA depending on whether they were considered Yugoslav citizens at the time of the nationalisation. Therefore, it is necessary to assess whether there are constitutionally admissible grounds for the enactment of such distinction.
35. The reasons set out in Paragraph 33 of this reasoning indicate that neither the challenged provision nor the other provisions of the DenA could have interfered with the private property of the petitioners, since this type of property did not exist when this typically transitional law came into force. However, in specific cases and to a specific degree, the DenA regulates a special method of obtaining property rights. The manner in which property is acquired and enjoyed is the subject of statutory regulation pursuant to the provision of Article 67 of the Constitution, with the function of the legislature being to determine restrictions on the constitutional right to private property in order to ensure the economic, social, and environmental function of ownership. In addition, Article 68 of the Constitution sets out a specific restriction under which aliens may acquire property rights to real estate only under the conditions provided by law. In accordance with the second paragraph of this article, aliens may not acquire title to land except by inheritance, under the condition of reciprocity. Article 13 of the Constitution explicitly determines that, in accordance with the relevant treaties, aliens in Slovenia are to enjoy all the rights guaranteed by this Constitution and laws, except for those rights which, pursuant to this Constitution or law, only citizens of Slovenia may enjoy. Articles 13 and 68 of the Constitution therefore serve as the basis for regulating differently the acquiring of

property if Slovene citizens are not concerned. The Constitution leaves the regulation of conditions for obtaining property rights by aliens to statutory regulation. In this regard, the margin of appreciation of the legislature is wider than in cases where the Constitution itself determines and regulates the constitutional right in question. In accordance with the second paragraph of Article 14 of the Constitution, the legislature is obliged to adhere to the principle of equality before the law. In this respect, it must regulate the same legal positions equally, but may regulate certain legal positions differently on the condition that this is not done in an arbitrary manner. The legislature cannot be deemed to act arbitrarily when the distinction is based on reasonable grounds derived from the matter at hand, or on the basis of another objectively substantiated reason.

36. According to the assessment of the Constitutional Court, the legislature had well-founded reasons for the distinction in this case. The assets were confiscated at a time when Yugoslavia had been ravaged after the end of the Second World War, with its citizens sustaining war damage of considerable magnitude. There were also internationally binding war reparations agreed for the compensation of this damage, and the treaties with numerous other countries on the indemnification of their citizens for the confiscated assets demonstrate that foreign citizens had either already been compensated for the confiscated assets or were entitled to compensation.
37. The National Assembly's claim that the SFRY concluded a number of treaties under which foreign states assumed the obligation to compensate their citizens for the nationalised assets is true. For example, the provision of the second paragraph of Article 27 of the State Treaty for the Re-establishment of an Independent and Democratic Austria (Official Gazette FPNRY [Federal National Republic of Yugoslavia], MP, No. 2/56) specifies that the FLRY has the right to seize, retain or liquidate Austrian assets, rights, and interests within Yugoslav territory at the time this treaty comes into force, and the Austrian government undertakes to compensate Austrian citizens whose assets are confiscated in this manner. The Decree on the Liquidation of Austrian Assets on the basis of the State Treaty for the Re-establishment of an Independent and Democratic Austria (Official Gazette FPNRY, No. 6/57) determined (point II) that goods, rights, and benefits directly attached to the Austrian state or Austrian legal entities or natural persons shall be considered Austrian goods. The Instructions for Implementing the Decree, which the Federal State Secretary of Finance issued on the basis of the authority vested in him by the Decree (Official Gazette FPNRY, No. 4/67), determined (point 3) that assets owned by an Austrian citizen on 13 March 1938 (the day of the Anschluss) and that remained such on 28 April 1945 (the day Austria was established) will be deemed Austrian assets that were transferred to the ownership of the FPNRY on the basis of the Act on the Transfer of Enemy Assets to State Ownership and on the Sequestration of Assets of Absent Persons (Official Gazette DFY, No. 2/45, and the Official Gazette FPNRY, No. 63/46; – hereinafter referred to as the ATEA) or on any other legal grounds. For nationalisations carried out on the basis of the regulations referred to in point 8 of the first paragraph of Article 3 of the DenA, the states concluded the Treaty between

SFRY and the Republic of Austria on the Regulation of Specific Property Law Issues (Official Gazette SFRY, MP, No. 9/81), according to which (first paragraph of Article 2), similarly, Austrian citizenship at the time of the nationalisation was taken into account as the criterion. Pursuant to the Treaty between the Governments of the USA and the FPRY on the Financial Claims of the USA and its Citizens (Official Gazette Presidium of the People's Assembly of FPRY, No. 25/51), in which the question of compensation for US assets on account of nationalisation and other dispossessions of assets between 1 September 1939 and the day the treaty was concluded was regulated, only the persons with US citizenship at the time of the nationalisation or other dispossession are entitled to compensation (Article 3).

38. Treaties were also concluded with other states (Hungary, Italy, Switzerland, and Turkey). One of the criteria for compensation under these treaties is the requirement that the individuals were citizens of this foreign state at the time the assets were nationalised (e.g. the second paragraph of Article 5 of the Treaty between the FPRY and the Swiss Confederation, which refers to the compensation of Swiss interests in Yugoslavia affected by measures of nationalisation, dispossession and restrictions (Official Gazette FPRY, No. 16/49) and Article 6 of the Protocol on the Compensation of Turkish Assets and Property Interests in Yugoslavia (Official Gazette FPRY, No. 23/50)). With the provisions of the first paragraph of Article 3 of the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, Slovenia explicitly regulated the legal succession of the treaties concluded by Yugoslavia. Therefore, Slovenia is also obliged and entitled to adhere to these treaties when adopting the laws, in accordance with Article 8 and the second paragraph of Article 153 of the Constitution. The third paragraph of Article 10 of the DenA also explicitly states that persons who received or were entitled to compensation from a foreign state for confiscated assets were not deemed beneficiaries under this Act.
39. As is evident from the aforementioned and other treaties, aliens had the opportunity to claim compensation for confiscated assets from the state whose citizenship they possessed. Yugoslav citizens however did not have this option. It is evident from the legislature's aforementioned basis for drafting this Act that the legislature considered precisely those confiscations of property for which no appropriate, or even any, compensation was paid to be unjust. Yugoslav citizens who left Yugoslavia after the Second World War were generally unable to obtain foreign citizenship quickly, and shared the ill fate of displaced persons. Those Yugoslav citizens who remained in the state were deprived of the right to free economic initiative for decades owing to the constant and systematic threat to human rights and fundamental freedoms in the then communist system. Also for this reason, the status of aliens at the time differed from the status of Yugoslav citizens.
40. For the reasons stated above, a distinction based on citizenship in the challenged provision is constitutionally admissible. The legislature had objectively substantiated reasons due to which it could implement the aforementioned distinction. Therefore, it is impossible to accuse it of acting arbitrarily. In view of the aforementioned, the

challenged provision is not inconsistent with Article 14 of the Constitution, which introduces the principle of equality. For the same reasons, the challenged provision is also not contrary to the provisions of the treaties that bind Slovenia and prohibit the legislature from acting in an arbitrary manner. Above all this applies to the provisions of Article 14 of the ECHR and Article 26 of the International Covenant on Civil and Political Rights. At the time of its establishment, Slovenia recognised legal continuity with the former Yugoslav state and with the provision of Article 39 of the CRSA it also explicitly established legal continuity in relation to the issues of citizenship. Therefore, the challenged provision is also not problematic with respect to it relying on the Yugoslav citizenship that existed at the time of nationalisation.

### B – III

41. It is not the second paragraph of Article 9 of the DenA that denies the status of beneficiary to a petitioner who has been issued a negative declaratory decision on citizenship in an administrative procedure on the basis of the second paragraph of Article 35 of the CA, but the first paragraph of Article 9 of the DenA, since the latter provision determines that a beneficiary is someone who was a Yugoslav citizen at the time of the nationalisation and whose citizenship was recognised after 9 May 1945 by law or treaty. The answer to the question of who was a Yugoslav citizen is evident from the regulations applicable for determining the existence of citizenship. The Constitutional Court may review the constitutional admissibility of the application of the second paragraph of Article 35 of the CA from the perspective of whether the provision was, at the time of its creation, contrary to the general principles of law which were recognised by civilised nations and, in that respect, whether its application in the present day proceedings conducted by state authorities is consistent with the Constitution.
42. The DFY Citizenship Act (Official Gazette DFY, No. 64/45 – hereinafter referred to as the DFYCA), which entered into force on 28 August 1945, determined in the first paragraph of Article 35 that, from the day this Act enters into force, all those who were Yugoslav citizens under valid regulations are deemed Yugoslav citizens. The provision of Article 36 of the DFYCA specified that, unless determined otherwise by a treaty, Yugoslav citizenship under the provisions of this Act shall be obtained by all those who have a right of domicile or a domicile in the jurisdiction of municipalities in the territories which become part of the DFY according to a treaty and those who by nationality belong to one of the nations of Yugoslavia and reside in this territory, unless they emigrate from the Yugoslav state territory or unless based on special regulations they opt for their previous citizenship. Pursuant to the provisions of Article 36 of the DFYCA, it is not possible to state that all persons who were domiciled in municipalities of the Kingdom of Yugoslavia automatically became citizens of the DFY, since this Act prescribed two conditions for obtaining citizenship. The second, negative condition was that the persons must have not emigrated or opted for their previous citizenship. In the opinion of the Constitutional Court, this condition refers to both the aforementioned categories of persons. The Act Confirming and

Amending the DFY Citizenship Act, dated 23 August 1945, confirmed and amended the DFYCA based on the third paragraph of Article 136 of the Constitution of the FPRY, also renaming it to: the FPRY Citizenship Act (CA). This Act specified in the first paragraph of Article 35 that persons who were citizens of the FPRY under regulations in effect on 28 August 1945 shall be deemed citizens of the FPRY. The provision of Article 36 of the DFYCA that tied the acquisition of Yugoslav citizenship to the condition of domicile jurisdiction and to an additional condition was retained: “if such a person does not emigrate from the state territory of the FPRY or does not opt for their previous citizenship under special regulations”. With the amendment to the Act in 1948 (Official Gazette FPRY, No. 105/48), the provision of Article 36 remained unchanged, adding a new second paragraph to Article 35 of the CA, according to which the persons of German nationality who lived abroad and who during or prior to the war violated their civic responsibilities through their disloyal conduct against the national and state well-being of the nations of the FPRY shall not be deemed citizens of the FPRY pursuant to the first paragraph of Article 35.

43. The CA did not envisage the issue of declaratory decisions regarding which persons obtained Yugoslav citizenship on the basis of statutory provisions. In accordance with Article 26 of the CA, under which the minister of the interior was authorised to prescribe the manner of keeping records of citizens and regarding the issuance of citizen identity cards, Rules on the Implementation of the CA (Official Gazette FPRY, No. 98/46) were issued. These Rules determined that a register of citizens was to be established by no later than 31 December 1947. In accordance with the provision of Article 12 of these Rules, entries in the register of citizens were carried out *ex officio*, the first entry being made on the basis of the notification of permanent residents from the territory of the People’s Councils, for which a register of citizens had been kept based on the registers of domiciled people and other evidence available at the time. This entails that the determination of whether a person obtained Yugoslav citizenship was not made for persons who did not register for entry into the register of citizens unless they themselves requested the issue of declaratory decisions. Obtaining citizenship in accordance with the provisions of Articles 35 and 36 of the CA had an *ex lege* effect. If the conditions were not met, citizenship also could not be obtained. Entry in the register of citizenship, i.e. the register of citizens, was only carried out after the declaratory proceedings and was only a reflection of whether citizenship was obtained or not. The entry, as petitioners claim, was only carried out in 1947, after the establishment of the registers of citizens.
44. The provisions of the second paragraph of Article 35 of the CA cannot be interpreted without taking into consideration the provision of Article 36 of the CA which has remained unchanged in terms of content since 28 August 1945. It is evident from the historical sources (Dr Dušan Nećak: *Nekaj osnovnih podatkov o usodi nemške narodnostne skupnosti v Sloveniji po letu 1945* [Some Key Data on the Fate of the German National Community in Slovenia after 1945]; Zgodovinski časopis, No. 3, Ljubljana 1993) that the majority of the so-called “Volksdeutsche” left Slovenia together with the departing German army; a few thousand remained who are said to have “vanished” after the

departure of the German occupation army, while it is said to be indisputable that at the end of 1946 “there was practically not a single German living in the territory of Lower Styria (Štajerska)”. It is evident even from the documents the petitioners submitted that the petitioners, or their legal predecessors, emigrated from Slovenia in 1945 or 1946, or were deported by the authorities at the time. In 1948, when the amendment to the CA, including the challenged provision, was implemented, these persons were therefore abroad. In view of the aforementioned provision of Article 36 of the CA, already valid as of 28 August 1945, persons who had emigrated from Yugoslavia did not obtain citizenship of the DFY or the FPRY, even if they had been domiciled in municipalities in a territory which belonged to Yugoslavia. The challenged provision of the CA, as the petitioners allege, and as the competent administrative authority itself states, was applied retroactively from 28 August 1945 to its date of entry into force and is now applied in the same way by the competent administrative authorities in the present day proceedings for deciding on citizenship.

45. According to this regulatory framework, the post-war Yugoslav authorities denied Yugoslav citizenship to persons of German nationality who were loyal to the German Reich during the occupation. This decision was the subject of the sovereign assessment of the newly created state and a reflection of the international situation at the time. Every state has the right to determine who its citizens are through its legislation. Other states recognise such a regulatory framework if it complies with the international customs and general principles of law recognised by civilised nations. The Constitutional Court cannot review the content of the decision itself. However, it needs to be established that such a regulatory framework was not contrary to the general principles of law that were already recognised at that time by the civilised nations victims of the Nazi regime during the Second World War. In addition, the legal foundations that defined the responsibility of the German nation for crimes committed and damage caused during the Second World War were established through the appropriate international legal acts that were issued by the allies (the Potsdam Agreement, concluded on 2 August 1945, became the basis for peace treaties). In view of the post-war conditions at the time and the outcome of the war, despite the enforcement of actual retroactivity in the challenged provision, it is impossible to accuse the legislature of acting inadmissibly. In accordance with the principle of legal continuity in determining citizenship, even in present day proceedings conducted by competent authorities on the basis of the challenged provision, the legal validity of this provision must therefore be recognised. Here, the assertions of the petitioners that the application of the challenged provision is contrary to Articles 32, 61, and 63 of the Constitution are unfounded since it does not relate to the regulation of the current legal position of petitioners but to the regulation of their position during the enactment of the regulations regarding Yugoslav citizenship. If the legislature was to implement such a regulatory framework today, it would undoubtedly be contrary to the cited constitutional provisions. In the time at issue, given the aforementioned relevant circumstances of international law, it is impossible to accuse the legislature of violating the freedom of movement, the free expression of affiliation to an

individual's own nation or encouraging national discrimination. Back then, the legislature denied Yugoslav citizenship only to those persons of German nationality who were deemed disloyal - so the basis for the inequality was not nationality, but as the National Assembly alleges, the activity of individuals during the war. Therefore, the application of such a provision in determining citizenship is admissible from the point of view of legal continuity. Similarly, the allegation that the challenged provision is contrary to Article 27 of the Constitution is also without merit. The presumption of innocence is a special constitutional right guaranteed by this constitutional provision to anyone who is accused of a criminal offence. Neither the provision of the second paragraph of Article 35 of the CA nor the provision of the third paragraph of Article 63 of the DenA relate to criminal proceedings or to the regulation of criminal liability.

#### **B – IV**

46. The provision of the third paragraph of Article 63 of the DenA reads: "At the request of the authority referred to in Article 54 or 56 of this Act, the municipal administrative authority responsible for internal affairs shall issue a declaratory decision on the citizenship of a beneficiary if the latter is not registered in the register of citizenship. It is not possible to determine disloyal conduct against the interests of the nations and the state of the FPRY in this procedure". This provision is comprised of two parts. The petitioners are challenging the second part; i.e. the part that relates to the determination of disloyalty. The regulatory framework therefore prohibits the competent authority from determining the disloyalty of persons in the procedure determining citizenship in cases where it is necessary to apply the provisions of the second paragraph of Article 35 of the CA. According to the assertions of the National Assembly, this provision supposedly favours beneficiaries, since it prevents the aversion of the affected persons to the previous political regime from being considered disloyalty. However, the position in the case law is different – not that disloyalty should not be established, but the position of the Supreme Court (which is evident from the judgments presented by the petitioners) is to interpret the provision of the third paragraph of Article 63 of the DenA as a legal fiction of disloyalty which is impossible to disprove. The Constitutional Court believes that such an interpretation of the third paragraph of Article 63 of the DenA does not constitute a legal fiction, but can only be considered an irrebuttable legal presumption. Legal presumption exist when it is deemed by law, without evidence, that certain facts exist or do not exist on the basis of their relation to other facts, the existence (or non-existence) of which is demonstrated under general rules. Presumptions thus presuppose two facts which are in correlation: the first fact which is difficult to prove and whose existence (non-existence) is presumed by law, and the second, which ordinarily has a specific relation to the first fact, is easier to prove and must be demonstrated under general rules. In this event, after establishing the facts that the person was of German nationality and lived abroad, which is proven under general rules, the competent authorities considered

these persons to also have been disloyal on the basis of the challenged statutory provision. On the other hand, a legal fiction is when a regulation deems a specific fact to be true, despite it knowing that it is not or that it does not even exist, or *vice versa* (a fact is deemed non-existent despite existing in reality). A legal fiction thus differs from a legal presumption in that a presumption presupposes as true something that is probably true, whereas a legal fiction considers as true something that is known to be untrue. In the case in question, such an interpretation actually creates an irrebuttable legal presumption, which precisely due to its irrefutability closely resembles a legal fiction, but is not a legal fiction.

47. Given the aforementioned, the Constitutional Court believes it is inadmissible for a competent authority to apply the provision of the second paragraph of Article 35 such that it relates to all persons of German nationality, without making distinctions on the basis of the criterion determined by the legislature at the time (the disloyalty criterion). Such use of the provisions of the second paragraph of Article 35 of the CA entails a discrimination against persons of German nationality contrary to the first paragraph of Article 14 of the Constitution. In addition to the CA, the post-war regulations, which serve as the basis for the nationalisation of German assets, indicate that it was possible to deprive of their citizenship only citizens of German nationality who were disloyal. Discrimination in this case is not discrimination according to criterion of nationality but discrimination which had its basis at the time on the German occupation and on the fact, confirmed by historical sources, that the majority of the persons with German nationality were Nazified at the time of the occupation. The aforementioned case law is not consistent with the principle of equality as it sets different conditions compared to the conditions that existed at the time the assets were nationalised. In view of the aforementioned historical reasons, which were based on the internationally established liability of persons of German nationality on account of their loyalty to the Nazi regime, the legislature could establish a presumption of disloyalty, but not in a way that would prevent its rebuttal. With this kind of interpretation, the measure of not recognising Yugoslav citizenship relates to all persons of German nationality, including those who could prove their loyalty, as well as those who were considered disloyal without reason, perhaps due to the unlawful and unjust behaviour of the post-war Yugoslav authorities. The legislature did not cover these persons under the third paragraph of Article 63 of the DenA. If it had done so, it would have set a distinction by nationality, instead of a distinction according to the loyalty criterion. In addition, the legislature could have designed the regulatory framework according to criteria that differ from the criteria that applied at the time of the confiscation of assets, which would have been deemed unequal treatment without any grounds in the circumstances that existed at the time. The interpretation of the third paragraph of Article 63 of the DenA, under which the presumption of disloyalty cannot be challenged by evidence to the contrary, is therefore contrary to the first paragraph of Article 14 of the Constitution.
48. The aforementioned interpretation of the challenged provision is also contrary to the provision of Article 22 of the Constitution. A party in the procedure is prevented

from proving their loyalty; however, as is evident from the positions of the National Assembly and the clarifications of the Ministry of the Interior, the competent authorities responsible for proving the status of German nationality may also put forward evidence which essentially proves the disloyalty of persons. A party may not challenge such allegations, since the Act supposedly prohibited this under the interpretation that has been used to date. Therefore, the provision of the third paragraph of Article 63 of the DenA should be interpreted as a presumption against which evidence to the contrary is possible and admissible, thereby allowing a party to prove his or her loyalty.

49. In the disputed part of the challenged provision, the legislature instructed the competent authority to not conduct the taking of evidence during the procedure for determining citizenship and to not demonstrate the disloyalty of a person. However, it did not prevent individuals from proving their loyalty under such a regulatory framework. It is possible to reach the conclusion that this was the intention of the legislature from the provision of the second paragraph of Article 9 of the DenA. It is constitutionally admissible for the legislature to emphasise the presumption of disloyalty; this is grounded in historically proven circumstances, if it simultaneously does not prohibit individuals from proving the opposite in the process of exercising their rights. The erroneous interpretation of the third paragraph of Article 63 of the DenA in specific proceedings does not constitute grounds to abrogate this provision, as under general rules of interpretation it is only possible to interpret it in the manner described above. That is why the Constitutional Court decided that the provision of the third paragraph of Article 63 of the DenA is not inconsistent with the Constitution. Here, the Constitutional Court did not decide on the allegations regarding the use of specific data in procedures for determining citizenship, since these can only be subject of specific proceedings and, therefore, also subject of the potential specific constitutional court review of acts issued in these proceedings.

## **B – V**

50. The DenA classified the Avnoј Decree on the Transfer of Enemy Assets to State Ownership, the State Management of the Assets of Absent Persons and on the Seizure of Assets which was Forcibly Confiscated by the Occupation Authorities (hereinafter referred to as the DTEA) and the ATEA among the legal bases for denationalisation (points 20 and 21 of Article 3). At the same time, the existence of Yugoslav citizenship at the time of the nationalisation was set as a criterion in the first paragraph of Article 9 of the DenA. In accordance with point 1 of the first paragraph of Article 1 of the DTEA, all the assets of the German Reich and its citizens were transferred to state property. Pursuant to point 2 of the first paragraph of Article 1 of the DTEA, all assets belonging to persons of German nationality, with the exception of the Germans who fought in the ranks of the National Liberation Army and Yugoslav partisan detachments or were citizens of neutral countries and showed no hostility during the occupation were also transferred to state property. The presidency of

AVNOJ issued a special mandatory explanation (Official Gazette DFY, No. 39/45) of the cited point 2 of the DTEA, in which it specified: “2. Civil rights and assets shall not be dispossessed from the citizens of Yugoslavia of German nationality or of German origin or surname:

- a) who took part as partisans or soldiers in the national liberation struggle or actually took part in the national liberation movement;
- b) who were already assimilated as Croats, Slovenes or Serbs before the war and did not join the Kulturbund nor appear as members of the German national community during the war;
- c) who during the occupation refused to become part of the German national community when requested to do so by the occupying or Quisling authorities;
- č) who, despite their German nationality, concluded a mixed marriage with persons of one of the Yugoslav nationalities, or with persons of Jewish, Slovak, Rusyn, Hungarian, Romanian or any other recognised nationality.” All these groups had to ensure that their actions during the occupation were not contrary to the liberation struggle of the nations of Yugoslavia and did not aid the occupier in any way. The substance of this interpretation was incorporated into the provisions of the ATEA. The assets belonging to those persons of German nationality who were not disloyal could therefore not be confiscated on the basis of the DTEA or the ATEA. The legislature clearly deemed that injustices had occurred in the confiscation of property, especially due to the behaviour of the post-war authorities at the time, which were meant to be remedied with the implementation of the DenA. The legislature, in adopting such a regulatory framework, drew particular attention to the fact that the DenA does not allow for the restitution of property to persons of German nationality to whom Yugoslavia denied citizenship on account of them opting for the Third Reich (“Volksdeutsche”) or their disloyal behaviour towards the national and state interests of the nations of the FPRY (draft DenA, Gazette of the National Assembly of the Republic of Slovenia, No. 21/91). The legislature therefore deliberately excluded disloyal persons of German nationality from denationalisation. The classification of the regulations alone under Article 3 of the DenA does not automatically give a person the status of a denationalisation beneficiary. This status is provided only by the provisions which the petitioners are challenging. With this regard, the second paragraph of Article 9 and Article 12 of the DenA, in addition to the first paragraph of Article 9, relate to persons of German nationality.

**51. The second paragraph of Article 9 of the DenA determines:**

“Natural persons under Articles 3, 4, and 5 of this Act who, at the time the assets were nationalised, were not entered in the records of citizens (register of citizens) for reasons referred to in the second paragraph of Article 35 of the FPRY Citizenship Act (Official Gazette DFY, No. 64/45, and Official Gazette FPRY, Nos. 54/46 and 105/48) are not considered beneficiaries unless the individual was interned for religious or other reasons or fought on the side of the anti-fascist coalition.”

Pursuant to the second paragraph of Article 9 of the DenA, persons who were not entered in the register of citizens at the time of the nationalisation for reasons referred to in the second paragraph of Article 35 of the CA, were supposedly nevertheless deemed beneficiaries if they had been interned or fought on the side of the anti-fascist coalition. At the time of the confiscation of assets of persons of German nationality, these persons clearly could not have been entered in the register of citizens, as the petitioners correctly state, since such register was not kept at that time. Given that the entry in the register of citizens was merely considered a record and not constitutive in nature, the provisions of the second paragraph of Article 9 of the DenA cannot be interpreted in a way to tie the reasons referred to in the second paragraph of Article 35 CA to entries in the records, but rather to obtaining or not obtaining citizenship - the entry in the records then follows only after obtaining citizenship. If a person did not obtain citizenship on these grounds, then they also could not be subsequently entered into the records at the time the registers of citizens were established or thereafter.

52. In the above paragraphs of this reasoning, the Constitutional Court defined how the provision of the third paragraph of Article 63 of the DenA must be interpreted. The provisions of the second paragraph of Article 9 of the DenA cannot be interpreted without reference to what was explained above. In order to establish whether a person did not become a Yugoslav citizen for reasons determined in the second paragraph of Article 35 of the CA, it is first necessary to carry out the procedure for determining citizenship in which a rebuttable presumption of disloyalty applies to persons of German nationality. The individual is given the opportunity to provide evidence to the contrary by any means of evidence. In the second paragraph of Article 9 of the DenA, the legislature provided parties means of evidence that have greater value in declaratory proceedings. An individual who demonstrates that he was interned for religious or other reasons or who demonstrates that he fought on the side of the anti-fascist coalition, is thus deemed to have succeeded in demonstrating loyal actions for the requirements of the procedure for determining citizenship as a condition for entitlement to denationalisation on the basis of the challenged provision. Such evidence creates the presumption of their loyalty. The challenged provision therefore favours potential beneficiaries to which the provision refers. At the same time, it does not interfere with the legal position of other potential beneficiaries to denationalisation, nor with the legal position of the persons of German nationality who can invoke the position of denationalisation beneficiary by proving their loyalty in the proceedings determining citizenship under the third paragraph of Article 63 of the DenA, as follows from this reasoning. The legislature may treat different legal positions differently, so the allegation that the challenged provision, contrary to the second paragraph of Article 14 of the Constitution, creates inequality between potential denationalisation beneficiaries is without merit.
53. The Potsdam Agreement explicitly opened the possibility of the reimbursement of reparation claims to individual states from German assets located outside the western zones. The Agreement on Reparation from Germany, on Establishing Inter-Allied Reparation Authorities and Restitution of Monetary Gold (concluded in Paris

on 21 December 1945), of which Yugoslavia was also a signatory, even explicitly envisaged the right of individual countries to confiscate German assets in their territory as repayment of their claims for reparations because of the war damage caused by German military occupation. These were international legal sources, which also bound and entitled the then Yugoslavia to a special (non-contractual) method of obtaining reparations for war damage. For these reasons, the challenged provision of the second paragraph of Article 9 of the DenA is not contrary to the Convention on the Prevention and Punishment of the Crime of Genocide, nor to the general principles of international law. Similarly, it is also not contrary to Article 26 of the Constitution, as the first petitioner claims, without providing any grounds for the lack of conformity. The first paragraph of Article 26 of the Constitution guarantees compensation for damage caused to an individual by a state authority, local government authority or a bearer of public authority through its unlawful conduct in performing its duty or any other activity. This constitutional right to compensation is a special right, which may be regulated differently for denationalisation rights, which are not common claims for damages but the specific reparation of injustices. Therefore, the provision of the second paragraph of Article 9 of the DenA is not inconsistent with this constitutional provision.

#### **B – V**

**54. Article 12 of the DenA determines:**

“If a natural person referred to in the second paragraph of Article 9 of this Act is not a beneficiary hereunder, his spouse or heir who is first in line to inherit shall be deemed a beneficiary, provided that Yugoslav citizenship was recognised under the regulations referred to in the first paragraph of Article 9 of this Act.”

Through this provision, the legislature actually widened the pool of beneficiaries entitled to denationalisation in the specific cases in which persons whose assets were nationalised, would not be entitled to denationalisation on account of the principle determined in the first paragraph of Article 9 of the DenA. This intention of the legislature is entirely legitimate and cannot be disputed. The legislature would not have acted in an inadmissible manner if he had not opted for such a solution. Since it did, however, it should treat similar cases, essentially, in a similar manner if there are no objective or well-founded grounds to differentiate between them.

**55. According to Article 12 of the DenA, only the legal successors of the persons who did not obtain Yugoslav citizenship for the reasons determined in the second paragraph of Article 35 of the CA may become denationalisation beneficiaries. The status of such beneficiary is only given to the spouse and the heirs who are first in line to inherit under specific conditions: 1) to a spouse only if, taking into account the provisions of the first paragraph of Article 9 of the DenA, he/she was a Yugoslav citizen at the time the assets of the spouse – the owner of the property – were nationalised, and this citizenship was recognised to him/her after 9 May 1945 by law or treaty; 2) to children, if their citizenship was recognised on that date by a law or treaty referred to in the first paragraph of Article 9 of the DenA, or later at**

birth. In Article 12, the Act restricted the determination who can be a beneficiary to the persons who were the closest relatives of the owner of the nationalised assets, i.e. to those who were generally directly affected by the loss of the assets - clearly the spouse and descendants of the owner of the nationalised assets. Referring to the spouse, such can only be the person who was the spouse of the owner at the time the assets were nationalised. Since the challenged provision maintains the principle of Yugoslav citizenship as a condition under the first paragraph of Article 9 of the DenA, this also applies to the spouse, who must have been a Yugoslav citizen at the time of nationalisation. In accordance with the first paragraph of Article 9 of the DenA and Article 12 of the DenA, this citizenship must also have been recognised after 9 May 1945. The descendants of the decedent, regardless of their birth date, were directly affected by the confiscation of the assets, so it is impossible to require that they would have to have been born at the time of the confiscation of the property.

56. The challenged provision does not give such a status to the legal successors of other persons who also were not Yugoslav citizens. The Constitutional Court agrees with the petitioners that the legislature had no objectively grounded reasons for such a distinction. Therefore, such a distinction is contrary to the principle of equality set out in the second paragraph of Article 14 of the Constitution. Since this is an instance in which the legislature failed to regulate a certain issue by a statutory provision, which it should have regulated in accordance with the principle of equality, the Constitutional Court only abrogated the part of the wording of Article 12 of the DenA preventing such regulation, i.e. the words “of the second paragraph”, which ties the challenged provision only to the second paragraph of Article 9 of the DenA. The Constitutional Court draws attention to the fact that, pursuant to the provision of the second paragraph of Article 10 of the DenA, persons who were awarded or had the right to be awarded compensation for confiscated assets from a foreign state may not obtain the position of denationalisation beneficiary under any circumstances.
57. However, it is impossible to agree with the position that the challenged provision interferes with the constitutional right to inheritance determined in Article 33 of the Constitution. In accordance with the provision of the second paragraph of Article 67 of the Constitution, the manners and conditions of inheritance shall be determined by law. The legislature may treat differently the manner of inheritance and the conditions under which it is possible to inherit from a decedent in relation to the different relations of relatives to the decedent. The subject of the provision of Article 12 of the DenA does not even refer directly to the regulation of inheritance itself. The provision regulates the widening of the pool of beneficiaries, that is those with respect to whom it is even possible, on the basis of the right to inheritance, to enter into legal succession, which the DenA regulates in the same manner for all legal successors in the provision of Article 15. A beneficiary should generally be that person whose assets were confiscated. Therefore, the conduct of the legislature that limited the transfer of the beneficiary position only to those who were in the closest relationship with the person whose assets were nationalised is not arbitrary. In this respect, the provision is not inconsistent with Article 14 of the Constitution.

58. The Constitutional Court decided on the costs of proceedings claimed by the parties in accordance with the first paragraph of Article 34 of the CCA, as there was no reason to adopt a different decision.

**C**

59. The Constitutional Court adopted this decision on the basis of the first paragraph of Articles 40 and 25 and the first paragraph of Article 34 of the Constitutional Court Act, composed of Dr Tone Jerovšek, the President, and Judges Mag. Matevž Krivic, Mag. Janez Snoj, Dr Janez Šinkovec, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. The decision was reached unanimously.

*Dr Tone Jerovšek*  
*President*

Decision No. **U-I-146/07**, dated 13 November 2008

### DECISION

At a session held on 13 November 2008 in proceedings to review constitutionality initiated upon the petition of Evgen Bavčar, Ajdovščina, represented by Jože Hribernik, attorney in Ljubljana, the Constitutional Court

*decided as follows:*

1. The Civil Procedure Act (Official Gazette RS, Nos. 26/99, 96/02, 12/03 – official consolidated text, 2/04, 36/04 – official consolidated text, 52/07, 73/07 – official consolidated text, and 45/08) is inconsistent with the Constitution, as it does not regulate the right of blind and partially sighted persons to access court documents and written applications of parties and other participants in proceedings in a form accessible to them.
2. The National Assembly must remedy the established inconsistency within a period of one year from the publication of this Decision in the Official Gazette of the Republic of Slovenia.
3. Until the established inconsistency is remedied, courts in civil proceedings must provide blind and partially sighted persons, upon their request, access to court documents and written applications of parties and other participants in proceedings in a form accessible to them. The costs required for such are to be paid from the funds of the court.

*Reasoning*

#### A

1. The petitioner challenges Article 102 of the Civil Procedure Act (hereinafter referred to as the CPA), which regulates the right of participants in proceedings to use their language at hearings and during other oral parts of the proceedings. He alleges that the challenged provision is inconsistent with the Constitution as it does not regulate the right of blind persons to Braille transcripts of court documents and the written applications of parties and other participants in proceedings. He explains that he has been blind since the age of twelve and therefore in the pending civil proceedings

against him he requested a transcription of the claim and other documents into Braille at the expense of the opposing party. The court of first instance allegedly dismissed his request by stating that the CPA does not require courts to provide blind persons with Braille transcripts of written applications. According to the court's assessment, Article 102 of the CPA ensures participants in proceedings only the right to use their language at hearings and during other oral parts of the proceedings, but not also in written applications, which have to be prepared in the official language of the court. The court allegedly dismissed the petitioner's allegations regarding his unequal position in proceedings by stating that he is ensured an equal position due to the fact that he is represented by a lawyer. It allegedly also informed the petitioner that he could deposit an advance payment for a transcription of the relevant written applications into Braille. In the petitioner's opinion, the above-described conduct of the court proves that blind persons are subject to indirect discrimination in civil proceedings. Therefore, the challenged regulation is allegedly inconsistent with the principle of equality before the law determined by Article 14 of the Constitution. The petitioner further states that the obligation of the state to ensure to everyone the equal protection of rights in proceedings also follows from Article 22 of the Constitution. Therefore, he also claims a violation of that provision. Furthermore, he claims that the challenged statutory regulation does not enable blind persons to effectively communicate with the court and the opposing party, and therefore it is allegedly also inconsistent with the right to judicial protection (Article 23 of the Constitution) and the right to an effective legal remedy (Article 25 of the Constitution). The fact that the legislature failed to provide a special regulation for blind persons that would enable them to effectively exercise their rights in judicial proceedings is allegedly also constitutionally disputable in light of the fact that the legislature already appropriately regulated the special position of some categories of persons with disabilities in proceedings before courts and other state authorities. The petitioner draws attention to the fact that in accordance with the Slovene Sign Language Act (Official Gazette RS, No. 96/02 – hereinafter referred to as the SSLA), deaf persons have the right to use Slovene sign language in proceedings before state authorities, whereby the payment of the costs of an interpreter must be provided by the state authorities. In the petitioner's opinion, the positions of blind and deaf persons in proceedings before state authorities are essentially similar. Therefore, he believes that no sound reasons exist for their different treatment. Such allegedly constitutes another reason substantiating the inconsistency with Article 14 of the Constitution.

2. The National Assembly replied that the regulation contained in Article 102 as well as in Articles 103 and 104 of the CPA entails the implementation of the right to use one's language and script determined by Article 62 of the Constitution. It drew attention to the fact that the legislature enjoys a broad field of discretion when determining the manner of the implementation of that right. What is allegedly crucial is that the legislature fulfils the purpose pursued by the cited provision, i.e. to ensure a fair trial. Therefore, in the opinion of the National Assembly, the right to use one's language and script applies particularly to the oral part of the proceedings.

However, when regulating the right to use one's script in the written part of the proceedings, the legislature allegedly enjoys a particularly broad field of discretion. Such is allegedly understandable, as a party who does not understand the language is at a severe disadvantage during [the oral part of] the proceedings, whereas he or she may prepare written applications also with the assistance of other persons. According to the National Assembly, the same, *mutatis mutandis*, also applies to blind persons. As the nature of their disability allegedly does not prevent them from following the oral part of the proceedings and actively participating therein, their disability allegedly does not render their active participation at hearings impossible. In addition, they can allegedly understand written applications with the assistance of a third party (as equally applies to other persons). The National Assembly emphasises that when interpreting the content of the above-mentioned constitutional provision, Article 11 of the Constitution, which determines that in Slovenia the official language is Slovene, must also be taken into consideration. Thus, already pursuant to the Constitution, the Slovene language is allegedly privileged in relation to other languages. Moreover, in principle the right to use one's language allegedly does not ensure parties to proceedings the right to the free assistance of an interpreter.

3. In the opinion of the National Assembly, other procedural provisions ensure the right of blind persons to a fair trial with regard to the written part of the proceedings. The National Assembly assesses that blind persons can participate in the written part of the proceedings through an authorised representative. If due to their unfavourable financial situation they cannot cover the cost of such a representative, they may, in the opinion of the National Assembly, request that the court appoint them a lawyer free of charge (Article 170 of the CPA) or they may request free legal aid in accordance with the rules determined by the Free Legal Aid Act (Official Gazette RS, Nos. 96/04 etc. – hereinafter referred to as the FLAA). A constitutionally consistent interpretation of Article 102 of the CPA allegedly also allows courts to provide blind persons with an interpreter for Braille to assist them in participating in the written part of the proceedings. However, with regard to such, the National Assembly stresses that a blind person has not necessarily been trained to read Braille. The National Assembly is furthermore of the opinion that an authorised representative or interpreter can also assist a blind person to review the content of a written document that is produced at a hearing for evidentiary purposes. If a blind person does not have an authorised representative and he or she does not propose that the court appoint him or her an interpreter, the National Assembly is of the opinion that also the court could inform that person of the content of a document (Article 12 of the CPA) or that it could appoint an interpreter *ex officio* (Article 102 of the CPA). The National Assembly also draws attention to the fact that when regulating civil procedure the legislature must take into consideration the requirements of expeditious, economical, and effective proceedings, the aim of which is to ensure the right of (both) parties to a trial without undue delay and with as little cost as possible.
4. The National Assembly furthermore explains that the regulation of civil procedure does not differ from other procedural regulations. Article 62 of the General

Administrative Procedure Act (Official Gazette RS, Nos. 80/99 etc. – hereinafter referred to as the GAPA) allegedly determines that parties who due to their disability cannot use the language in which the proceedings are conducted have the right to follow the course of proceedings with the assistance of an interpreter. However, in accordance with Articles 113 and 115 of the GAPA, each party is allegedly required to cover their own costs in advance. Furthermore, the National Assembly explains that Article 70 of the Criminal Procedure Act (Official Gazette RS, Nos. 63/94 etc. – hereinafter referred to as the CrPA) indeed determines that a defence with the assistance of a legal representative is also mandatory in instances in which a defendant is mute, deaf, or otherwise unable to conduct his or her own defence, and that, in accordance with Article 92 of the CrPA, the costs and payment of the appointed legal representative are initially paid from the funds of the authority that is conducting the criminal proceedings. However, the National Assembly emphasises that these costs are subsequently recovered from those who are required to pay them in accordance with the law. Moreover, in the opinion of the National Assembly, it must also be taken into consideration that Article 29 of the Constitution guarantees defendants in criminal proceedings additional procedural safeguards in order to ensure them a fair trial.

5. As regards the allegations regarding the unequal regulation of the procedural position of blind persons in comparison to deaf persons, the National Assembly replied that their positions are not comparable due to the different nature of their disabilities. The National Assembly explained that the right to the free assistance of a sign language interpreter is guaranteed to deaf persons due to the fact that they are not capable, either alone or with the assistance of an authorised representative, to effectively follow the oral part of the proceedings and effectively participate therein. The position of blind persons is allegedly different, as the nature of their disability does not prevent them from following the oral parts of the proceedings and actively participating therein. As regards their written communication with the court, the constitutional procedural safeguards are (as already explained) allegedly ensured to blind persons through other measures. The National Assembly moreover draws attention to the provisions of the CPA that allow the audio recording of hearings and thereby provide for the possibility that a blind person can access such audio recordings also after the hearing has been conducted. In light of the above, the National Assembly is of the opinion that also for such reason the regulation of civil procedure is not inconsistent with Article 14 of the Constitution.
6. In the opinion of the Government, Article 102 of the CPA is not inconsistent with the Constitution. The challenged provision allegedly does not place anyone in a less favourable position, nor does it provide anyone with a particular advantage, but, on the contrary, it guarantees the equal treatment of all persons in accordance with Article 14 of the Constitution. Moreover, the Government does not agree with the petitioner that blind persons do not have the right to use Braille already on the basis of Article 102 of the CPA. Therefore, in the opinion of the Government, the challenged provision is also not inconsistent with Articles 22, 23, and 25 of the Constitution.

However, the Government is of the opinion that the petition does justifiably raise the question of whether a special law should also ensure blind persons certain financial entitlements in proceedings before state authorities (e.g. payment for transcriptions into Braille), such as the SSLA ensures deaf persons with reference to the right to use Slovene sign language. The Government adds that the Ministry of Justice will strive to provide the appropriate technical equipment in order to also enable blind persons to follow the course of court hearings by themselves.

7. The petitioner replied that his requests are based on the Convention on the Rights of Persons with Disabilities (Official Gazette RS, No. 37/08, MP, No. 10/08 – hereinafter referred to as the CRPD), which is also binding on Slovenia. He stated that the idea of a lawyer as a conveyor of documents and the idea of “interpreting Braille” (the latter is allegedly also complete nonsense) have been endorsed without previously being assessed by experts. He emphasises that blind persons who can read Braille are independent when reading, whereas in cases when others read to them they are dependant. And allegedly nobody has the right to force dependency on them. The standpoint that as [the petitioner is] a blind person it is only possible to interact with him orally, allegedly places him in the position of a merely speaking, but illiterate, citizen. He emphasises that such attitude is contemptuous of the rehabilitation of blind persons and the 200-year-old tradition of literacy programmes for blind persons that have provided them with the opportunity to lead dignified and independent lives.

#### **B – I**

8. By Order No. U-I-146/07, dated 13 March 2008, the Constitutional Court accepted the petition for consideration and decided to consider the case with absolute priority.
9. The petitioner claims that Article 102 of the CPA is inconsistent with the Constitution as it does not explicitly regulate the right of blind persons to free access to court documents and the written applications of parties and other participants in proceedings in Braille. The challenged statutory provision reads as follows:
  - “(1) The parties and other participants in proceedings may use their language at hearings and during other oral parts of the proceedings before the court. If the proceedings are not conducted in the language of the party or of other participants in the proceedings, they shall be provided, upon a motion filed to this effect or when the court finds that they do not understand the Slovene language, an oral translation of the statements made at the hearing and an oral translation of the documents used as evidence at the hearing.
  - (2) The parties and other participants in proceedings shall also be advised of their right to follow the oral proceedings in their own language through an interpreter. They may waive the right to translation by declaring that they understand the language in which the proceedings are conducted. The fact that the parties were advised thereof and their statements in this regard are entered into the minutes of the hearing.
  - (3) The translations shall be provided by interpreters.”

10. The challenged statutory provision only regulates the right of participants in civil proceedings to use their language in oral (and not written) communication with the court. Therefore, the allegations put forward by the petitioner cannot substantiate its unconstitutionality. However, due to the alleged existence of a so-called unconstitutional legal gap, the Constitutional Court had to establish whether the right of blind persons to Braille transcripts is regulated by some other statutory provision, and, if such is not the case, whether the requirement to regulate such instances follows from the Constitution.
11. With regard to written communication between the court and parties to proceedings, Article 103 of the CPA determines that summons, decisions, and other court documents are sent to the parties and other participants in proceedings in the language officially used by the court. In accordance with Article 104 of the CPA, the same applies to applications that the parties (or other participants) send to the court. The statutory text does not provide a clear answer to the question of whether upon the motion of a party and on the basis of *mutatis mutandis* application of the above-cited statutory provisions a court in civil proceedings should order a Braille transcription of court documents and the written applications of participants in proceedings. Moreover, however, it is of essential importance that no basis for the interpretation that blind persons are ensured transcripts of court documents and the written applications of other participants in proceedings in an accessible form at the expense of the court can be found in the provisions of the CPA. Article 152 of the CPA determines that (as a general rule) each party covers in advance the payment for costs resulting from their actions. In the final analysis, the criterion for the assessment as to who is to cover the costs of proceedings is the criterion of the parties' success in the litigation (Article 154 of the CPA), which is supplemented by the principle of guilt (Article 156 of the CPA), which has a corrective nature, and by individual special rules (Articles 158 through 161 of the CPA), which are not relevant to the case at issue. Unless blind persons are ensured a Braille transcript of court and other documents in proceedings at the expense of the state, we cannot speak of the right to use Braille. Thus, the right of blind persons to free access to court and other documents in proceedings in an accessible form cannot be deduced from the existing procedural provisions on civil procedure by means of interpretation. Such a right of blind persons is also not regulated by any other law. Therefore, the same rules apply to them as apply to all other participants in civil proceedings.
12. The petitioner claims that due to such equal treatment, which fails to take into consideration their special needs, blind persons do not have equal opportunities as regards the possibility to review the content of court and other documents in proceedings in comparison with the opposing party, and that therefore they do not have equal opportunities as regards effective communication with the court and with the opposing party. By these allegations the petitioner claims in substance that blind persons do not have equal opportunities to exercise their right to an adversarial procedure and the right to the equal treatment of parties in civil proceedings. The right to an adversarial procedure guarantees parties that courts will treat them as

active participants in proceedings and enable them to effectively defend their rights and thereby give them the opportunity to actively influence decisions in cases that interfere with their rights and interests. The significance of this right is thus to ensure that the parties are subjects to proceedings and not merely objects thereof.<sup>1</sup> In this respect, it is important that in proceedings the parties cannot effectively exercise the right to be heard unless they are previously given the opportunity to review the entire body of procedural materials.<sup>2</sup> An essential element of the right to the equal treatment of parties in civil proceedings is the requirement of the equality of arms, which entails that the parties to proceedings before the court must be guaranteed equal procedural positions. The parties must thus be ensured equal opportunities when reviewing procedural materials, when presenting their positions, including evidence, and when defending themselves against the opposing party's allegations. In accordance with established constitutional case law, both of the above-mentioned rights follow from the right to the equal protection of rights determined by Article 22 of the Constitution. In view of the fact that this is the central provision of the Constitution that refers to the right to a fair trial,<sup>3</sup> the Constitutional Court hereinafter reviewed whether blind persons are discriminated against in exercising the rights stemming from that constitutional provision because they are treated equally. The right to use one's language and script in judicial proceedings is specifically protected within the framework of Article 62 of the Constitution,<sup>4</sup> however, (as the Constitutional Court has emphasised many times)<sup>5</sup> the constitutional framework of this right follows precisely from the constitutional standards of a fair trial. Therefore, a review of the position of blind persons with regard to the exercise of their constitutional procedural safeguards stemming from Article 22 of the Constitution also encompasses a review of their position from the perspective of the enjoyment of the mentioned human right.

13. As the petitioner does not dispute the position of blind persons during the oral part of proceedings, the Constitutional Court limited its review to only the question of whether blind persons are discriminated against in exercising their right to a fair trial as regards the written part of proceedings.

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1 Held by the Constitutional Court already in Decision No. Up-39/95, dated 16 January 1997 (OdlUS VI, 71), wherein, regarding the right determined by Article 22 of the Constitution, it wrote that "[...] it is based on respect for human personality, since it ensures everyone the possibility to be heard in proceedings that affect their rights and interests, and thus prevents a person from becoming simply an object of the proceedings."

2 See also Decision of the Constitutional Court No. Up-108/00, dated 20 February 2003 (Official Gazette RS, No. 26/03, and OdlUS XI, 49).

3 See, A. Galič, *Ustavno civilno procesno pravo* [Constitutional Civil Procedure Law], GV Založba, Ljubljana 2004, p. 219.

4 Article 62 of the Constitution reads as follows: "Everyone has the right to use his language and script in a manner provided by law in the exercise of his rights and duties and in procedures before state and other authorities performing a public function."

5 See, *inter alia*, Order of the Constitutional Court No. Up-43/96, dated 30 May 2000 (OdlUS IX, 141), and Decision No. Up-404/05, dated 21 June 2007 (Official Gazette RS, No. 64/07, and OdlUS XVI, 101).

## B – II

**The Prohibition of Discrimination due to Personal Circumstances**

14. The first paragraph of Article 14 of the Constitution determines that in Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. This constitutional provision thus prohibits discrimination with regard to guaranteeing, exercising, or protecting human rights and fundamental freedoms regardless of an individual's personal circumstances. With reference to such, it is important that in order to determine a violation of the constitutional prohibition of discriminatory treatment it is sufficient to establish the existence of inadmissible discrimination in the enjoyment of a human right, whereas a petitioner does not have to demonstrate an interference with that human right.<sup>6</sup>
15. The principle of non-discrimination (as a fundamental element of the principle of equality) within the meaning of the first paragraph of Article 14 of the Constitution is established in an essentially different manner than within the meaning of the second paragraph, since non-discrimination with regard to guaranteeing human rights regardless of an individual's personal circumstances exceeds the usual formal framework of equality.<sup>7</sup> The standpoint that from the requirement of non-discriminatory treatment there follows not only the requirement of formal equal treatment but the requirement of substantive equal treatment as well has also been adopted in recent (Slovene and comparative) constitutional case law<sup>8</sup>, as well as in the case law of the ECtHR.<sup>9</sup> A substantive approach to understanding and exercising

6 In its recent case law also the European Court of Human Rights (hereinafter referred to as the ECtHR) exceeded the dependant, ancillary nature of the right to equality in accordance with which a violation of Article 14 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) could only be successfully enforced in connection with a violation of one of the Convention rights (regarding the older case law, cf. P. Mahnič, *Enakost in enakopravnost* [Equality and equality before the law], in: *Javna uprava* [Public Administration], Inštitut za javno upravo, No. 3, Vol. 38, Ljubljana 2002, p. 362). In its recent decisions, the ECtHR has namely emphasised that the application of Article 14 of the ECHR no longer presupposes a breach of other Convention rights and that therefore Article 14 of the ECHR is to this extent autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the ECHR or its Protocols (cf. *Thlimmenos v. Greece*, Judgment dated 6 April 2000, No. 34369/97, Para. 40).

7 M. Cerar, *Nekateri (ustavno)pravni vidiki načela nediskriminacije* [Some (Constitutional) Legal Aspects of the Principle of Non-Discrimination], in: D. Zagorc (Ed.), *Enakost in diskriminacija, Sodobni izzivi za pravosodje* [Equality and Discrimination: Modern Challenges for the System of Administration of Justice], Mirovni inštitut, Ljubljana 2005, p. 46.

8 Cf. L. Šturm, *Člen 14 (načelo enakosti)* [Article 14 (The Principle of Equality)], in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za poudiplomske državne in evropske študije, Ljubljana 2002, p. 181. See also, P. Mahnič, *op. cit.*, p. 358.

9 In recent years, the ECtHR has made a shift from a formal understanding of the prohibition of discrimination, which follows from Article 14 of the ECHR and Article 1 of Protocol No. 12 to the ECHR (Slovenia has not (yet) ratified the Protocol and therefore it is not binding on Slovenia), to a substantive understanding of that concept. In

equality draws attention to the fact that (formal) equal treatment of individuals in equal (i.e. essentially similar) positions does not ensure *de facto* equality of those (formally) equally treated individuals who, due to individual circumstances (e.g. due to a marginal social position, prejudice and stereotypes that are silently lurking in the social morality of the majority, due to past discrimination, or under-representation in certain areas of social life) find themselves in a *de facto* less privileged position.<sup>10</sup> Therefore, the principle of equality allegedly also entails a normative power that allows the law to legitimately create certain differences in order to abolish the differences that are a result of traditional and long-lasting discrimination between people.<sup>11</sup> Such concerns the implementation of the principle of equal opportunities. The Constitutional Court has already recognised such a positive aspect of equality (cf. Decision of the Constitutional Court No. U-I-298/96, dated 11 November 1999, Official Gazette RS, No. 98/99, and OdlUS VIII, 246).

16. Thus, by implementing the concept of substantive equality a differentiated manner of exercising equality is implemented that within a certain scope and under certain conditions includes the prevention of *de facto* or indirect discrimination.<sup>12</sup> Such a concept of equality was also adopted in the Implementation of the Principle of Equal Treatment Act (Official Gazette RS, Nos. 61/07 etc. – hereinafter referred to as the IPETA), which defines equal treatment as the absence of direct and indirect discrimination on grounds of any of the personal circumstances referred to in Article 2 of that Act (Article 4 of the IPETA). In accordance with the third paragraph of Article 4 of the IPETA, indirect discrimination exists when due to an apparently neutral regulation, criterion, or practice a person with a certain personal circumstance was, is, or would be placed in a less favourable position compared to other persons in equal or similar circumstances and conditions, unless these provisions, criteria, or practices are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Discrimination thus also exists when individuals or social groups are formally ensured equal rights or an equal scope of rights, however, individuals who are in a *de facto* less favourable position are disadvantaged with regard to the exercise of their rights or the fulfilment of their obligations.<sup>13</sup>

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accordance with recent ECtHR case law, the right to non-discriminatory treatment in the enjoyment of Convention rights is not only violated when a state treats persons in similar situations differently without providing an objective and reasonable justification, but also when a state without an objective and reasonable justification fails to treat differently persons whose positions are significantly different (cf. the above cited case of *Thlimmenos v. Greece*; for a more detailed consideration of this question, see O. De Schutter, Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights, in: A. Lawson & C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, Hart, Oxford and Portland, Oregon 2005, p. 52). Cf. K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 3rd edition, Thomson, Sweet & Maxwell Ltd, London 2008, p. 273.

10 B. Flander, *Pozitivna diskriminacija* [Positive Discrimination], Univerza v Ljubljani, Fakulteta za družbene vede, Ljubljana 2004, p. 66.

11 P. Mahnič, *op. cit.*, p. 367.

12 B. Flander, *op. cit.*, p. 72.

13 *Ibid.*, p. 71.

17. The requirement of substantive equality follows already from the first paragraph of Article 14 of the Constitution. It is thus important that not only formal equality is ensured, since, as explained above, constitutional case law already exceeded such an understanding of equality. In cases of alleged indirect discrimination, it must be established whether there exists an inequality, not in the legal regulation itself, but in the effects of the legal regulation. In preventing indirect discrimination, the protection of the affected interests or expected benefits namely refers to the result or consequences of the legal regulation (i.e. the differentiation). Such protection requires that the consequences of the adopted legal norms be analysed and that the potential discriminatory effects of the legal regulation be eliminated.<sup>14</sup>
18. In the event of a review of the legal position of a disadvantaged social group (due to a specific personal circumstance determined by the first paragraph of Article 14 of the Constitution), what may also prove to be constitutionally inadmissible is the failure to determine an exception to the general norm if such general norm has discriminatory effects for that social group. In certain instances, the prohibition of discrimination namely also entails the requirement to implement special legal positions or special rights, including certain positive measures that aim to prevent a less favourable position or marginalisation of the weakest links in society and to promote and create equal opportunities for such categories of people in order to ensure their participation in social life on an equal basis with others.<sup>15</sup> Positive measures that are adopted with such a purpose do not entail an interference with the principle of equality,<sup>16</sup> but are intended precisely for its implementation. The ECtHR also adopted the standpoint that from the prohibition of discrimination there also follows the requirement of the prevention of indirect discrimination and consequently also the requirement to adopt appropriate reasonable accommodations that aim to ensure *de facto* equal treatment of disadvantaged social groups.<sup>17</sup>

14 *Ibid.*

15 Legal theory refers to this legal instrument with the expression “positive discrimination in the broader sense”. In contrast, according to legal theory “positive discrimination in the narrower sense” is a legal instrument which implements the unequal (privileged) legal treatment of certain categories of persons in the exercise of rights which as a general rule are ensured to all legal addressees to the same extent and under the same conditions in order to promote or create equal opportunities, in order to promote their more equal representation in the political, economic, social, and other areas of life in society, and in order to eliminate or prevent indirect discrimination and the consequences of past discrimination. Positive discrimination in a narrower sense exists when certain categories of persons are exceptionally and provisionally treated differently (i.e. in a privileged manner) when exercising their rights that as a general rule are ensured to members of different social groups or to all persons under the same conditions and to the same extent (for more, see B. Flander, *ibid.*, pp. 101–102).

16 In Decision No. U-I-283/94, dated 12 February 1998 (Official Gazette RS, No. 20/98, and OdlUS VII, 26), The Constitutional Court indeed adopted the position that ensuring a certain social group special rights entails a deviation from the principle of equality. However, the cited case is different from the case at issue. In the cited case, the Constitutional Court namely reviewed the constitutional admissibility of the special right of the members of autochthonous national minorities to a so-called double right to vote as a form of positive discrimination in the narrower sense.

17 *Cf. D. H. and Others v. the Czech Republic* (Grand Chamber Judgment, dated 13 November 2007): the Grand

## B – III

### The Prohibition of Discrimination due to Disability

19. Numerous international instruments increasingly emphasise that as an objectively disadvantaged social group, persons with disabilities must be ensured *de facto* equal treatment. Such demands are a consequence of the changing social attitude towards persons with disabilities: from a person with a disability as an object, to a person with a disability as a bearer of rights, thus, from a situation in which others decide on their behalf, to a situation in which they decide independently for themselves.<sup>18</sup> In addition to the prohibition of discrimination within the meaning of implementing formal equality, already the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities<sup>19</sup> promoted the idea that society must ensure equal opportunities for persons with disabilities by means of active measures. They also explicitly emphasised the overall importance of accessibility (also to information and communication) in the process of the equalisation of opportunities in all spheres of society (Rule 5). The steadily increasing social awareness of the need to equally integrate persons with disabilities into society is also reflected in the amendment of Article 15 of the European Social Charter (The right of persons with disabilities to independence, social integration, and participation in the life of the community), to which a new third paragraph was added during the revision of the European Social Charter. That paragraph explicitly states that it is necessary to promote the full social integration and participation in the life of the community of persons with disabilities.<sup>20</sup>
20. Also in the legal order of the European Union it has been increasingly underlined that the legislature may not only take into account the prohibition of discrimination,

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Chamber established that the Czech Republic violated Article 14 (the Prohibition of Discrimination) of the ECHR read in conjunction with Article 2 (the Right to Education) of Protocol No. 1 to the ECHR as it did not attempt to eliminate the discriminatory effect caused by legislation in the sphere of education that was the same for all children by means of different (accommodated) treatment of the members of the Roma community.

- 18 Cf. Malaga Ministerial Declaration on People with Disabilities: “Progressing towards full participation as citizens”, which was adopted in 2003 at the Second European Conference of Ministers Responsible for Integration Policies for People with Disabilities, organised by the Council of Europe. The text of the Declaration is published on the website: [http://www.mddsz.gov.si/si/delovna\\_podrocja/invalidi/malaska\\_deklaracija\\_o\\_invalidih/](http://www.mddsz.gov.si/si/delovna_podrocja/invalidi/malaska_deklaracija_o_invalidih/).
- 19 Even though the Rules, which were adopted by Resolution No. 48/96, dated 20 December 1993, were not adopted as a binding international instrument, their introduction stated that although the Rules are not mandatory, they could become international customary law if they were applied by a great number of states that have decided to respect the rules of international law.
- 20 The third paragraph of Article 15 of the revised European Social Charter (Official Gazette RS, No. 24/99, MP, No. 7/99) reads as follows: “With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular: to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.”

but that it must be active in ensuring the equal treatment of persons with disabilities by encouraging them as members of society to participate in all forms of social life.<sup>21</sup> Within the framework of the European Year of Persons with Disabilities, a European Action Plan (2004–2010): “Equal opportunities for people with disabilities” was adopted that provides for the adoption of two-year action plans. In 2006, the European Parliament resolution on the situation of people with disabilities in the enlarged European Union: the European Action Plan 2006–2007 (2006/2105(INI)) was adopted,<sup>22</sup> which, *inter alia*, draws attention to the fact that it is necessary that documentation produced by European institutions should always be made available on demand in accessible formats, particularly as regards forms being fully accessible to blind and partially sighted persons (paragraph 31).<sup>23</sup> Within the framework of the European Year of Persons with Disabilities, also Slovenia adopted The Action Plan for Persons with Disabilities 2007–2013,<sup>24</sup> which among the general principles and obligations emphasises the obligation to accept disabilities as part of human diversity, the obligation to ensure equal opportunities, the obligation to ensure the full and effective participation and integration of persons with disabilities in society, the obligation to respect their personal dignity and independence, including their right to their free choice and independence as well as accessibility, as the fundamental conditions for exercising their rights and ensuring their social integration. Moreover, the Charter of Fundamental Rights of the European Union (OJ C 303, 14 December 2007) emphasises that persons with disabilities must be ensured not only formal (legal) equality, but also *de facto* (substantive) equality, which is intended to ensure equal opportunities and equality of results in order to eliminate *de facto* inequalities. The first paragraph of Article 21 of the Charter namely not only emphasises that discrimination based on disability is prohibited, but Article 26 (Integration of persons with disabilities) explicitly recognises and guarantees persons with disabilities the right to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community.

21. Another reflection of the ever greater social awareness of the significance of ensuring equal opportunities for persons with disabilities is the amendment of

21 At the level of the European Union, the general principle of the prohibition of discrimination has been included in the Treaty Establishing the European Community (hereinafter referred to as the EC Treaty) with the Treaty of Amsterdam. Cf. Article 13 of the EC Treaty (OJ C 340, 10 November 1997, and Official Gazette RS, No. 27, MP, No. 7/04 – consolidated text). The provision speaks of “appropriate action to combat discrimination.” This can also be understood as the possibility to adopt positive measures.

22 OJ C 316 E, 22 December 2006, pp. 370–378.

23 In 2007, Europol adopted the Rules for Access to Europol Documents (OJ C 072, 29 March 2007, pp. 37–40), which in Article 10 (Access following an application) determine, *inter alia*, that documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print, or tape) and in one of the available linguistic versions in accordance with the applicant’s preference.

24 The Action Plan is published on the website: <http://www.mddsz.gov.si/si/splosno/novice/novica/article/1939/5367/?cHash=075eded6b1>.

the first paragraph of Article 14 of the Constitution,<sup>25</sup> by which the right to non-discriminatory treatment was extended,<sup>26</sup> and now disability is explicitly listed among the personal circumstances that may not be a basis for discrimination.<sup>27</sup> Even prior to such, disability was undoubtedly considered one of the personal circumstances that may not be a basis for discriminatory treatment, however, such symbolic emphasis in the Constitution with regard to the protection of persons with disabilities against discrimination gives it even greater significance at the symbolic level.<sup>28</sup>

22. Moreover, it must be taken into consideration that in 2008 the CRPD<sup>29</sup> and its Optional Protocol came into force, which is the first binding instrument of the UN with regard to the human rights of persons with disabilities. States Parties have, *inter alia*, undertaken to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability and to adopt all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention (Article 4 of the CRPD). According to the CRPD, discrimination on the basis of disability also includes the denial of necessary and appropriate modifications

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25 Cf. The Constitutional Act Amending Article 14 of the Constitution of the Republic of Slovenia (Official Gazette RS, No. 69/04).

26 In recent years, such extensions of the principle of non-discriminatory treatment have also been adopted in certain other European countries. In 1994, the German *Bundestag* adopted an amendment to Article 3 of the Basic Law, which now explicitly determines that no one may be placed at a disadvantage due to their disability (cf. Maunz-Dürig, *Grundgesetz Kommentar*, Band I, GG-Text, Art. 3, Verlag C. H. Beck München, p. 353a).

27 The Slovene legal order does not contain a uniform definition of disability. Disability and the status of a person with a disability depend on the individual fields of legal regulation (cf. M. Kalčič, *Invalidnost kot osebna okoliščina* [Disability as a Personal Circumstance], in: *Prepoved diskriminacije, Med varstvom človekovih pravic in konkurenčnostjo delodajalca* [The Prohibition of Discrimination, Between the Protection of Human Rights and the Competitiveness of the Employer], Inštitut za delo pri Pravni fakulteti Univerze v Ljubljani, Ljubljana 2007, p. 361). The second paragraph of Article 1 of the CRPD defines persons with disabilities as persons who have long-term physical, mental, intellectual, or sensory impairments that in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. The notion of disability is, however, explicitly determined in the Preamble. Disability is defined as an evolving concept and as a result of the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others (Recital e). From both definitions it clearly follows that they establish a connection between an individual – a person with disabilities – and his or her environment. Thereby, both definitions indirectly oblige the States Parties to remove barriers in the environment that cause discrimination and render equal opportunities impossible (*ibid.*, p. 359).

28 Cf. L. Šturm, *Ustavnopravni vidiki načela enakosti* [The Constitutional Law Aspects of the Principle of Equality], in: *Človekove pravice in invalidi, Za 14. člen – od ideje do ustavnega zakona* [Human Rights and Persons with Disabilities, For Article 14 – from an Idea to a Constitutional Amendment], p. 43, published on the website: [http://www2.arnes.si/ljzdis1/books/ZDIS\\_zbornik\\_2005.pdf](http://www2.arnes.si/ljzdis1/books/ZDIS_zbornik_2005.pdf). Cf. M. Cerar, *Ustavna razprava pred prehodom v drugo fazo* [The Constitutional Debate before Reaching the Second Stage], *Pravna praksa*, No. 44/2003, Uvodnik, pp. 3–4.

29 The Convention and the Optional Protocol thereto were adopted by the General Assembly of the UN in December 2006 by Resolution No. A/61/611. In accordance with Article 45 of the Convention, it entered into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession, i.e. on 30 May 2008.

and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms (Article 2 of the CRPD). The CRPD, *inter alia*, explicitly requires that States Parties ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as (direct and indirect) participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages (*cf.* Article 13 – “Access to Justice”). Slovenia has also ratified the CRPD.<sup>30</sup> This entails that in accordance with the second paragraph of Article 153 in conjunction with Article 8 of the Constitution, from the day of its entry into force, its provisions are binding on the National Assembly when adopting laws. The duty to adopt appropriate accommodations that would enable blind persons to (independently) effectively participate in proceedings before courts is thus imposed on the legislature also by a binding treaty.

#### B – IV

##### **The Position of Blind and Partially Sighted<sup>31</sup> Persons in Civil Proceedings**

23. In consideration of all the above, the Constitutional Court notes that the existing regulation of civil procedure, which does not ensure special rights to blind persons, but treats them equally as other participants in proceedings, despite the fact that they are an objectively disadvantaged social group, interferes with their right to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution). Preventing access to court and other documents in civil proceedings in a form that is accessible to blind persons namely entails a significant obstacle for blind persons, which (in comparison with other [i.e. sighted] persons in the same position) makes the exercise of their right to fair treatment significantly more difficult. In order to remedy the disadvantaged position of blind persons in civil proceedings, the implementation of certain appropriate accommodations would be necessary. The National Assembly namely failed to demonstrate that blind persons are ensured an equal position in exercising their rights in civil proceedings by means of other, already existing, procedural institutions.
24. The Constitutional Court has already emphasised<sup>32</sup> that in determining the constitutional framework of the right to use one's language or script in judicial proceedings, the fact that in Slovenia the official language is Slovene (and in certain areas also Italian and Hungarian) must be taken into consideration.<sup>33</sup> Furthermore,

30 Slovenia signed the CRPD together with the Optional Protocol on 30 March 2007. The National Assembly ratified it on 4 April 2008.

31 Partially sighted persons may also find themselves in the same position as blind persons. Hereinafter, the Constitutional Court refers to all such persons as blind persons.

32 *Cf.* the above-cited Order No. Up-43/96, Paragraph 18 of the reasoning.

33 *Cf.* T. Jerovšek, *Člen 62 (pravica do uporabe svojega jezika)* [Article 62 (The Right to Use One's Own Language)], in: L. Šturm (ed.), *op. cit.*, p. 615.

the Constitutional Court has already adopted the standpoint that the fact that a party to civil proceedings must him- or herself provide for the translation of court and other documents into a language that he or she understands is in and of itself not inconsistent with the right to use one's language in proceedings as the party is, nevertheless, ensured a fair trial.<sup>34</sup> However, the position of blind persons cannot be equated with the position of persons who do not understand the Slovene language. A Braille transcript of court or other documents in proceedings is namely still a document in Slovene and not in a foreign language. Therefore, the position of blind persons can only be compared with the position of persons who, like blind persons, understand the Slovene language. In consideration of the above, there is no doubt that with regard to the possibility of reviewing the content of court documents or the written applications of parties and other participants in proceedings, blind persons are in a disadvantaged position in comparison with other [i.e. sighted] persons. Despite the fact that they partake in literacy programmes adapted to their disability, which, regardless of the obstacles caused by their blindness, enables them to review by themselves the content of court and other documents in proceedings in the Slovene language, the state does not ensure them appropriate accommodations.

25. As regards the possibility of reviewing the content of the written documents of the court and the participants in proceedings, blind persons are in a disadvantaged position not only in comparison with [sighted] persons who understand the Slovene language, but are also in a substantially more difficult position in comparison with [sighted] persons who do not understand the Slovene language. Blind persons namely cannot obtain court or other documents in proceedings in a form that they can understand in the same manner as persons who do not understand the Slovene language can. As highlighted by the petitioner, the existence of interpreters for Braille is conceptually impossible. In order to obtain a Braille transcript, the form of the document must be "translated" into another form with the help of technical equipment. This can be done either by printing the documents in Braille or by converting the writing to Braille using an electronic Braille pad (or into a spoken form using a speech synthesiser). However, in order to use either method blind persons must be provided an electronic version of the document. The fact that court or other documents in proceedings are served on them [only] in printed form thus makes it substantially more difficult for blind persons to obtain transcriptions of documents in a form that is accessible to them.
26. Moreover, the institution of authorised representation cannot ensure blind persons an equal position as regards the exercise of their rights in civil proceedings. If only blind persons were required to exercise their rights with the assistance of an authorised representative, such would namely not entail a special benefit (not even if such representation was provided at the expense of the state), but the discrimination of blind persons, as they could not exercise their rights in judicial proceedings under the same conditions as others (who can freely choose [whether to avail themselves

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34 See, Order of the Constitutional Court No. Up-1378/06, dated 20 May 2008 (Official Gazette RS, 59/08).

of the assistance of an authorised representative or not]). Such would namely entail that blind persons would be denied the capacity to represent themselves already at the first and second instances, while it is recognised to other persons (who possess contractual capacity or the capacity to sue or be sued). Moreover, the institution of authorised representation would not eliminate the unequal position of blind persons in civil proceedings even if mandatory representation by a lawyer were prescribed equally for all parties to proceedings.<sup>35</sup> Blind persons would still be in a disadvantaged position in comparison with others despite the fact that the capacity to validly act in proceedings without a lawyer would be equally limited for all. Access to transcripts of court and other documents in a form that is accessible to blind persons would namely still be substantially more difficult in comparison with other persons (as follows from the preceding paragraphs of the reasoning).

27. In accordance with all of the above, the existing regulation of the exemption from the payment of the costs of proceedings (which also includes the costs of legal representation) cannot by itself remedy the less favourable position of blind persons in civil proceedings as regards the exercise of their rights determined by Article 22 of the Constitution. Not only because the institution of representation by a lawyer in itself cannot as a general rule ensure a blind person an equal position in proceedings, but also because free-of-charge representation by a lawyer, even if a blind person freely decides that he or she wishes to exercise his or her rights in proceedings only in such manner, is not provided in every case. In accordance with the provisions of the FLAA,<sup>36</sup> only persons in an unfavourable financial situation are entitled to an exemption from the payment of the costs of proceedings.<sup>37</sup> The mentioned regulation does not envisage any other reasons for the exercise of the right to free legal aid. As has already been emphasised, the right to access court and other documents in proceedings in a form that is accessible to blind persons exists only if such is ensured to them at the expense of the state.
28. As the Constitutional Court established that the legislature's failure to ensure blind persons the necessary and appropriate accommodations that would enable them to exercise their right to fair treatment in civil proceedings on an equal basis with others entails an interference with their right to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution), it had to review if such interference is constitutionally admissible. An interference with human rights is constitutionally

35 As is already prescribed (an exception is determined only by the fourth paragraph of Article 86 of the CPA) in proceedings regarding extraordinary legal remedies (*cf.* the third paragraph of Article 86 of the CPA).

36 Article 170 of the CPA, which regulated the right of a party to be appointed a free-of-charge lawyer, was repealed on 1 October 2008 by the entry into force of the Act Amending the Civil Procedure Act (Official Gazette RS, No. 45/08). Since that time, this right is decided on only in accordance with the rules determined in the FLAA.

37 The first paragraph of Article 1 of the FLAA reads as follows: "The purpose of free legal aid in accordance with this Act is to enable persons to exercise their right to judicial protection in accordance with the principle of equality, thereby taking into account their material position, as these persons would not be able to exercise such right without detriment to their ability to maintain themselves and their family."

admissible if it is based on a constitutionally admissible, i.e. objectively substantiated, aim (the third paragraph of Article 15 of the Constitution) and if it is in accordance with the general principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court performs a review of the consistency of the challenged regulation with the general principle of proportionality on the basis of a strict test of proportionality, which comprises a review of three aspects of the interference, i.e. a review of the necessity, appropriateness, and proportionality of the interference in the narrow sense, provided that it established beforehand that the limitation is based on a constitutionally admissible aim (see, Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03, and OdlUS XII, 86, Paragraph 25 of the reasoning).

29. The Constitutional Court first reviewed whether there existed any constitutionally admissible reason for the failure to provide necessary and appropriate accommodations. The National Assembly, *inter alia*, objected that when regulating civil procedure the requirements of expeditious, economical, and effective proceedings, the aim of which is to ensure the right of (both) parties to a trial without undue delay and with as little cost as possible, must be taken into consideration. The objection with regard to the requirement of expeditious proceedings could be important from the viewpoint of the constitutional requirement that prohibits excessive interferences with the right to (effective) judicial protection determined by the first paragraph of Article 23 of the Constitution. However, by merely generally alleging that also this human right should be taken into consideration, the National Assembly failed to demonstrate that for this reason the right of blind persons to access court and other documents in proceedings in a form that is accessible to them could not be regulated in any (reasonable) manner. It is the obligation of the legislature to regulate the position of blind persons in civil proceedings within the framework of its field of discretion in such a manner that it does not excessively interfere with the human rights of other participants in proceedings. In addition, it must be taken into consideration that there already exists a statutory basis for the introduction of electronic operations in civil proceedings,<sup>38</sup> which will significantly facilitate the possibility of ensuring reasonable accommodations for blind persons. Furthermore, the National Assembly failed to demonstrate the existence of a constitutionally admissible reason for the established interference with this human right by relying on its duty to prevent excessive costs for the parties. As the Constitutional Court has already established, blind persons must be ensured access to court and other documents in proceedings in a form that is accessible to them at the expense of the state and not at the expense of the parties. The National Assembly did not even claim that the costs of appropriate accommodations would be so unreasonably high that such positive measures could not be carried out at all. In any event, within the framework of its field of discretion,

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38 Cf. The Act Amending the Civil Procedure Act (Official Gazette RS, No. 52/07), which already contains provisions on the electronic operations of courts, which have, however, not yet been implemented due to the fact that appropriate executive regulations still have to be adopted and appropriate technical conditions fulfilled.

the legislature can provide appropriate accommodations in such a manner that the state budget is burdened as little as possible. As, in accordance with the above clarification, the National Assembly did not demonstrate that the failure to provide necessary and appropriate accommodations that would enable blind persons to exercise their rights to fair treatment in civil proceedings on an equal basis with others is justified by any constitutionally admissible aim, already the first condition required by the Constitution for limitations of human rights is not fulfilled.

30. The Constitutional Court therefore established that the challenged regulation of civil proceedings, which does not take into consideration the special position of blind (and partially sighted) persons who participate in such proceedings and who are thus not ensured an equal position as regards the exercise of their right to fair treatment (Article 22 of the Constitution), is inconsistent with the first paragraph of Article 14 of the Constitution (Point 1 of the operative provisions). The Constitutional Court namely established that there exists a legal gap in the regulation of civil proceedings that cannot be filled and that its substance is deficient to such an extent that filling it in concrete cases would be arbitrary as there exist no predictable and legally reliable criteria that would indicate how to proceed in individual cases.<sup>39</sup> The equal protection of rights in authoritative decision-making procedures can namely be ensured only if the rules of procedure that authorities must respect when deciding on the rights, duties, and legal interests of individuals are precisely determined in advance. In view of the nature of this right, it is thus necessary that the manner of its exercise be determined by law (the second paragraph of Article 15 of the Constitution).<sup>40</sup> As in the case at issue the legislature did not regulate a certain issue that it should have regulated, an abrogation is not possible. Therefore, on the basis of the first paragraph of Article 48 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court adopted a declaratory decision. On the basis of the second paragraph of Article 48 of the CCA, it required the legislature to remedy the established inconsistency within a period of one year from the publication of this decision in the Official Gazette of the Republic of Slovenia (Point 2 of the operative provisions).

31. In order to satisfy the constitutional and Convention requirements of equal treatment of blind (and partially sighted) persons in civil proceedings, the legislature will have to appropriately regulate their right to access court and other documents in proceedings in a form that is accessible to them. Thereby, from the perspective of the right of blind persons to personal dignity, it is of essential importance that (within the framework of reasonable options) they are ensured the possibility to choose the manner in which they wish to review the content of documents (e.g. in the physical form of the document in Braille, a digital form of the document,

39 M. Pavčnik, *Argumentacija v pravu, Od življenjskega primera do pravne odločitve* [Legal Argumentation (From the Real Life Event to the Legal Decision)], the second amended and supplemented edition, Cankarjeva založba, Ljubljana 2004, pp. 123 *et seq.*

40 F. Testen, *Člen 22 (enako varstvo pravic)* [Article 22 (Equal Protection of Rights)] in: L. Šturm, *op. cit.*, p. 240.

a reading with the assistance of another person). The possibility to participate in proceedings on an equal basis with others regardless of blindness namely depends on the particular capabilities of the individual. In the assessment of the Constitutional Court, mandatory representation by a lawyer as a manner of ensuring that blind persons exercise their right to a fair trial on an equal basis with others could only be constitutionally admissible in cases where blind persons, due to their personal circumstances, cannot be ensured effective protection of their rights by other appropriate accommodations. However, in such cases blind persons would have to be guaranteed representation by a lawyer at the expense of the state, regardless of their financial situation and income.

32. Despite the fact that in the case at issue the Constitutional Court reviewed only whether the regulation of civil procedure ensures blind persons the opportunity to exercise their right to fair treatment in civil and other judicial proceedings in which the provisions of the CPA are applied *mutatis mutandis*<sup>41</sup> on an equal basis with others, the Constitutional Court draws attention to the fact that the question of the necessity of an appropriate regulation of the equal rights of blind persons also in other judicial proceedings and proceedings before other state authorities has been raised. Therefore, the adoption of a uniform statutory regulation for all judicial proceedings (as well as for other proceedings before state authorities, local community authorities, and bearers of public authority in which an individual's rights, obligations, or legal interests are decided on) should be considered, such as has already been adopted, for example, with regard to deaf persons. Even though the Constitutional Court established the constitutional inconsistency of the CPA, this does not entail that within the framework of its field of discretion the legislature is not allowed to regulate the inconsistency established in this Decision by a special law (such as the act adopted with regard to deaf persons), or in the Equalisation of Opportunities for Persons with Disabilities Act,<sup>42</sup> the Courts Act (Official Gazette RS, Nos. 19/94 etc.), or any other law.
33. As the Constitutional Court established that the challenged regulation of the civil procedure is inconsistent with the principle of non-discriminatory treatment within the meaning of the first paragraph of Article 14 of the Constitution, it did not review the allegations of the unequal treatment of blind persons in comparison with deaf

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41 The provisions of the CPA namely do not apply only in civil, but (*mutatis mutandis*) also in other judicial proceedings. Cf. Article 15 of the Execution of Judgments in Civil Matters and Securing of Claims Act (Official Gazette RS, Nos. 51/98, etc.), Article 37 of the Non-litigious Civil Procedure Act (Official Gazette SRS, Nos. 30/86, etc.).

42 From the legislative materials of the draft Act on the Ratification of the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities, No. EVA 2007-1811-0110, dated 21 February 2008, it follows that the Ministry of Labour, Family, and Social Affairs is preparing the text of the draft of the Equalisation of Opportunities for Persons with Disabilities Act, which, as a *lex specialis* in the field of the protection of persons with disabilities, will, in addition to the IPETA, regulate the prohibition of discrimination due to disability and measures for the equalisation of opportunities of persons with disabilities.

persons (i.e. the alleged violation of the principle of equality before the law or in the law on the basis of the second paragraph of Article 14 of the Constitution).

34. In order to guarantee blind persons a position that will enable them to exercise, effectively and on an equal basis with others, their rights in civil and other judicial proceedings in which the CPA is applied *mutatis mutandis* until the established inconsistency is remedied, the Constitutional Court determined the manner of the implementation of the Decision on the basis of the second paragraph of Article 40 of the CCA. In accordance with such, courts must ensure blind persons, upon their request, access to court documents and the written applications of parties and other participants in proceedings in a form accessible to them, whereby the costs of such are to be paid from the funds of the court (Point 3 of the operative provisions). The Constitutional Court is aware that due to the complexity of the issue that the legislature has to regulate, it will not be possible to fully ensure the equal position of blind persons in civil proceedings until the adoption of the appropriate statutory regulation. Until the appropriate technical solutions are adopted, the courts will namely not be able to ensure in every case that blind persons can review the procedural materials in the manner of their choice. However, in order to ensure that during this transitional period blind persons are guaranteed at least minimum procedural safeguards, the courts will have to provide blind persons, upon their request, Braille transcripts of at least the more important procedural materials (i.e. documents that have to be served on parties). A different manner of reviewing the content of procedural materials (e.g. by providing a reading or an appropriate oral summary of the relevant content of the procedural materials or in some other appropriate manner) can be applied in cases where due to the circumstances of the individual case (either due to the format of the recorded information – e.g. a photograph or a sketch – or due to other, e.g. technical, obstacles) this right of blind persons cannot be ensured by means of Braille transcripts of documents. Until the adoption of appropriate legislation, it is particularly important that blind persons are ensured access to court and other documents in proceedings in a form that is accessible to them to such an extent that will enable them to effectively protect their rights in proceedings.

### C

35. The Constitutional Court adopted this Decision on the basis of Article 48 and the second paragraph of Article 40 of the CCA and the fifth paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of President Jože Tratnik and Judges Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Dr Ciril Ribičič, and Jan Zobec. The decision was adopted unanimously.

Jože Tratnik  
President

Decision No. **U-I-425/06**, dated 2 July 2009

### DECISION

At a session held on 2 July 2009 in proceedings to review constitutionality initiated upon the petition of Mitja Blažič, Dobrovo v Brdih, and Viki Kern, Vodice, the Constitutional Court

*decided as follows:*

1. Article 22 of the Registration of a Same-Sex Civil Partnership Act (Official Gazette RS, No. 65/05) is inconsistent with the Constitution.
2. The National Assembly must remedy the established inconsistency within six months from the publication of this decision in the Official Gazette of the Republic of Slovenia.
3. Until the established inconsistency is remedied, the same rules apply for inheritance between partners in registered same-sex partnerships as apply for inheritance between spouses in accordance with the Inheritance Act (Official Gazette SRS, Nos. 15/76 and 23/78 and Official Gazette RS, No. 67/01).

*Reasoning*

#### A

1. The petitioners challenge Article 22 of the Registration of a Same-Sex Civil Partnership Act (hereinafter referred to as the RSSCPA), which regulates inheritance between partners in such partnerships. They claim that they are partners in a same-sex partnership and that they have registered their partnership in accordance with the RSSCPA, and on the basis of this registration they have acquired the right to inheritance from a deceased partner in accordance with this act. In their opinion, the challenged regulation on inheritance from a same-sex partner is discriminatory. They allege that the challenged provision inadmissibly differentiates between the inheritance of the separate and the community property of partners in same-sex partnerships and as it does not specifically regulate the inheritance of separate property and does not determine a forced portion to be inherited by a same-sex partner, it entails an unconstitutional differentiation between partners in same-sex

partnerships and spouses or common-law partners. In their opinion, the challenged provision is inconsistent with Articles 14, 15, 33, and 66 of the Constitution.

2. The National Assembly did not reply to the petition.
3. The Constitutional Court accepted the petition and due to the fact that the conditions provided for in the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) were satisfied, it immediately proceeded to decide on the merits.
4. The first paragraph of Article 22 of the RSSCPA determines that in the event of a partner's death, the surviving partner of a registered same-sex partnership (hereinafter referred to as a same-sex partner) has the right to inheritance of the decedent's share of the community property in accordance with this act. This provision establishes a legal foundation for inheritance between same-sex partners. Neither the Inheritance Act (Official Gazette SRS, No. 15/76 etc. – hereinafter referred to as the IA) as a general regulation, nor any other regulation in the field of inheritance namely includes same-sex partners in the circle of heirs.<sup>1</sup> The second and third paragraphs of Article 22 of the RSSCPA regulate the manner of inheritance of the community property between same-sex partners. If a decedent has children, the community property is inherited by the surviving partner and the decedent's children in equal shares (the second paragraph of Article 22); if a decedent does not have any children, the surviving partner inherits the entire share on the community property (the third paragraph of Article 22). The fourth paragraph of the challenged Article 22 of the RSSCPA regulates the inheritance of the decedent's separate property and determines that this property is inherited in accordance with the general regulations on inheritance. These regulations are applied also for inheritance of the share of the decedent's community property, if the RSSCPA does not determine otherwise. The fifth paragraph of Article 22 of the RSSCPA determines that local courts have subject-matter jurisdiction to decide in probate proceedings in accordance with this act.

## B – II

5. One of the petitioners' allegations regarding the challenged regulation is that, in the field of inheritance, it entails discrimination against same-sex partners in comparison with spouses or common-law partners and is therefore inconsistent with the first paragraph of Article 14 of the Constitution.
6. The first paragraph of Article 14 of the Constitution determines that in Slovenia everyone is guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. The above-mentioned constitutional provision prohibits discrimination in ensuring, exercising, and protecting human rights and fundamental freedoms regarding individuals' personal circumstance.

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1 Another regulation which does not include same-sex partners in the circle of heirs is the Inheritance of Agricultural Holdings Act (Official Gazette RS, No. 70/95), which is not, however, a subject of review in the case at issue.

7. In order to review this allegation as regards unequal, discriminatory treatment, the following questions must be answered in the case at issue: 1) whether the alleged different treatment refers to ensuring or exercising a human right or a fundamental freedom; 2) if so, whether the petitioners or a person to whom the petitioners compare themselves are receiving different treatment; 3) whether the actual positions that the petitioners are comparing are essentially the same and thus the differentiation is based on a circumstance determined in the first paragraph of Article 14 of the Constitution; and 4) if the differentiation is indeed based on a circumstance determined in the first paragraph of Article 14 of the Constitution and thus there is an interference with the right to non-discriminatory treatment, whether such interference is constitutionally admissible. If the answers to the first three questions are affirmative and the interference does not stand the so-called strict test of proportionality, the discrimination is not constitutionally admissible.
8. The first paragraph of Article 14 of the Constitution prohibits discrimination in ensuring, exercising, and protecting human rights and fundamental freedoms regarding individuals' personal circumstances. In order to establish a violation of the constitutional prohibition against discriminatory treatment, the determination of the existence of inadmissible discrimination in the enjoyment of any human right suffices, whereby a petitioner does not need to demonstrate the interference with this human right in and of itself.<sup>2</sup> In the case at issue, the petitioners claim discriminatory treatment in the statutory regulation of inheritance. In accordance with Article 33 of the Constitution, the right to inheritance is a human right. The allegation thus concerns inadmissible discrimination in ensuring a human right.
9. The IA does not differentiate between the inheritance of the separate and community property of spouses, but regulates the inheritance of both types of property in the same manner. Pursuant to this act, the spouse, as a heir in the first degree, and the decedent's children inherit equal shares (Article 11 of the IA). If a decedent did not have descendants, the heirs in the second degree are the decedent's parents, who inherit one half of the estate (or their descendants on the basis of the right to assume their parents' position; in accordance with Articles 15 and 16 of the IA), and the surviving spouse, who inherits the other half (in accordance with the first and second paragraphs of Article 14 of the IA). In such a case, the surviving spouse inherits the

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2 The Constitutional Court has adopted such position already in Decision No. U-I-146/07, dated 13 November 2008 (Official Gazette RS, No. 111/08). Also the European Court of Human Rights (hereinafter referred to as the ECtHR) in its recent case law superseded the dependant, ancillary nature of the right to equality, according to which a violation of Article 14 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) could be successfully exercised only in connection with a violation of one of the Convention rights. In its recent decisions, the ECtHR has namely underlined that the application of Article 14 of the ECHR does not presuppose a violation of one or more of the substantive provisions of the Convention and its Protocols, and that Article 14 of the ECHR was therefore to this extent autonomous. For Article 14 of the ECHR to become applicable, it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (*cf. Thlimmenos v. Greece*, 6 April 2000, § 40).

entire estate only in the event that both of the decedent's parents have died without descendants before the decedent (Article 17 of the IA). In accordance with the first paragraph of Article 33 of the IA, under certain conditions the surviving spouse has the right to have household goods be excluded from the estate. With reference to inheritance on the basis of testacy, the first paragraph of Article 25 of the IA provides for a spouse as among the forced heirs. The spouse's forced portion amounts to one half of the share which he or she would be entitled to in the case of intestacy (the second paragraph of Article 26 of the IA). The same rules apply for inheritance between a man and a woman who live in a lasting partnership and are not married (i.e. common-law partners) if there are no reasons for which a marriage between them would be void (the second paragraph of Article 10 of the IA). Any reference in this decision to (only) spouses (a marriage) shall be deemed to also constitute a reference to common-law spouses (a common-law marriage).

10. In the RSCPA, the inheritance of the separate and community property of partners is regulated differently. The first paragraph of Article 22 of the RSCPA determines that in the event of a partner's death, the surviving same-sex partner has the right to inheritance of the share of the community property in accordance with this act. If a decedent has children, the community property is inherited by the surviving partner and the decedent's children in equal shares (the second paragraph of Article 22); if a decedent does not have any children, the surviving partner inherits the entire share on the community property (the third paragraph of Article 22). As regards all other matters, the general regulations on inheritance are applied for the inheritance of the share of the decedent's community property (the second sentence of the fourth paragraph of Article 22 of the RSCPA). This entails, *inter alia*, that in the case of testacy, a same-sex partner is not entitled to a forced portion. The IA, as a general regulation on inheritance, namely does not include same-sex partners in the circle of forced heirs (Article 25 of the IA). In addition, they are not entitled to the right that household goods be excluded from the estate (Article 33 of the IA). The fourth paragraph of Article 22 of the RSCPA determines that the decedent's separate property is inherited in accordance with the general regulations on inheritance. Considering the fact that the general regulations on inheritance do not include same-sex partners in the circle of heirs, they cannot inherit the separate property of their partners.
11. It is evident from the above-mentioned summary of the statutory regulation that there are essential, important differences between the regulation of inheritance between spouses and between same-sex partners. The differences, which have also been stated by the petitioners, can be summarised as follows:
  - If a decedent does not have any children, the surviving same-sex partner inherits the entire share on the community property, whereas a spouse, as a heir in the second degree, inherits only one half of the estate, while the decedent's parents inherit the other half (or their descendants on the basis of their right to assume their parents' position). If a decedent does not have any children, the surviving spouse inherits the entire estate only if both of the decedent's parents have died without descendants before the decedent.

- Same-sex partners, differently than spouses, cannot inherit the separate property of their partners.
  - Same-sex partners, differently than spouses, do not fall within the circle of forced heirs and do not enjoy the right to have household goods be excluded from the estate.
12. There is evidently discriminatory treatment in cases in which the state (on the basis of personal circumstances) treats individuals in the same situation differently.<sup>3</sup> If the situations being compared are not essentially the same, it is not a matter of unconstitutional discrimination. From the perspective that is important for the review of the challenged regulation (the right to inheritance from a deceased partner, Article 22 of the RSSCPA), it is thus essential whether the petitioners' position is comparable in its essential and legal elements to the position of spouses. The Constitutional Court holds that the answer is affirmative. A registered partnership is a relationship that is in terms of substance similar to a marriage or a common-law marriage. The essential characteristic of such partnerships is also the stable connection of two persons who are close to, help, and support each other.<sup>4</sup> The ethical and emotional essence of registered partnerships, which is expressed in Article 8 of the RSSCPA, and according to which partners must respect, trust, and help each other, is similar to the community between a woman and a man. Also the legal regulation of this relationship is similar to that of marriage. The RSSCPA ensures partners certain mutual rights and obligations, protects the weaker partner, and regulates legal positions toward third persons, the state, and the social environment.<sup>5</sup> In the field of property relations during the period of a registered partnership, the RSSCPA almost entirely follows the regulation of property regime between spouses laid down in the Marriage and Family Relations Act (Articles 9 through 18 of the RSSCPA). Moreover, it regulates the obligation to ensure the maintenance of a partner who does not have sufficient funds for living (Article 19 of the RSSCPA). However, the legislature did regulate inheritance between partners in registered partnerships differently. In the case of such partnerships, the legislature did not enact, as applies for a marriage, the presumed will of the deceased partner that, although he or she did not leave a will, the person with whom he or she had shared his or her life be economically provided for by inheritance. In both a marriage and registered partnership, the decedent's presumed will is based on the same empirical and ethical arguments – to ensure also after one's death the financial security and stability of the person with whom the decedent was emotionally, intimately, financially, and in all areas of life most closely connected.<sup>6</sup>

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3 With reference to such, the ECtHR refers to analogous situations (see, *Van der Musselle v. Belgium*, 23 November 1983, § 46).

4 V. Žnidaršič Skubic, *Dedovanje v istospolni partnerski skupnosti* [Inheritance in the Same-Sex Partnership], *Podjetje in delo*, No. 6-7/08, p. 1533.

5 N. Brlič, *Istospolni partnerji in njihov pravni položaj* [Same-Sex Partners and the Regulation of their Position], *Pravna praksa*, No. 47/05, Priloga, p. III.

6 In this sense, also V. Žnidaršič Skubic, *ibidem*.

- 13** With regard to all of these essentially the same actual and legal bases of partnerships – not only registered same-sex partnerships, but also partnerships between a woman and a man – it is evident that the differences in the regulation of inheritance are not based on any objective, non-personal circumstance, but on sexual orientation. Sexual orientation is, although not explicitly mentioned therein, undoubtedly one of the personal circumstances provided for in the first paragraph of Article 14 of the Constitution. It is namely a human characteristic that importantly defines an individual, influences his or her life, and follows him or her through his or her entire life, just as circumstances such as race, sex, and birth do. Sexual orientation, as a circumstance which may not be a basis for differentiation, is also regarded as such by the ECtHR, although it is not among the explicitly enumerated circumstances in Article 14 of the ECHR.<sup>7</sup>
- 14.** This different regime of inheritance between same-sex partners interferes with the petitioners' right to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution), which requires a review of the constitutional admissibility of the interference. Interferences with human rights are constitutionally admissible only if they are based on a constitutionally admissible, i.e. objectively justified, aim (the third paragraph of Article 15 of the Constitution) and are consistent with the general principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court carries out a review of whether a challenged regulation is consistent with the general principle of proportionality on the basis of the so-called strict test of proportionality, which comprises a review of three aspects of the interference, i.e. a review of the necessity, appropriateness, and proportionality of the interference in the narrower sense if it is established beforehand that the limitation is based on a constitutionally admissible aim (see, Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03, and OdlUS XII, 86; Paragraph 25 of the reasoning).
- 15.** The Constitutional Court first reviewed whether there exists any constitutionally admissible reason for a different regulation of inheritance between spouses and common-law partners, on one hand, and same-sex partners, on the other. In the case at issue, such a reason cannot be found. The National Assembly did not reply to the petition, and also from the legislative materials there does not follow a constitutionally admissible reason for the challenged regulation, which interferes with the right determined in the first paragraph of Article 14 of the Constitution. Consequently, already the first condition which is required by the Constitution in cases of the limitation of human rights is not satisfied.
- 16.** The Constitutional Court therefore established that the challenged regulation of inheritance in accordance with the RSSCPA is inconsistent with the first paragraph of Article 14 of the Constitution (Point 1 of the operative provisions). Due to the fact that the Constitutional Court established an inconsistency with the above-mentioned constitutional provision, it did not review the petitioners' further allegations as

<sup>7</sup> E.g. *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999, § 36, and *E.B. v. France*, 22 January 2008, § 89.

regards inconsistencies with other provisions of the Constitution. In the case at issue, the annulment of the challenged provision is not possible, as it would not remedy the consequences of the established unconstitutionality, but would only exacerbate the inequalities and could even entail an interference with some other human rights of the petitioners. Therefore, on the basis of the first paragraph of Article 48 of the CCA, the Constitutional Court adopted a declaratory decision. On the basis of the second paragraph of Article 48 of the CCA, it required that the legislature remedy the established inconsistency within six months from the publication of this decision in the Official Gazette of the Republic of Slovenia (Point 2 of the operative provisions).

17. On the basis of the second paragraph of Article 40 of the CCA, the Constitutional Court can determine the manner of the implementation of its decision. In order to ensure that inheritance be regulated in a manner that is not discriminatory for partners in registered same-sex partnerships until the established inconsistency is remedied, the Constitutional Court decided that until the established inconsistency is remedied, the same rules apply for inheritance between partners in registered same-sex partnerships as apply for inheritance between spouses in accordance with the IA.

### C

18. The Constitutional Court reached this decision on the basis of Article 48 and the second paragraph of Article 40 of the CCA, composed of: Jože Tratnik, President, and Judges Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Dr Ciril Ribičič, and Jan Zobec. The decision was reached unanimously.

*Jože Tratnik*  
*President*

Decision No. **Up-555/03, Up-827/04**, dated 6 July 2006

### DECISION

At a session held on 6 July 2006 in proceedings to decide upon the constitutional complaints of A. A., Y., and B. B., Z., represented by C. C., attorney in X., the Constitutional Court

*decided as follows:*

The complainants' right to an effective legal remedy determined by the fourth paragraph of Article 15 of the Constitution in relation to Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94) was violated.

### *Reasoning*

#### **A**

1. The complainants lodged two constitutional complaints. In the first one, they challenge Order No. I Kp 652/2003, dated 29 May 2003, by which the Ljubljana Higher Court upheld Order No. Ks 801/2002, issued by a panel of the Ljubljana District Court and dated 27 September 2002, on the dismissal of a request to initiate a criminal investigation that they filed as subsidiary prosecutors. They challenge the part of the mentioned Order that refers to the criminal offences of violating the inviolability of dwellings determined by the first, second, and third paragraphs of Article 152 of the Penal Code (Official Gazette RS, No. 63/94 *et seq.* – hereinafter referred to as the PC). They allege a violation of the right to judicial protection (Article 23 of the Constitution), the right to the equal protection of rights (Article 22 of the Constitution), the principle of a state governed by the rule of law (Article 2 of the Constitution), and the right to the inviolability of dwellings (Article 36 of the Constitution).
2. The complainants allege that on 3 April 2000, six police officers entered by force into the locked hallway leading to the apartment of A. with their pistols raised. They allegedly knocked down D. D. (the complainants are his wife and father, respectively), handcuffed him while beating him, and dragged him into his apartment. Afterwards, they allegedly also knocked down the complainant, handcuffed her behind her back,

and ordered her to look down at the floor. According to the complainants, the police officers entered the apartment without authorisation, they did not communicate the reason for their entrance to D. D. or the complainant, nor did they serve on them a house search warrant. The police officers, proceeding in the manner described above, allegedly unlawfully restricted their freedom of movement and violated the inviolability of their dwelling. D. D. died during the police procedure. Immediately after that, a group of four other police officers allegedly searched the apartment. Furthermore, the police officers allegedly also carried out a personal search of D. D., namely without a warrant and contrary to their authorisations, first when he was still alive and later, after he died, one more time. The complainant states that during the procedure she was not enabled access to a lawyer.

3. With regard to the alleged violation of Article 36 of the Constitution, the complainants allege that the first group of police officers entered by force into the apartment contrary to the law, as they allegedly unjustifiably referred to the house search warrant issued by the investigating judge. In the opinion of the complainants, they did not enter the apartment for the purpose of executing the house search warrant, because it was known in advance that the house search was going to be carried out by another group of criminal investigators. The police officers allegedly entered the apartment by force at the same moment as a visitor entered. Their assumption that the visitor was there to buy drugs cannot, in the opinion of the complainants, justify such entrance by force. Furthermore, such assumption was rebutted by the subsequent flow of events. However, had the police officers arranged that the visitor was to buy drugs from D. D., this entails, in the opinion of the complainants, police entrapment, therefore also the forced entrance into the apartment by the police was unlawful.
4. The complainants are also of the opinion that their right determined by Article 23 of the Constitution was violated by the challenged Order, as considering the fact that they were not allowed to present the evidence that they proposed they were in fact not ensured an adversarial procedure (Article 22 of the Constitution). In the opinion of the complainants, the balance between the rights of the subsidiary prosecutors in relation to the state authority (the police) was not established in the disputed judicial decisions. The evidence that they proposed was allegedly neither presented nor correctly evaluated in the judicial decisions. On the other hand, the police reports were taken into consideration in their entirety, i.e. the reports of the authority in which the suspects were employed. Individual reports for the District State Prosecutor's Office were allegedly even signed by a police employee who himself was one of the suspects, with regard to which the criminal complaint against him had not yet been decided on. With regard to the above, also Article 2 of the Constitution was allegedly violated.
5. In the second constitutional complaint, the complainants challenge the Order issued by a three-judge panel for pre-trial appeals of the Ljubljana District Court, No. Ks 1295/2003, dated 28 October 2003, which in one part rejected the request of the injured parties acting as prosecutors (the complainants) for a retrial in conformity

with Article 409 of the Criminal Procedure Act (Official Gazette RS, No. 63/94 etc. – hereinafter referred to as the CrPA) regarding the criminal offence of negligent homicide determined by the first paragraph of Article 129 of the PC, and in the second part dismissed the request for a retrial regarding the aforementioned criminal offence. They also challenge Koper Higher Court Order No. Kp. 167/2004, dated 1 September 2004, by which the appellate court dismissed their appeal against the mentioned Order.

6. They allege a violation of the right to judicial protection (Article 23 of the Constitution), of the right to the equal protection of rights, and of the principle of a state governed by the rule of law (Article 2 of the Constitution). They are of the opinion that their request for a retrial and [request] to initiate a criminal investigation refers to a criminal offence that is incriminated such that it protects a person's right to life and "the right to the prohibition of torture". These two rights are, in their opinion, also protected by 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), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette RS, No. 24/93, MP, No. 7/93 – hereinafter referred to as the Convention against Torture), the Universal Declaration of Human Rights (hereinafter referred to as the Universal Declaration of the UN), and 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 International Covenant). Furthermore, they state that in conformity with the provisions of the Convention against Torture, each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by its competent authorities. They add that the Slovene legislation indeed does not regulate the specific criminal offence of torture; however, the criminal offences that were the subject of the request to initiate an investigation and the request for a retrial substantively correspond to the definition of the term torture and other forms of prohibited (cruel and degrading) treatment. The complainants emphasise that by ratifying the mentioned conventions and declarations, Slovenia bound itself to respect them. Moreover, they allege that the state also encapsulated the protection of the mentioned values and rights in Articles 17, 18, 19, 21, 36, and in other articles of the Constitution. They note that the mentioned rights also cannot be relativised. Nevertheless, they note that in actuality they do not enjoy legal protection.
7. They allege that all the judicial decisions that prevented a criminal investigation were based exclusively on the suspects' statements of defence supported by the reports issued by the Ljubljana Police Directorate, which were allegedly a construct elaborated on the basis of the suspects' statements. In their opinion, much of the evidence that they themselves collected indicates that the suspects' statements are

not true, however, in the judicial decisions such evidence was either not mentioned or was erroneously assessed, or motions to take such evidence were *a priori* rejected.

8. The challenged decision of the appellate court allegedly violates their right determined by Article 23 of the Constitution. They allege that “the challenged Order does not substantively provide them with this right, because, in fact, by not allowing the taking of evidence that was proposed by the subsidiary prosecutors it does not ensure [the complainants] an adversarial procedure” (Article 22 of the Constitution). They are of the opinion that the balance between the rights of the injured parties acting as prosecutors in relation to the state authority (the police) has not been established in the disputed judicial decisions.
9. Furthermore, they allege that they also appealed due to the fact that at the trial at the first instance a judge was deciding against whom they had previously filed a criminal complaint and subsequently a subsidiary indictment (case No. III K 56/2003 of the Ljubljana Local Court), therefore the judge should have recused herself or should have requested that the President of the Court issue an appropriate decision thereon. However, the appellate court dismissed their appeal with the reasoning that they had not requested such recusal, irrespective of the fact that they were not informed of the composition of the panel. In the opinion of the complainants, this entails a violation of the principles of a state governed by the rule of law.
10. By Order No. Up-555/03, Up-827/04, dated 23 March 2006, the Constitutional Court accepted the two constitutional complaints for consideration. In conformity with the provisions of the first and fourth paragraphs of Article 26 in relation to Article 49 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the constitutional complaints were sent to the Ljubljana Higher Court and the Koper Higher Court, which did not reply thereto. In conformity with Article 22 of the Constitution, the constitutional complaints were also sent to the opposing parties in the police procedure, which also did not reply thereto.

#### **B – I**

11. In Orders No. Up-285/97, dated 10 May 2001 (Official Gazette RS, No. 52/01, and OdlUS X, 115) and No. Up-168/98, dated 10 May 2001 (Official Gazette RS, No. 52/01, and OdlUS X, 116), the Constitutional Court adopted the position that an injured party acting as a prosecutor (a subsidiary prosecutor) and a private prosecutor do not have active standing to file a constitutional complaint against a final judgment of acquittal or some other judicial decision by which the criminal procedure was concluded finally.
12. The case at issue is substantively different than the two mentioned above. The complainants namely challenge a final order on the dismissal of a request to initiate a criminal investigation and a final order on the dismissal of a request for a retrial in conformity with Article 409 of the CrPA, which they filed against the persons who at the time when they allegedly committed the criminal offences with which they are charged were taking part, as police officers, in a police action during which one person died. Hitherto, the Constitutional Court has not yet adopted a position

with regard to whether the filing of constitutional complaints is justified in such cases. Therefore, in the case at issue, the Constitutional Court decided to consider the matter on its merits. It resolved that it would decide on both constitutional complaints by one decision.

## B – II

13. The Constitutional Court consulted file No. II Kpr 70/2001 of the Ljubljana District Court.
14. The file shows that after a state prosecutor had rejected their criminal complaint, the complainants acting as subsidiary prosecutors (i.e. the injured parties acting as prosecutors) filed a request to initiate an investigation against six police officers (the first group of police officers) on grounds of a reasonable suspicion that they had committed the criminal offences of negligent homicide, a violation of the inviolability of dwellings, two criminal offences of the unlawful deprivation of liberty (of the complainant and D. D.), the criminal offence of a wrongful personal search (of D. D.), and two criminal offences of the violation of personal dignity (of the complainant and D. D.) by the abuse of office or official duties. Against one of these police officers and another three police officers (the second group of police officers), the injured parties acting as prosecutors filed a request to initiate an investigation on grounds of a reasonable suspicion that they had committed the criminal offences of the abuse of office or official duties and a violation of the inviolability of dwellings. Due to the death of one of the police officers they later withdrew the request to initiate an investigation against him.
15. The investigating judge of the Ljubljana District Court decided, by Order No. II Kpr 70/2001, dated 28 May 2002, that an investigation be carried out against the police officers from the first group on grounds of a reasonable suspicion that they had committed the criminal offences of negligent homicide determined by Article 129 of the PC and the violation of personal dignity (of D. D.) by the abuse of office or official duties determined by Article 270 of the PC in relation to Article 25 of the PC. With regard to the police officers from the second group, the investigating judge initiated an investigation against them on grounds of a reasonable suspicion that they had committed the criminal offence of a violation of the inviolability of dwellings as determined by the first, second, and third paragraphs of Article 152 of the PC in relation to Article 25 of the PC.
16. The investigating judge decided on the request to initiate an investigation only in the above-mentioned part. In the remaining part, he requested that a three-judge panel for pre-trial appeals decide on the matter, as he did not agree that an investigation should be initiated.
17. The defence counsels of all the defendants but two appealed against the order initiating the investigation. By Order No. Ks 801/2002, dated 29 September 2002, the three-judge panel for pre-trial appeals of the District Court granted the appeals and modified the order issued by the investigating judge so as to dismiss in its entirety the request to initiate a criminal investigation (points I A and I B of the Order). Furthermore, it dismissed *ex officio* the request to initiate a criminal investigation

against the two police officers who did not appeal. By the above-mentioned Order, the decision of the three-judge panel for pre-trial appeals mentioned in point I became final.

18. By the same Order, the panel also decided on the remaining part of the request to initiate an investigation such that it concurred with the investigating judge's opinion that there was no reasonable suspicion that the defendants committed the alleged criminal offences; therefore, also in this part it dismissed the request to initiate an investigation (points II A and II B of the Order).
19. The complainants as subsidiary prosecutors filed an appeal against point II of the Order of the panel of the Ljubljana District Court and claimed that there had been an erroneous finding on the state of the facts. By Order No. I Kp 652/2003, dated 29 May 2003, the Ljubljana Higher Court dismissed their appeal as unfounded.
20. Thereupon, the complainants filed a request for a retrial, in conformity with Article 409 of the CrPA, against the police officers from the first and second groups for having committed the criminal offence of negligent homicide as determined by Article 129 of the PC. By point I of Order No. Ks 1294/2003, dated 28 October 2003, the three-judge panel for pre-trial appeals of the Ljubljana District Court rejected the request of the injured parties acting as prosecutors for a retrial against the police officers from the second group. By point II it dismissed as unfounded the request of the injured parties acting as prosecutors for a retrial against the police officers from the first group.
21. Both subsidiary prosecutors appealed against point II of the Order of the three-judge panel for pre-trial appeals. By Order No. Kp 167/2004, dated 1 September 2004, the Koper Higher Court (the jurisdiction of this court was determined, upon the motion of the subsidiary prosecutors to transfer the territorial jurisdiction, by a Supreme Court order) dismissed their appeal, and rejected a supplement to the appeal for being too late.

### **B – III**

22. In the proceedings that were concluded by the challenged judicial decisions, the injured parties requested that a criminal investigation be initiated against the police officers that participated in the police action during which one person (the husband or son of the complainants, respectively) died. The complainants allege a violation of the right to a fair trial. They allege, *inter alia*, that their request that a criminal investigation be initiated and that a retrial be carried out refers to criminal offences that interfered with the human rights determined by Articles 17, 18, 19, 21, and 36 of the Constitution. They also refer to the provisions of the ECHR and in particular emphasise the violation of a person's right to life and "the right to the prohibition of torture". The complainants are of the opinion that by not allowing the criminal investigation to be initiated, the courts violated the first paragraph of Article 23 of the Constitution. They request that a fair investigation be carried out by an impartial court independent from the police in which they will be given the opportunity to present the incriminating evidence in their possession.

23. In their constitutional complaint, the complainants emphasise in particular the interference by the police officers with the human rights determined by Articles 17, 18, and 21 of the Constitution, which refer to protection from interferences with fundamental human rights. Article 17 of the Constitution guarantees the inviolability of human life. Article 18 of the Constitution (the prohibition of torture) determines, *inter alia*, that no one may be subjected to torture, inhuman or degrading punishment or treatment. Article 21 of the Constitution (the protection of human personality and dignity) guarantees respect for human personality and dignity in criminal and all other legal proceedings, as well as during the deprivation of liberty and enforcement of punitive sanctions. Moreover, it prohibits violence of any form on any person whose liberty has been restricted in any way and the use of any form of coercion in obtaining confessions and statements. The above-mentioned constitutional provisions are intended to protect individuals from the interferences of the state or its public officials with their life, physical and mental integrity, and dignity. In Decision No. Up-183/97, dated 10 July 1997 (OdlUS VI, 183), the Constitutional Court adopted the position that the provision of Article 18 of the Constitution is above all intended to protect persons from the use of various forms of (physical and psychological) violence during the exercise of the state authorities' repressive authorisations.
24. Human life, a person's physical and mental integrity, and dignity are the highest values within the hierarchy of human rights; as such, they are protected by numerous international instruments. Already the International Covenant and the Universal Declaration of the UN guarantee these rights special protection. As the complainants correctly state, the above-mentioned fundamental human rights are also guaranteed by the ECHR and the Convention against Torture. The right to life is guaranteed by Article 2 of the ECHR and Article 1 of Protocol No. 6.<sup>1</sup> The second paragraph of Article 2 [of the ECHR] expressly lists the instances in which the deprivation of life that is the result of the use of force which is no more than absolutely necessary is not deemed to entail a violation of the above-mentioned provision. Protection against torture and inhuman or degrading treatment or punishment is ensured by Article 3 of the ECHR,<sup>2</sup>

1 Article 2 of the ECHR (the right to life) reads as follows:

- "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
- (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 1 of Protocol No. 6 to the ECHR (the abolition of the death penalty) reads as follows: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

2 Article 3 of the ECHR (the prohibition of torture) reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

which allows no exceptions and which in conformity with the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR) is also absolute. As regards the differentiation between torture and inhuman or degrading treatment, in its case law the ECtHR has relied on the differentiation determined by the Convention against Torture.<sup>3</sup> Torture is also unconditionally prohibited by the Convention against Torture. Acts of torture determined by the first paragraph of Article 1 of the Convention against Torture<sup>4</sup> are, as a general rule, those committed by public officials. The first paragraph of Article 16 of the Convention against Torture determines the duty of states to undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment committed by public officials. The first paragraph of Article 4 of the Convention against Torture determines that each state shall ensure that all acts of torture are offences under its criminal law. Article 12 of the Convention against Torture determines that each state shall ensure that its competent authorities proceed to a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture or inhuman treatment has been committed on its territory. Furthermore, in conformity with Article 13 of the Convention against Torture, each state shall ensure that any individual who alleges he or she has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his or her case promptly and impartially examined by its competent authorities. Also from the case law of the ECtHR it follows that states are obliged, within the framework of their positive duties, to prevent violence that results in the death of a person and to consistently track down the alleged perpetrators [of the criminal offence] and conduct an investigation against them.<sup>5</sup>

25. The first paragraph of Article 5 of the Constitution binds the state to protect human rights and fundamental freedoms on its own territory. With regard to the protection of human rights and fundamental freedoms, the state has so-called negative and positive obligations. Negative obligations entail that the state must refrain from interferences with human rights and fundamental freedoms. Positive obligations, on the other hand, bind the state and its individual branches of power (the judicial, legislative, and executive powers) to actively protect human rights and fundamental freedoms. Thus, the protection of human rights should not be regarded only as the duty of the state to refrain from conduct that would interfere with human rights or limit the same; the protection of human rights also obliges the state to actively

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3 This is stated by the ECtHR in *Selmouni v. France*, dated 28 July 1999, No. 25803/94, Para. 97.

4 The first paragraph of Article 1 of the Convention against Torture reads as follows: “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.”

5 This is stated by the ECtHR in *Avsar v. Turkey*, dated 10 July 2001, No. 25657/94, Para. 393.

carry out activities such that it creates opportunities for the most effective exercise of human rights possible. In one of its decisions, the Constitutional Court stated: “In a state governed by the rule of law, there must exist such a system of organisation as enables the implementation of the Constitution and laws, and such system of procedures as enables the exercise of rights and freedoms” (the Decision in case No. U-I-13/94, dated 21 January 1994, Official Gazette RS, No. 6/94, and OdlUS III, 8). The mentioned requirement also follows from the case law of the ECtHR. In principle, the positive obligations of the state are all the more emphasised as the protected value is placed higher in the hierarchy of human rights.<sup>6</sup> Due to the fact that human rights that protect life, physical and mental integrity, and the dignity of individuals are the fundamental values in a democratic society, the state is obliged to protect them in a particularly active manner and to create opportunities for their most effective exercise possible.

26. In conformity with the mentioned positive obligation, the state protects individuals from the most severe interferences with their lives, integrity, and dignity also in such manner that in its criminal law it defines such interferences as criminal offences. In fact, torture and inhuman treatment are not defined as separate criminal offences in the PC. However, certain criminal offences determined by the PC (which also include those with regard to which the complainants requested that a criminal investigation be initiated) encompass specific conduct that follows from the definitions of the human rights determined by Articles 17, 18, and 21 of the Constitution.
27. In conformity with the CrPA, the prosecution of perpetrators of criminal offences that are prosecuted *ex officio* is in the hands of state prosecutors. A criminal investigation is initiated upon the request of the authorised prosecutor. In conformity with point 1 of the second paragraph of Article 45 of the CrPA, in respect of criminal offences that are prosecuted *ex officio*, public prosecutors have the jurisdiction to do what is necessary with regard to the detection of criminal offences, tracking down the perpetrators, and directing the police procedure. They carry out their prosecutorial function in conformity with the principle of legality, provided that the law does not determine otherwise. In conformity with the mentioned principle, a public prosecutor is obliged to initiate criminal prosecution if a reasonable suspicion exists that an individual has committed a criminal offence that must be prosecuted *ex officio*. If a public prosecutor establishes that a reasonable suspicion does not exist that such criminal offence has been committed, he or she does not institute criminal prosecution. In conformity with Article 51 of the CrPA, a public prosecutor may also discontinue prosecution. In both instances, an injured party acting as a prosecutor may take his or her place (the second paragraph of Article 60 of the CrPA). This possibility is envisaged as a corrective for the prosecutor's assessment of the non-existence of the statutory conditions necessary to initiate criminal prosecution, which for various reasons may be erroneous or even illegal and which may have detrimental consequences for the

<sup>6</sup> B. M. Zupančič 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, pp. 112 and 113.

injured party. An injured party acting as a prosecutor has the right to file a request that a criminal investigation be initiated or a direct indictment in order to enforce his or her interests.<sup>7</sup> If the injured party enters criminal proceedings in the above-described manner, he or she becomes a party to the criminal procedure.

28. The first paragraph of Article 23 of the Constitution determines that everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. The Constitutional Court has already adopted the position that the right to judicial protection does not entail the right to a precisely determined type of judicial proceedings.
29. In the case at issue, the complainants requested, in conformity with the above-mentioned provisions of the CrPA, that a criminal investigation be initiated; their request was decided by a court order that became final. Thus, within such scope, the judicial protection of the complainants' rights determined by the CrPA was ensured. In fact, the complaints do not deny this. However, they maintain that due to the alleged interference with human rights, a judicial investigation should be carried out against the suspects in which they would have the right to actively participate as injured parties.
30. With regard to Articles 2 and 3 of the ECHR, it follows from the Convention against Torture and the case law of the ECtHR that the state must additionally protect individuals who were deprived of liberty and who are therefore in a particularly vulnerable position. The ECtHR emphasises that any recourse to physical force during the deprivation of an individual's liberty that is not in the strict sense provoked by the individual's behaviour, curtails the individual's dignity and in principle violates the right determined by Article 3 of the ECHR.<sup>8</sup> If an individual, when under the actual physical control of repressive authorities, suffers serious injuries or dies, the state must provide a plausible explanation of how such consequences occurred.<sup>9</sup> To this end, it must ensure that procedures be carried out in which all the relevant facts and circumstances in respect of the concrete event are investigated and determined in conformity with the principle of directness, as well as, above all, the possible reasons for the death or injuries of such individual.<sup>10</sup>

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7 The procedure with regard to the request to initiate an investigation is determined by Article 169 of the CrPA. Upon receiving the request to initiate an investigation, the investigating judge examines, on the basis of the file that is enclosed with the request by the state prosecutor, whether the standard of proof of reasonable suspicion is fulfilled. If the investigating judge does not agree to grant the request to initiate an investigation, he or she requests that the three-judge panel for pre-trial appeals decide thereon. An appeal to the Higher Court is allowed against the decision of this panel. In fact, this entails a special phase of the police procedure in which the court decides whether the criminal procedure should be initiated or not.

8 This is stated by the ECtHR in *Ribitsch v. Austria*, dated 4 December 2005, No. 42/1994/489/571, Para. 38.

9 This is stated by the ECtHR in *Selmouni v. France*, Para. 87, and in *Avsar v. Turkey*, Para. 391.

10 See the case law of the ECtHR, e.g. *Ribitsch v. Austria*, Para. 34; *Andronicou and Constantinou v. Cyprus*, dated 9 October 1997, No. 86/1996/705/897, Para. 171 (also the dissenting opinion of Judge Pikis, who emphasised the importance of errors when planning an action by the repressive authorities in selecting the participating

31. The ECtHR also assessed the case *Rehbock v. Slovenia* in light of the above-mentioned criteria.<sup>11</sup> The ECtHR established, *inter alia*, that due to the manner in which the applicant was treated (the case concerned the arrest of a suspect who allegedly smuggled drugs) during the procedure resulting in the deprivation of his liberty there was a violation of Article 3 of the ECHR. With regard to the serious nature of his injuries, the ECtHR was of the opinion that the Government failed to provide convincing and plausible arguments on the basis of which it would be possible to explain or justify the degree of force used during the arrest. According to the assessment of the ECtHR, the force used in the given circumstances was excessive and unjustified. The consequence of such use of force were injuries that undoubtedly caused the applicant serious suffering, therefore he was being treated inhumanly.<sup>12</sup>
32. Article 13 of the ECHR guarantees everyone whose rights and freedoms as set forth in the ECHR were violated to have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. In conformity with the case law of the ECtHR, judicial proceedings do not necessarily always entail an effective (legal) remedy. Nevertheless, the legal remedy must be effective in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the state.<sup>13</sup> From the case law of the ECtHR relating to Article 13 of the ECHR in instances involving allegations of the violation of the rights and freedoms determined by Articles 2 and 3 of the ECHR, it follows that the nature of the right that was allegedly violated by the repressive authorities also has an influence on the type of legal remedies that must be guaranteed to victims. According to the ECtHR, in instances where an allegation of the violation of Articles 2 and 3 of the ECHR is probable, the notion of an effective (legal) remedy in the sense of Article 13 of the ECHR must also entail a thorough and effective investigation capable of leading to the identification and punishment of the perpetrators, as well as effective access

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officers, weapons, etc., when what is at issue are actions in which human health or life could be threatened); and *Salman v. Turkey*, dated 27 June 2000, No. 21986/93, Para. 99.

11 Judgment dated 28 November 2000, No. 29462/95.

12 In this decision, the ECtHR referred to two other decisions; namely to the Judgment in *Ribitsch v. Austria*, in which the ECtHR (after an in-depth assessment of the facts established before the domestic courts in the criminal procedure) established a violation of Article 3 of the ECHR and stated that the government failed to provide a plausible explanation of how the applicant sustained injuries and also failed to produce appropriate evidence by which it could raise doubts with regard to the applicant's allegations. In this respect, it stated the mere reference to the outcome of the criminal procedure in which it was established that the high standard of proof needed for a criminal conviction was not satisfied does not suffice. The second Judgment [referred to] is *Klaas v. Germany*, dated 22 September 1993 (No. 27/1992/372/446). In this case, [the complainant] sustained less serious injuries during the course of an arrest and the national courts (in civil proceedings) had, in the opinion of the ECtHR, satisfactorily established the facts after having had the opportunity to hear witnesses first hand and to assess their credibility.

13 This is stated by the ECtHR in *Aksoy v. Turkey*, dated 18 December 1996, No. 100/1995/606/694, Para. 95.

by the injured party or his or her relatives to the investigation procedure.<sup>14</sup> With regard to the above, in instances where an individual has lost his or her life while under the control of the repressive authorities, the state is obliged to establish all the relevant facts and circumstances of the case and enable the effective participation of the relatives of the deceased in such procedure. The investigation must be carried out by independent investigators, unimpeded by the state.<sup>15</sup> In conformity with the case law of the ECtHR, a prompt and thorough investigation is particularly important, as an incomplete investigation is tantamount to undermining the effectiveness of any other remedies that may have existed.<sup>16</sup>

33. The Constitution does not expressly guarantee the above-mentioned right. It follows from the Constitution that no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognize that right or freedom (the fifth paragraph of Article 15 of the Constitution). The fourth paragraph of Article 15 of the Constitution guarantees judicial protection of human rights and fundamental freedoms, and the right to obtain redress for the violation of such rights and freedoms. This is a general constitutional provision that reflects the requirement determined by Article 13 of the ECHR, which imposes on the contracting states the duty to guarantee effective (legal) protection of human rights. As applies to determining the right to judicial protection determined by the first paragraph of Article 23 of the Constitution, also in determining the content of the above-mentioned right one must proceed from the general premise in conformity with which the possibility of the effective and actual exercise of human rights must be ensured, as it is not the purpose of the Constitution to recognise human rights only formally and theoretically (Decision of the Constitutional Court No. Up-257/97, dated 16 July 1998, OdlUS VII, 231). With regard to the above, the provision of the fourth paragraph of Article 15 of the Constitution must be understood in such a manner so as to also encompass the right to an independent investigation of the circumstances of an incident in which a person was allegedly subjected to torture or inhuman or degrading treatment by the repressive authorities of the state, or in which a person died during an action carried out by the repressive authorities of the state. Furthermore, the mentioned right also includes the right of the affected persons to effective access to such investigation. Although the provision of the fourth paragraph of Article 15 of the Constitution guarantees judicial protection of human rights, the above-mentioned case law of the ECtHR relating to Article 13 of the ECHR determines that in such situations as mentioned above already an investigation carried out outside [the framework] of judicial proceedings is sufficient, provided that it is independent and that it ensures the affected persons effective participation therein.

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14 This is stated by the ECtHR in *Kaya v. Turkey*, dated 19 February 1998, No. 158/1996/777/978, Para. 107.

15 J. Simor *et al.* (Ed.): *Human Rights Practice*, Sweet and Maxwell, London 2002, p. 13,009, Para. 13,002.

16 This is stated by the ECtHR in *Aksoy v. Turkey*, Para. 99.

34. Hence, from the fourth paragraph of Article 15 of the Constitution and Article 13 of the ECHR it does not follow that an independent investigation should be carried out within the framework of a criminal procedure. The fundamental purpose of a criminal procedure is namely to establish whether the defendant committed a criminal offence and whether he or she is guilty thereof, and, if the answer to both questions is affirmative, to impose a criminal sanction on him or her. As regards the purpose of the criminal procedure, such procedure can neither be extended to the investigation of the circumstances of the incident within the sense of the requirements that follow from the case law of the ECHR, nor can it be regarded as a substitute therefor. The Constitutional Court has already adopted the position that the right of the injured party in a criminal procedure to take over criminal prosecution does not also entail that he or she also has a constitutionally protected right to achieve a criminal conviction (the Constitutional Court stated this in Decision No. Up-285/97). Furthermore, limiting an independent investigation to a criminal procedure would annul the possibility of an independent investigation of state violence in instances where it could not be alleged that persons have committed a criminal offence or where obstacles to initiating criminal proceedings would exist. With regard to the above, the complainants' right determined by the fourth paragraph of Article 15 of the Constitution in relation to Article 13 of the ECHR was not violated merely because no criminal investigation was initiated with respect to the incident.
35. With regard to what was established, the Constitutional Court had to provide an answer to the question of whether the complainants were ensured appropriate legal protection of their rights, i.e. in conformity with the requirement determined by the fourth paragraph of Article 15 of the Constitution in relation to Article 13 of the ECHR.<sup>17</sup>
36. At the time of the incident in question, persons who believed that the actions of a police officer or a police officer's failure to act violated their rights and freedoms also had the possibility to file a complaint with the police (Article 28 of the Police Act, Official Gazette RS, No. 49/98 – hereinafter referred to as the PA). The second paragraph of the mentioned article of the PA determined that representatives of the public and representatives of the police union shall participate in the resolution of such a complaint. From the Instructions on the Resolution of Complaints (Official Gazette RS, No. 103/2000) in force at the time it follows that the panel that considered the complaints was composed of three members and was presided over by the Director General of the Police, the Director of a Police Directorate, or by some other police employee to whom they conferred their authorisation, respectively. Furthermore, the Director General of the Police or the Director of a Police Directorate appointed the representatives of the public and the representatives of the police union. However, from the constitutional complaint it is not evident whether the complainants had filed such a legal remedy or not. Due to the fact

<sup>17</sup> Decision No. Up-277/96, dated 7 November 1996 (OdlUS V, 189), referred to a similar situation.

that the mentioned legal remedy did not fulfil the conditions determined for an independent investigation within the meaning of the fourth paragraph of Article 15 of the Constitution in relation to Article 13 of the ECHR, the Constitutional Court did not have to adopt a position with regard to the question of whether the complainants had exhausted this legal remedy.

37. The criminal file shows that on the basis of the Rules on Police Powers (Official Gazette RS, No. 51/2000 – hereinafter referred to as the Rules), on 13 September 2000 a commission was established at the Ljubljana Police Directorate whose task was to determine the circumstances of the carrying out and course of the procedure on 3 April 2000 (with regard to the use of measures involving the use of force), during which D. D. died. The minutes of the meeting of the mentioned commission on 11 October 2000 show that in conformity with the legislation in force at that time, the commission was composed of four members employed by the Police Directorate; however, the complainants did not have any influence thereon.<sup>18</sup> With regard to the above, also this investigation of the circumstances of the incident did not match the criteria introduced by the ECtHR with regard to the right to an effective legal remedy determined by Article 13 of the ECHR.
38. In conformity with the second paragraph of Article 59 of the CCA, if the Constitutional Court establishes that the challenged decision is based on an unconstitutional law, it can initiate proceedings for the review of its constitutionality *ex officio*. Due to the fact that Article 28 of the PA was subsequently amended (by the Act Amending the Police Act, Official Gazette RS, No. 79/03 – hereinafter referred to as the PA-B), and because the possible establishment of the inconsistency of the disputed regulation with the Constitution would not have any influence on the legal position of the complainants, the Constitutional Court did not review the constitutionality of Article 28 of the PA in force at the time when the alleged police violence occurred.
39. In conformity with the provision of the fourth paragraph of Article 15 of the Constitution in relation to Article 13 of the ECHR, the state must, in instances such as in the case at issue, provide for an independent investigation of the circumstances of the incident and enable the complainants effective access to such investigation. The state failed to provide such an investigation. Since the Constitutional Court established that the complainants' human rights and fundamental freedoms were not violated merely because the criminal investigation was not initiated (Paragraph 34 of the reasoning), it did not abrogate the challenged provisions, but adopted a declaratory decision instead. It granted the constitutional complaints by deciding that the complainants' right to an effective legal remedy determined by the fourth paragraph of Article 15 of the Constitution in relation to Article 13 of the ECHR was violated.

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18 Already in the Judgment in *Rehbock v. Slovenia*, the ECtHR established that the investigation carried out by the Police Directorate, whose employees had been involved in the applicant's arrest, was not appropriate (Para. 74).

## C

40. The Constitutional Court adopted this Decision on the basis of Article 47 in relation to Article 49 of the CCA, composed of: Dr Janez Čebulj, President, and Judges Dr Zvonko Fišer, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr Ciril Ribičič, Dr Mirjam Škrk, Jože Tratnik, and Dr Dragica Wedam Lukić. The decision was reached unanimously. Judges Ribičič and Škrk submitted concurring opinions.

*Dr Mirjam Škrk,  
Vice President*

*on behalf of  
Dr Janez Čebulj  
President*

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**CONCURRING OPINION OF JUDGE DR RIBIČIČ**

1. When deciding, a judge of the Constitutional Court needs a penetrating mind, a clear view, a still hand, and not least, with regard to the Court being overburdened, he or she must be in good condition. My motivation to persist<sup>1</sup> lies, on the one hand, in cases such as the case at issue, in which the Constitutional Court granted the constitutional complaints, despite its negative attitude towards the right of subsidiary prosecutors to file a constitutional complaint, its reserved position with regard to declaratory decisions, and second thoughts with regard to certain standards of the protection of rights as introduced by the European Court of Human Rights (hereinafter referred to as the ECtHR) in its case law. On the other hand, I am motivated by separate opinions, such as that written by Judge Pikis, which is mentioned in Note No. 10 of the Decision of the Constitutional Court regarding which I am writing this concurring opinion. In this opinion, I wish to emphasise the significance and the particularities of the Decision in the case at issue, in favour of which I voted, as well as the significance of its legal effects.
2. G. Pikis, an *ad hoc* judge, submitted a dissenting opinion in the case of *Andronicou and Constantinou v. Cyprus*, in which he was opposed to the decision of the majority of the judges of the chamber of the European Court of Human Rights that on 9 October 1997 decided by five votes against four that Cyprus had not violated Article 2 of the European Convention on Human Rights (hereinafter referred to as the ECHR), which is intended to protect human life. It is rarely the case that when assessing a state's

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1 If you try to imagine someone who has been given the opportunity, as I was, to write this separate opinion in three days, and there was a small cloud of mosquitoes from the other branches of power buzzing around and biting him, once in the hand, then in the temple, again in the eye, then you can visualise circumstances in which it is not easy to persist.

responsibility, a judge who comes from a respondent state is objective and critical to the same degree, let alone more rigorous than the majority in the ECtHR's chamber. Judge Pikis supported his rigorous standpoint by the fact that the state he is a citizen of did not meticulously enough plan and carry out the rescue operation, the purpose of which was to rescue a captive, and in which both the perpetrator of violence as well as his victim, whom he used as a living shield (Elsie Constantinou), died as a result of the gunshots fired by the Cyprus special police forces. In the opinion of Judge Pikis, the duty of the state to protect the lives of its citizens should be assigned the highest priority. Therefore, an operation that includes a danger to human life "must be planned and controlled in a way eliminating every foreseeable element of unnecessary risk to life on account of the use of force." Choosing the special police task force officers who were trained to shoot to kill and equipping them with machine guns, as well as insufficient instructions and control resulted in the final consequence that two special squad officers, when they perceived a danger to their safety, reacted reflexively, resulting in a fatal consequence, the death of two people.

3. What is the substantive connection between the cited separate opinion of Judge Pikis and the present case? The similarity is in the circumstances in which the fate of an individual is left to the mercy of armed repressive authorities of the state. In such circumstances, not only in the opinion of Judge Pikis, but also according to the position of the ECtHR, the responsibility of the state for the consequences is much greater than otherwise, e.g. in instances where an armed conflict occurs suddenly and there is no time to plan and control the use of police force. Such position of the ECtHR was directly and painfully pointed out to Slovenia in the judgment in the case *Rehbock v. Slovenia*, dated 28 November 2000 (Application No. 29462/95), in which the applicant suffered severe injuries (a double fracture of his jaw and facial contusions) in the course of his arrest, which the police were able to comprehensively [plan and] well prepare in advance. In this case, it was established that Slovenia violated Article 3 of the ECHR (torture and inhuman and degrading treatment). The present case, which in fact occurred five years after the *Rehbock* case and half a year before the judgment in the *Rehbock* case was adopted, and which unfortunately is not the only such case, demonstrates that it was not a one-time mistake in police operations, but that the problem is more serious. In order to illustrate the matter, the case *Matko v. Slovenia* (Application No. 43393/98) can be mentioned, regarding which the ECtHR has not yet decided on the merits, but which it has established is ready to be decided on (the ECtHR accepted the application for consideration on 8 July 2004), also with regard to the question of whether the applicant's rights determined by Article 3 of the ECHR were violated when he was brutally beaten during his arrest, which was carried out due to the fact that he did not stop his vehicle when requested to do so by police officers. The applicant, Aleksander Matko, alleged that he did not exhaust all the legal remedies available within the Slovene legal order because he had lost confidence in the Slovene system of justice during the criminal proceedings, in which a suspended sentence was imposed on him for having attempted to obstruct an official carrying

out official duties. In his opinion, the police often exceed their powers and courts do not dare to hold the state liable. Similar holds true for actions for damages, which in addition last a very long time. On the basis of such testimonies regarding police operations, the picture of Slovenia and the protection of human rights and fundamental freedoms in Slovenia that results is anything but exemplary.

4. In my opinion, in the present case during the police action that led to the death of D. D., who was suspected of unlawfully dealing in narcotic drugs, the police made many incomprehensible mistakes (as regards poor planning and carrying out the action, deficient preparations therefor, a lack of information on the health condition of the victim, who suffered from severe asthma, police officers poorly trained to provide medical help, brutal and degrading treatment of the arrested person), which resulted, according to the testimony of his wife, in him dying handcuffed on the floor of his apartment in the presence of his wife and child, unable to take his medications. Furthermore, the significance of the Decision of the Constitutional Court in the present case is also that the Court established a violation of the ECHR and the Constitution, because the complainants, whose son or husband, respectively, died, did not have the opportunity to initiate and participate in an independent investigation into all the circumstances in which the death occurred. In fact, the Constitutional Court relatively often refers to the ECHR and the judgments of the ECtHR; however, probably in no case until the present one was the core of its decision based on the ECHR and numerous ECtHR judgments, from which the Constitutional Court derived the right to an independent investigation, as follows from the fourth paragraph of Article 15 of the Constitution and Article 13 of the ECHR. In particular, in Paragraphs 30 through 32 of the reasoning of the present Decision, the Constitutional Court refers to judgments of the ECtHR, the common element of which is that they all deal with the responsibility of states in cases in which applicants are left to the mercy of armed repressive authorities of the state. One could say that in the present case the Constitutional Court interpreted the Constitution in a manner friendly to the ECHR and the case law of the ECtHR.
5. The ECtHR operates in conformity with the principle of subsidiarity. In other words: the application of the ECHR in all 46 Member States of the Council of Europe with 800 million inhabitants cannot be ensured by the ECtHR itself. Therefore, the states assign the ECHR the force of a binding national legal act, which has, e.g. in Slovenia, the position of a regulation superior to laws and inferior to the Constitution. Individual provisions of the ECHR even have, as follows from the present Decision of the Constitutional Court and [as is the case] in the case at issue, the force of law, such as the constitutional provisions on human rights have, namely on the basis of the provision of the fifth paragraph of Article 15 of the Constitution, which determines that no human right or fundamental freedom regulated by legal acts in force in Slovenia (and the ECHR undoubtedly is such an act) “may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent.” Hence, it follows from the above that states themselves by means of their regulations and the operation of regular and constitutional courts ensure

the application of the ECHR. In a number of states, their constitutions determine, as regards individual constitutional rights or freedoms, a higher level of protection than determined by the ECHR, which can in no manner be regarded as disputable from the viewpoint of the provisions of the ECHR. It namely follows from Article 17 of the ECHR that the Convention may not be interpreted or abused in a manner such that would lead to a violation or limitation of human rights and freedoms. Consequently, the ECtHR must only intervene in instances where an individual state does not respect the level of protection of human rights and freedoms determined by the ECHR (the so-called minimum European standards of protection of human rights and freedoms).

6. The particularity of the ECHR is that it is an act that is constantly evolving and being extended by means of the case law of the ECtHR, which is its undisputable guardian and master. On the basis of the judgments of the ECtHR, it can be predicted with high probability that the ECtHR, had it decided on the merits of the present case, would have established a violation of Articles 2 or 3 of the ECHR. In my opinion, there is no doubt that the ECtHR would have established that Slovenia violated the aforementioned provisions of the ECHR, if such violation had not been established by the present Decision of the Constitutional Court. The judgment of the ECtHR in the case *Lukenda v. Slovenia* provides a convincing illustration of how a state that in its regulations and case law is not willing to consistently observe the case law of the ECtHR is held liable for such, in this case due to violations of the principle of a trial within a reasonable time and with regard to effective legal remedies available to those whose right to a trial within a reasonable time have been violated. It is important also from this point of view that the Constitutional Court granted the constitutional complaints in the present case. The constitutional courts that consider themselves particularly responsible for the enforcement of European human rights law operate in such manner.
7. In numerous decisions, the Constitutional Court proceeded from the standpoint that private and subsidiary prosecutors cannot file a constitutional complaint, as a criminal judgment does not refer to them, but rather concerns the guilt of the defendant who was acquitted by a final judgment. The Constitutional Court must not interfere with such a judgment, as such is prohibited by the principle of *ne bis in idem* determined by Article 31 of the Constitution (the prohibition of double jeopardy). According to the Constitutional Court, not even a shadow of a doubt may be cast upon a final judgment of acquittal. For such reason, the Constitutional Court rejects such constitutional complaints on the grounds that they were not filed by entitled applicants. Furthermore, the Constitutional Court, i.e. its criminal panel, proceeds in the same manner also in instances where the constitutional complaint does not challenge a final judgment of acquittal, but some other act by which a criminal (or police) procedure was concluded finally, and thus has an effect very similar to a final judgment of acquittal. I cannot agree with such position of the Constitutional Court with regard to the constitutional complaints of private and subsidiary prosecutors. I am namely of the opinion that the protection of the rights of a person who has been acquitted by a final judgment cannot extend so far that the Constitutional

Court cannot establish a violation of the complainant's procedural rights, under the condition that it does not directly interfere with a final judgment of acquittal. It is indeed true that in the event of such a declaratory decision, a shadow of a doubt is cast on the judgment of acquittal; however, this cannot entail a sufficient reason for such declaratory decision to not be admissible.

8. The particularities of constitutional decision-making should allow, in addition to black and white adjudication, which is characteristic of the regular courts' decision-making in criminal cases (conviction – acquittal), also a different, more balanced outcome (a judgment of acquittal and the establishment of a violation of the procedural rights of a private or a subsidiary prosecutor in a criminal procedure that led to a judgment of acquittal). In the case at issue, in view of the fact that what was at issue was not a final judgment of acquittal, the Constitutional Court could even have gone beyond a declaratory decision and annulled the decisions that prevented the carrying out of a criminal investigation or it could even have ordered such investigation by itself. The question is whether such a decision would be reasonable. I have in mind the fact that the incident happened in the spring of 2000 and an investigation would have been ordered only six years later, which could possibly have led to a lengthy criminal procedure concerning a very distant set of events, under the pressure of the possibility that the prosecution may become time-barred. From such viewpoint, the adopted declaratory decision has its advantages.
9. It follows from Paragraph 39 of the reasoning of the Decision in the present case that the Constitutional Court granted the constitutional complaints by means of a declaratory decision. In my opinion, this part of the reasoning should be clearer and with regard to its significance belongs in the operative provisions of the Decision. Nevertheless, it is completely undisputable that the present declaratory Decision entails the granting of the constitutional complaints; for the constitutional complainants this means that they have succeeded, that they have won the proceedings before the Constitutional Court. Why is this success of theirs important to them and why is it important in a broader sense? The highest guardian of human rights and freedoms in Slovenia, which is what the Constitutional Court is, granted the constitutional complainants an authoritative and comprehensively substantiated affirmation that their constitutional rights and rights determined by the ECHR were violated. This alone entails a moral satisfaction, which should not be underestimated. Obviously, these are not the only legal effects of the declaratory Decision adopted by the Constitutional Court in the present case.
10. For regular courts, which in ensuring that the Constitution and the ECHR are respected must not merely rely on the Constitutional Court, the Decision in the present case means that in [future] similar cases they will have to proceed from the positions adopted by the Constitutional Court. Consequently, in the future it should not happen again that the Constitutional Court establishes, six years after an incident that led to fatal consequences, that an independent investigation such as required by the Constitution and the ECHR has not even been conducted in a manner that the relatives of the deceased person are ensured appropriate access to participate therein.

11. Article 26 of the Constitution guarantees an injured person the right to compensation for damage caused by an unlawful action of a state authority. The injured party may pursue satisfaction due to an interference with human rights directly in a criminal procedure by means of filing a claim for indemnification in so-called ancillary proceedings. However, the injured party has the right to primarily pursue his or her claim for damages in a lawsuit, namely entirely independently of whether or not the criminal procedure was actually initiated or how it was concluded. The legislation in force gives the injured person the possibility to file an action for damages. Such action is decided on by a court in civil proceedings in conformity with the general rules on the law of damages. On such basis, the court can grant the injured person compensation for pecuniary and non-pecuniary damage if the conditions for the liability for damages are fulfilled. The criminal file shows that the complainants filed an action for damages. There is no doubt that the decision in the present case and the establishment therein of the violation of the complainants' constitutional rights and the rights determined by the ECHR will improve their position in their efforts to be awarded appropriate damages. In fact, it is true that in order for a decision on such pecuniary satisfaction to be adopted neither a criminal judgment of conviction nor such a declaratory decision as adopted by the Constitutional Court in the present case is necessary. However, the notorious case of O. J. Simpson proves how a decision in an action for damages can constitute important pecuniary satisfaction and a specific correction of the outcome of criminal proceedings in which the alleged perpetrator of damage has been acquitted.
12. In my opinion, the present Decision also has a great significance from the viewpoint of broadening the legislation. Also the separate opinion of Judge Dr Mirjam Škrk submitted with regard to the present Decision deals with this issue; it draws attention to the fact that in the Slovene legislation no criminal offence is determined that is based on the constitutional and the ECHR's prohibition of torture. The legislature will have to find solutions that will ensure that in instances where severe consequences occur to an individual who was "under the actual physical control of repressive authorities" (Paragraph 30 of the reasoning of the Decision in the present case), an effective investigation is provided, and that the access of the injured party or his or her relatives to the investigation is ensured. And that is not all. This Decision entails a new warning to all those concerned with the reputation of Slovenia that much more has to be done in order to prevent police violence and to ensure effective supervision over the cases in which there is a suspicion that unjustified violence has occurred. Also from this perspective the Decision in the present case resembles the case law of the ECtHR, which with numerous landmark or pilot judgments in recent years (e.g. *Broniowski v. Poland*)<sup>2</sup>

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2 In the ECtHR's so-called pilot or leading judgment dated 22 June 2004, which in my opinion has a revolutionary significance for the case law of the ECtHR, the Court established a violation of the rights determined by the ECHR of Jerzy Broniowski, the heir of an owner who had lost his real properties when the borders between Poland and the Soviet Union were changed after the Second World War. The judgment was not limited to [only] remedying the injustice inflicted on the applicant, but required of Poland to do the same in tens of thousands of other similar cases. The incredibly far-reaching consequences of the judgment are evident from

has paved new paths towards the effective protection of human rights; in doing so, it has not limited itself to criticising judicial decisions, but has also established systemic deficiencies that entail a violation of the ECHR and required that they be remedied. The compliment regarding the fact that the Decision in the present case can be compared to landmark judgments of the ECtHR is all the more justified, because both courts, the ECtHR and the Constitutional Court, adopted these decisions while being incredibly overburdened, which prevents them from dealing thoroughly with the development of the protection of human rights and freedoms.

13. With the present Decision, the Constitutional Court has perhaps not succeeded in re-establishing to a satisfactory extent the balance that was lost by the death of the complainants' husband and son, respectively, and by the fact that no independent and effective investigation into the circumstances of this death was carried out in which the complainants were able to participate. Nevertheless, this Decision undoubtedly established a basis for this to not happen again in similar cases in the future. Furthermore, it also is similarly crucial that by its Decision in the present case the Constitutional Court demonstrated an especially responsible stance towards the obligations of Slovenia that stem from the ECHR and the case law of the ECtHR, in particularly those in relation to applications against Slovenia. The effects of such an approach can be beneficial for everyone: for the citizens and the protection of their rights when they find themselves in the vice of repressive authorities; for the state, which is not indifferent to its reputation;<sup>3</sup> and for the ECtHR in that it will not have to assess cases concerning police violence if this is effectively prevented and punished [already] before Slovene courts. This is especially true when what is at stake is the obligation of the state, which stems from the Constitution and the ECHR, to protect the lives of people who find themselves subject to its interferences. I see the moral of the Decision in the present case in that in instances where a suspicion of police violence arises Slovenia must not *a priori* take the side of the state police, as it would thereby neglect its primary obligation

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the second judgment of the ECtHR in the same case, dated 28 September 2005, by which the ECtHR affirmed the friendly settlement agreement between the applicant and the Polish Government. It follows therefrom that Poland, by means of a judgment of its constitutional court and on the basis of a special law, established a legal basis for the injured persons to finally be granted the promised right to credit on account of the loss of their real properties, which was even increased by a quarter (from 15% to 20% of the value of the lost real properties). The judgment of the ECtHR in the case of *Broniowski* also deserves special examination for being a successful attempt to strengthen the role of the Court and the protection of rights under the condition of being greatly overburdened. Most certainly, the ECtHR could not have achieved such great shifts with respect to the effects of its judgments as introduced by the *Broniowski* case by amending the ECHR.

- 3 In the opinion of Dr Boštjan M. Zupančič, "in Europe, a single conviction of such nature stigmatises the Republic of Slovenia as an heir of a police state. This means that the case *Rehbock* must be regarded as a serious warning that not only are amendments of the criminal procedure needed *de lege ferenda*, but above all that – particularly in the judicial branch of power – the entire stance and attitude towards the suspect and defendant as an equal subject in the criminal-procedural dispute must be changed." (Introduction, in: Z. Dežman, A. Eberžnik, *Kazensko procesno pravo Republike Slovenije* [Criminal Procedural Law of the Republic of Slovenia], GV Založba, Ljubljana 2003, p. 9).

and responsibility in the field of the protection of human rights and freedoms, namely to protect the lives and dignity of its residents, which would be contrary to the Constitution, the ECHR, and the attained standards of civilised nations.

*Dr Ciril Ribičič*

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**CONCURRING OPINION OF JUDGE DR ŠKRK**

1. In Paragraph 26 of the reasoning of the Decision in favour of which I voted, the Constitutional Court established that the Penal Code (hereinafter referred to as PC) does not regulate torture as a separate criminal offence. Further on, the same paragraph states that certain criminal offences determined by the PC, which also include criminal offences regarding which the complainants requested that a criminal investigation be initiated, include specific types of conduct that follow from the definitions of the human rights determined by Articles 17 (the inviolability of human life), 18 (the prohibition of torture), and 21 (the protection of human personality and dignity) of the Constitution. In its Decision, the Constitutional Court did not attempt to form a value judgment on whether the legislature has acted correctly in that in the thirteen years since Slovenia acceded to the universal Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention against Torture) and became a contracting party to such,<sup>1</sup> the criminal offence of torture has not yet been enacted in the PC.
2. However, what “strikes the eye” in the present case, among other matters, is precisely the fact that the legislature has not enacted torture as a separate criminal offence in the PC, as defined in Article 1 of the Convention against Torture.<sup>2</sup> The constitutional complainants (and, not least of all, also the courts) had to resort, when defining the police violence against the victim who died during such violence and regarding whom they filed the constitutional complaints, to the incrimination of other criminal offences determined by the PC which in their intensity do not attain the level of torture such as defined by the Convention against Torture and as defined by the current case law of certain states, as well as by the case law of international courts and tribunals. What I have in mind are in particular the criminal offences of negligent homicide (Article 129 of the PC) and the violation of personal dignity by abuse of office or official duties (Article 270 of the PC) (see Paragraph 15 of the reasoning of the Decision).
3. Paragraph 24 of the reasoning of the decision states, *inter alia*, that the first paragraph of Article 4 of the Convention against Torture determines that each state shall

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1 Act of Accession, 16 July 1993. Multilateral Treaties Deposited with the Secretary General, status as of 31 December 2001, Volume I, UN, New York, p. 271. On 31 December 2001, there were 127 State Parties to the Convention.

2 For the definition of torture in the Convention against Torture, see note 4 of the Decision.

**ensure**<sup>3</sup> that all acts of torture are offences under its criminal law. The same provision of the Convention against Torture furthermore determines that the same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. The second paragraph of Article 4 determines the obligation of each State Party to make these offences punishable by appropriate penalties which take into account their grave nature.

4. The Convention against Torture binds the states to establish a universal jurisdiction over torture. In conformity with the first paragraph of Article 5 of the Convention against Torture, each State Party shall establish its jurisdiction over the offences of torture in the following cases: (a) when torture is committed in any territory under its jurisdiction (or on its aircrafts or ships); (b) when the alleged offender is a national of that state; and (c) under certain conditions, when the victim is a national of that state. In conformity with the second paragraph of Article 5, each State Party shall establish its jurisdiction over the prosecution of the offender if the offender is present in any territory under its jurisdiction (and if the conditions for extradition determined by Article 8 of the Convention are not fulfilled or if it does not extradite him). Article 6 determines that any State Party shall take the alleged perpetrator of torture into custody, carry out certain investigative acts, and inform thereof the states referred to in the first paragraph of Article 5, with regard to which it also must express its intentions regarding whether it will carry out the criminal procedure by itself. In the first paragraph of Article 7, the rule *aut iudicare aut dedere* is enacted: the State Party in a territory under whose jurisdiction a person alleged to have committed the criminal offence of torture is found shall carry out a criminal procedure if it does not extradite him to any of the states determined by the first paragraph of Article 5.
5. At this point, the question is raised whether or not does the mere fact that Article 18 of the Constitution prohibits torture, inhuman, or degrading punishment or treatment compel the legislature to enact the criminal offence of torture and prescribe an appropriate penalty therefor. With regard to the significance of the prohibition of torture, which falls within the scope of legal and societal demands of the highest rank, it seems that this question could be answered in the affirmative.
6. The Convention against Torture certainly does bind the legislature to incriminate torture in the PC, namely in such a form as this criminal offence is defined in Article 1 of the mentioned Convention. The Convention against Torture leaves the determination of the penalty to the national legislature, with regard to which it binds the legislature to define torture, as regards the prescribed penalty, as a severe criminal offence. In fact, these requirements of the Convention against Torture cannot be assigned the nature of self-executing provisions or provisions that are directly applicable before Slovene

3 At this point, the Decision correctly uses the Slovene verb “zagotoviti”, after the English original *to ensure*. The translation of the Convention in Slovene in the Official Gazette namely reads “*vsaka država članica [si] prizadeva...*” [each State Party shall strive...], which is imprecise. In the international law of treaties, the verb *to strive* does not entail that the state must realise the objective that is the subject of an international obligation. The phrase “shall ensure”, however, undoubtedly entails the obligation of result.

criminal courts.<sup>4</sup> The requirement to respect the principle of legality (*nullum crimen nulla poena sine lege praevia*), which is a universally recognised general principle of law, recognised by civilised nations and written in Article 28 of the Constitution, entails an impediment to the direct application of the Convention against Torture in the prosecution of alleged offenders who have committed torture. However, obligations imposed by means of treaties bind the state to really fulfil such obligations (this was also stated by the Constitutional Court in Opinion Rm-1/97, dated 5 June 1997, Official Gazette RS, No. 40/97, and OdlUS VI, 86). If treaties are not directly applicable, such ratified and published treaties create international obligations for the state to adopt in its national legal order appropriate national legal acts by which it ensures compliance with such obligations (this was stated by the Constitutional Court in Decision No. U-I-312/00, dated 23 April 2003, Official Gazette RS, No. 42/03, and OdlUS XII, 39). As regards the discussed issues, the Constitutional Court refers to the generally recognised *pacta sunt servanda* principle of the international law of treaties, which binds the contracting states to implement treaties in good faith.<sup>5</sup> Hence, as regards the Convention against Torture, there exists the obligation of the state to ensure its application in the national legal order as determined in the Convention against Torture itself, otherwise it is held responsible under international law for such failure to act.

7. Such obligation does not bind the state only to ensure that it is capable of criminally prosecuting alleged offenders who have allegedly committed criminal offences of torture in any territory under its jurisdiction. Within the scope of international cooperation in repressing torture, as established by the Convention against Torture, the state must be capable of criminally prosecuting the perpetrators of criminal offences of torture, if these perpetrators are in its territory, irrespective of the fact where such torture occurred, or it must extradite them to another state. The second paragraph of Article 123 of the PC determines universal jurisdiction. However, it is difficult to imagine on what legal basis an alien who as an official is suspected of having committed the criminal offence of torture in the state of which he or she is a national or in which he or she unlawfully acted in the capacity of an official, would be tried in Slovenia. In the event of a possible review of the conditions for the extradition of an alien suspected of torture, the non-incrimination of the criminal offence of torture in the PC could cause difficulties in the application of the rules on double criminality and speciality,<sup>6</sup> which are two established international standards of every extradition procedure.
8. In addition to all of the above, we must not overlook the fact that the Convention against Torture, which defines torture as an international offence under criminal law, was adopted on 10 December 1984.<sup>7</sup> Today, the prohibition of torture belongs, alongside

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4 This does not mean, however, that the definition of torture as contained in the Convention cannot be directly applied in some different context.

5 See, *inter alia*, Opinion No. Rm-1/97. The Constitutional Court refers therein to Article 26 of the Vienna Convention on the Law of Treaties of 1969.

6 With regard to the rule of speciality, see the considerations in paragraph 2 above.

7 In deliberations on the Convention on Torture, the Judgment of the House of Lords in the *Pinochet* case, dated 24 March 1999, refers to the Handbook on the Convention against Torture [and Other Cruel, Inhuman

the prohibition of genocide and grave and mass breaches of human rights, among the absolutely binding (peremptory) norms of customary international law (*ius cogens*)<sup>8</sup> that have *erga omnes* effects. Therefore, what is at issue are norms of international law that in the hierarchy of legal norms are above other norms and principles of international law. Such a standpoint, as can be seen from the *Al-Adsani* case, is also accepted by the European Court of Human Rights (hereinafter referred to as the ECtHR) when what is at issue is the criminal responsibility of an individual for an alleged commission of the criminal offence of torture.<sup>9</sup> Paragraph 24 of the reasoning of the Decision states that the protection under the prohibition of torture determined by Article 3 of the European Convention on Human Rights (hereinafter referred to as the ECHR) does not determine any exceptions and is, in conformity with the case law of the ECtHR, absolute.

9. As noted in Paragraph 31 of the reasoning of the Decision, in the case *Rehbock v. Slovenia* the ECtHR established that Article 3 of the ECHR, which prohibits torture or inhuman or degrading treatment or punishment, was violated.
10. Therefore, on the basis of the obligations assumed by the accession to the Convention against Torture in 1993, under international law there certainly exists an obligation for Slovenia to incriminate in the PC the criminal offence of torture as defined in Article 1 of this Convention.

Dr Mirjam Škrk

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or Degrading Treatment or Punishment] by Burgers and Danelius. In their opinion, the standpoint that only the Convention against Torture established the unlawfulness of torture under international law and only for its State Parties is erroneous. The authors are of the opinion that the Convention against Torture proceeds from the comprehension that the practice of torture was declared unlawful under international law already before the adoption of the Convention. The fundamental purpose of the Convention against Torture was to enforce the already existing prohibition of torture by measures designated for that purpose. UK House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, 24 March 1999, 38 International Legal Materials (ILM) 581 (1999), p. 650.

- 8 In the Judgment in *Al-Adsani v. the United Kingdom*, dated 21 November 2001, Application No. 35763/97, the ECtHR referred to the Judgment of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundzija*, dated 10 December 1998 (p. 10, Para. 30), and to the standpoint of the House of Lords in the *Pinochet* case. In the opinion of the ECtHR, the House of Lords in the mentioned case adopted the position that the prohibition of torture had acquired the status of a *ius cogens* norm in international law and that torture had become an international crime, See Judgment of the ECtHR, p. 16 (Para. 51) and p. 20 (Para. 64).
- 9 In the *Al-Adsani* case, the ECtHR otherwise adopted a negative standpoint as to the question of waiving the immunity of states *ratione personae* before foreign courts for their responsibility for damage that arises from violations of *ius cogens* norms of international law. "While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State." *Ibidem*, p. 19 (Para. 61).

**DECISION**

At a session held on 16 October 2014, in proceedings to decide upon the constitutional complaint of Janko Pibernik and Slavka Pibernik, both from Krško, Mojca Pibernik and Jan Pibernik, both from Brežice, and Kana Pibernik, Ljubljana, all represented by Bojan Klakočar, attorney in Krško, the Constitutional Court

*decided as follows:*

Supreme Court Judgment No. II Ips 435/2010, dated 5 April 2012, Ljubljana Higher Court Judgment No. II Cp 3775/2009, dated 12 May 2010, and Ljubljana District Court Judgment No. P 3614/2007-III, dated 18 June 2009, are abrogated in the part in which the claims of Janko Pibernik, Slavka Pibernik, Mojca Pibernik, and Kana Pibernik were dismissed. In this part, the case is remanded to the Ljubljana District Court for new adjudication.

*Reasoning***A**

1. The challenged judgments were issued in a civil procedure in which the complainants (the parents of the deceased Samo Pibernik, his partner Mojca Pibernik, and their two children) demanded the payment of compensation for non-pecuniary damage that occurred due to the death of Samo Pibernik that was allegedly caused by the unlawful conduct of police officers in a police action on 3 April 2000. The court of first instance required the defendant (the Republic of Slovenia) to pay complainant Mojca Pibernik (the third applicant in the lawsuit) compensation for non-pecuniary damage in the amount of EUR 1,000 with statutory default interest, and dismissed the compensation claims of the other complainants (the plaintiffs in the lawsuit). Both the complainants and the defendant filed appeals against the judgment of the first instance. The Higher Court dismissed all the appeals and upheld the judgment of the court of first instance. The Higher Court determined that Article 26 of the Constitution and Article 172 of the Obligations Act (Official Gazette SFRY, Nos. 29/78,

39/85, and 57/89 – hereinafter referred to as the OA), which was in force at the time when the damaging incident occurred, is the basis for the liability of the state for damages. The challenged decision is based on the assessment that the complainants failed to prove the unlawfulness of the conduct of the police in the procedure against the deceased Samo Pibernik, therefore their claims for the payment of compensation for [having suffered] psychological damage due to the death of a relative (Article 201 of the OA) and compensation for lost alimony and support (Article 194 of the OA) are not substantiated. Following from the finding that Samo Pibernik died of an acute asthma attack triggered by the physical and emotional strain during the arrest, the courts proceeded by focusing, in particular, on the assessment of the question of whether police officers acted lawfully in their action and in conformity with the police authorisations and instructions on the use of measures involving the use of force that were applicable at the time. According to the positions of both the court of first instance and the Higher Court, the police officers did not act unlawfully in the circumstances of the concrete case. The courts established that on that day police officers were charged with executing the Order of the investigating judge on duty, No. I Kpd 381/2000, dated 3 April 2000, by which a house search was ordered due to the suspicion that criminal offences related to drug trafficking had been committed. With respect to the findings in the evidentiary proceedings, the deceased resisted the orders of the police officers, therefore, in the assessment of the courts, the police officers applied measures involving the use of force appropriately. The first and second instance courts also concurred with regard to the assessment that it is not possible to criticise the police officers for not enabling the deceased to receive timely and appropriate medical help (i.e. that they were or should have been acquainted with the medical situation of the deceased and the possibility that he could suffocate due to an acute asthma attack), and that with regard thereto it is not possible to allege inadequate diligence when planning the action. Both courts concurred that a causal link between such conduct and the death of Samo Pibernik does not exist even if with regard thereto it were proven that the conduct of the police officers was inappropriate.

2. The Supreme Court partially granted the revision filed by the complainants and in the part in which they refer to the fourth complainant (i.e. the minor son of the deceased) abrogated the judgments of the courts of the first and second instance, and in such scope remanded the case to the court of first instance for new adjudication. In the assessment of the Supreme Court, the court of first instance rejected, without substantiation, the taking of evidence by hearing the minor Jan Pibernik, because at the time of the damaging incident he was still a child (although he was an eyewitness to the relevant incident in the apartment). The court of first instance refused to hear him, arguing that due to the fact that the son was [only] a little more than 5 years old when the incident happened, it would constitute an inappropriate piece of evidence. According to the Supreme Court, also a child can be examined as a party as it has been scientifically established that also very small children have the same sensory capacities as adults. In the action, the hearing of the son as a party was proposed due to the fact that he was present during the key moments when the police officers

carried out the actions due to which the defendant could be liable for damages. In the assessment of the Supreme Court, the defendant justifiably requested the taking of evidence by hearing the minor son of the deceased as a party to proceedings and this does not entail an inappropriate piece of evidence that the court could refuse to take in advance. The Supreme Court dismissed the revision allegations of the other complainants. It concurred with the substantive law assessment of the lower courts that the arrest procedure involving Samo Pibernik did not entail inadmissible conduct and that the reaction of the police officers to the asthmatic attack did not entail negligent conduct. Therefore, also in the assessment of the Supreme Court, not all the prerequisites for the liability of the defendant for damages are fulfilled.

3. The complainants allege violations of the rights determined by Article 14, the fourth paragraph of Article 15, and Articles 22, 23, and 26 of the Constitution. First of all, they stress that they were the distinctly weaker party in the dispute against the state. They refer to Decision of the Constitutional Court No. Up-555/03, Up-827/04, dated 6 July 2006 (Official Gazette RS, No. 78/06, and OdlUS XV, 92), by which it was established that the right of complainants Mojca Pibernik and Janko Pibernik to an effective legal remedy determined by the fourth paragraph of Article 15 of the Constitution and in relation to Article 13 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) was violated. According to the allegations of the complainants, this Decision of the Constitutional Court was not implemented in the concrete civil proceedings for damages. They reproach the [respective] court for having carried out the civil proceedings in a discriminatory manner. According to the complainants' allegations, although the court was acquainted with the mentioned Decision of the Constitutional Court, it did not carry out the proceedings in such a manner so as to determine the state of the facts and to establish the liability of the defendant. The complainants find the fact that the court rejected the taking of virtually all evidence that they proposed to be particularly unacceptable. On the other hand, the court took all the evidence proposed by the defendant. The complainants stress that the challenged decision was adopted without them being heard as parties to proceedings (with the exception of the minor Jan Pibernik, with regard to whom the Supreme Court remanded the case to the court of first instance for new adjudication). They are convinced that this entails a violation of the principle of parties' right to be heard as determined by the Civil Procedure Act (Official Gazette RS, No. 73/07 – official consolidated text and 45/08 – hereinafter referred to as the CPA) and, at the same time, also a violation of the right to make a statement (Article 22 of the Constitution). That the proceedings were carried out in a discriminatory manner was allegedly also evident when other evidence proposed by the complainants in order to establish the liability of the defendant were rejected (especially the motion for examining the expert witness Dr Miroslav Žaberl, expert on questions regarding the exercise of police authorisations). The complainants are convinced that the civil trial court did not assess with sufficient expertise the testimonies of the police officers who participated in the action at issue. They find the position of the court that the police

officers were not obliged to comply with the provisions of the Criminal Procedure Act (Official Gazette RS, No. 63/94, 70/94 – corr., 72/98, and 6/99 – hereinafter referred to as the CrPA) on house searches to be unacceptable, because in fact they were not yet carrying out such a search, but only “created the conditions for carrying out a house search.” Allegedly, the court uncritically followed the allegations of the defendant, who justified the intrusion of police officers by the necessity of the house search. The complainants allege that the Supreme Court unjustifiably overlooked infringements of essential procedural requirements of the provisions of the CPA, which at the same time also entailed a violation of human rights and fundamental freedoms. The court allegedly completely overlooked their allegations regarding the violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette RS, No. 24/93, MP, No. 7/93 – hereinafter referred to as the Convention against Torture). This allegedly happened precisely because the proposed evidence was not taken (i.e. due to the refusal to hear the complainants, the rejection of the expert opinions of permanent court-appointed medical experts Dr Dolšek and Dr Čakar, the rejection of the opinion of pulmonologist Dr Skralovnik, and the refusal to take evidence by appointing an expert pulmonologist). In such context, the complainants underline that during the direct examination of the court-appointed expert Dr Turel it became apparent that the appointed expert is not a pulmonologist, but an internist who referred to his individual experience in the field of the treatment of pulmonary patients. According to the complainants, the appropriate specialisation and expertise of the appointed expert were thus not ensured. Such conduct of the court is particularly unacceptable for the complainants due to the fact that the court rejected other motions for evidence that, in the opinion of the complainants, were essential for establishing the liability of the defendant. In such context, the complainants also draw attention to the unacceptable application of Article 213 of the CPA (when the court negatively assessed in advance the quality of a certain evidentiary means). What was at issue in the disputed police action was, according to the complainants, a violation of human rights and fundamental freedoms (determined by Articles 17, 18, 19, and 21 of the Constitution). The complainants are convinced that the defendant itself caused the dangerous conduct of the police officers, therefore it must be liable for damages resulting from the tragic outcome. The state carried out the action as planned, but in the opinion of the complainants it was poorly planned. Numerous circumstances regarding the incident allegedly demonstrate that what was at issue was not an action carried out with negligence (severe violence by police officers that lasted for a prolonged period of time, numerous bodily injuries, loss of blood, the refusal to provide [medical] assistance in time). The complainants are convinced that the force was applied contrary to the principles of necessity and proportionality (i.e. the application of the mildest measures involving the use of force) and respect for the personality and dignity of the deceased. In order to assess the liability of the defendant, it would also be necessary, according to the complainants, to take into consideration the appropriate provisions of the ECHR and the Convention against Torture (which explicitly determines that the state shall ensure to victims of torture

an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible; in the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation). With regard to the above, the complainants propose that the challenged judgments be abrogated and the case remanded to the court of first instance for new adjudication.

4. By Order No. Up-679/12, dated 2 April 2013, the Constitutional Court accepted the constitutional complaint for consideration. The Constitutional Court rejected the constitutional complaint of Jan Pibernik against the Supreme Court Order (by which that court abrogated the judgments of the lower courts with regard to the decision regarding his claim and in such scope remanded the case to the court of first instance for new adjudication) due to the non-exhaustion of legal remedies. In the new proceedings, the court will namely decide anew on the substantiation of his claim, and after the exhaustion of all legal remedies the mentioned complainant will also be able to file a constitutional complaint.
5. In conformity with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), the Constitutional Court notified the Supreme Court that it had accepted the constitutional complaint for consideration. In conformity with the second paragraph of the mentioned Article of the CCA, the Constitutional Court sent the constitutional complaint for a reply to the opposing party from the civil procedure, who did not reply thereto.

## **B**

6. The complainants claim that the challenged decision of the courts is based on standpoints regarding the liability of the state for damages that are unacceptable from the viewpoint of the right to compensation for damage determined by Article 26 of the Constitution. They are opposed to the substantive law assessment of the courts that in the police action that was carried out in order for Samo Pibernik to be arrested the police officers did not act in an inadmissible manner. According to the allegations of the complainants, in the mentioned action there was police violence, and already during the civil proceedings they also referred to the provisions of the ECHR and the Convention against Torture. Also unacceptable for the complainants is the assessment of the courts that the reaction of the police officers to the asthmatic attack of the deceased did not entail insufficiently diligent conduct and that therefore the conduct of the police officers was not unlawful, which is one of the prerequisites for the liability of the state for damages. The complainants stress that during the civil procedure they also referred to Decision of the Constitutional Court No. Up-555/03, Up-827/04, by which it was established that the right of the first complainant (the father of the deceased) and the third complainant (the partner of the deceased) to an effective legal remedy determined by the fourth paragraph of Article 15 of the Constitution in connection to Article 13 of the ECHR was violated because the state did not carry out an independent investigation of the circumstances of the incident (the death of Samo Pibernik). According to the

complainants, this Decision of the Constitutional Court was not implemented in the civil proceedings for damages at issue.

7. In conformity with the established constitutional case law, a violation of the right determined by Article 26 of the Constitution is expressed when a court bases its decision on a certain legal standpoint that would be unacceptable from the viewpoint of that right.<sup>1</sup> For such reason, the Constitutional Court must assess the standpoints that the courts adopted in relation to Article 26 of the Constitution in the challenged judgments. The central question that arises is the question regarding unlawfulness as one of the prerequisites of the liability of the state for damages. In the case at issue, this question is tightly intertwined with the content of the right to life (Article 17 of the Constitution) and the positive and negative obligations of the state with regard to the protection of this human right.
8. Article 17 of the Constitution determines that human life is inviolable. By the right to life one of the supreme constitutional values is protected in free and democratic societies, i.e. human life.<sup>2</sup> By this human right, the physical existence of a human as the prerequisite for his intellectual existence, personal freedom, and acting in general is protected.<sup>3</sup> A human's right to life is an essential and the underlying element of human dignity as hierarchically the highest constitutional value that represents the value starting point of all human rights.<sup>4</sup> As such, the Constitution guarantees it as an absolute right, therefore it cannot be limited even on the basis of the third paragraph of Article 15 of the Constitution. In conformity with the established constitutional case law, there exist negative and positive obligations of the state in relation to the protection of human rights and fundamental freedoms. The negative obligations entail that the state must refrain from interferences with human rights and fundamental freedoms, especially interferences with the right to life (Article 17 of the Constitution) and the right to the prohibition of torture (Article 18 of the Constitution). The positive obligations, however, oblige the state and its individual branches of power (the judicial, legislative, and executive powers) to actively protect human rights and fundamental freedoms, whereby possibilities for their as effective as possible exercise shall be created. In such context, it is clear that the positive obligations of the state escalate in conformity with the importance of the affected constitutionally protected value. Since human rights that protect the life, health, security, physical and mental integrity and dignity of individuals are the fundamental values

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1 Cf. Order of the Constitutional Court No. Up-2/04, dated 4 May 2005 (OdlUS XIV, 46) and Decision of the Constitutional Court No. Up-695/11, dated 10 January 2013 (Official Gazette RS, No. 9/13).

2 Its supreme importance is also evident from the second paragraph of Article 16 of the Constitution, in accordance with which the right to life is placed among the human rights that cannot be temporarily suspended or restricted even during a war or state of emergency.

3 Cf. B. Ivanc in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije: dopolnitev komentarja – A* [Commentary on the Constitution of the Republic of Slovenia: Supplement to the Commentary – A], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2011, p. 207, Para. 1.

4 *Ibidem*, p. 208, Para. 3. See also Decision of the Constitutional Court No. U-I-109/10, dated 26 September 2011 (Official Gazette RS, No. 78/11, and OdlUS XIX, 26).

of a democratic society, the state must protect them in a particularly active manner and it must create possibilities for their maximally effective exercise.<sup>5</sup>

9. The right to life is first and foremost a defensive right of individuals that prohibits authoritative and intentional interferences of the state with human life as a constitutionally protected good.<sup>6</sup> In the event of the death of a person due to the use of force by the repressive authorities of the state (e.g. the Police or the military), the state must ensure an effective and independent official investigation of the circumstances of the death. Thereby, the procedural aspect of the right to life is protected. Within the framework of procedures initiated due to an event that leads to the death or injury of an individual, the state must credibly and plausibly justify the occurrence of such consequences. The state carries the burden of proof in demonstrating that in the circumstances of a concrete event it acted in conformity with the statutorily determined competences and authorisations, and in particular also in conformity with the positive obligation to protect the inviolability of life and the physical integrity of the persons involved. Within the framework of its positive obligations, the state must namely, by its active conduct (which includes diligent planning and supervision of the measures taken when force is used), prevent the occurrence of fatal consequences for individuals.
10. Furthermore, from the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR) it follows that the right to life (Article 2 of the ECHR)<sup>7</sup> is, together with Article 3 of the ECHR (the prohibition of torture),<sup>8</sup> one of the most fundamental values in a democratic society that connect the Member States of the Council of Europe. The objective or purpose of Article 2 of the ECHR as an instrument for protecting the individual from the state arbitrarily depriving him or her of his or her life requires that this Article be in such respect interpreted narrowly and applied in a manner that enables effective and practical supervisory measures.<sup>9</sup> From the wording of Article 2 of the ECHR taken as a whole, it follows that the right to life applies not only to intentional killing, but also to situations where the use of force is allowed and where such use of force ends with the deprivation of life, although unin-

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5 Cf. Decisions of the Constitutional Court No. Up-555/03, Up-827/04, Paragraph 25 of the reasoning, and No. Up-1082/12, dated 29 May 2014 (Official Gazette RS, No. 43/14), Paragraph 14 of the reasoning.

6 Cf. B. Ivanc, *op. cit.* p. 216, Para. 18.

7 Article 2 of the ECHR (right to life) reads as follows:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

8 Article 3 of the ECHR (prohibition of torture) reads as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

9 Cf. judgments of the ECtHR in *Andronicou and Constantinou v. Cyprus*, dated 9 October 1997, and in *Huohvainen v. Finland*, dated 13 March 2007.

tentionally. Any use of force must be “absolutely necessary” to achieve one or more purposes determined by subparagraphs (a) through (c).<sup>10</sup> From Article 2 of the ECHR there follows the requirement that the force applied must be strictly proportionate to the achievement of admissible objectives.<sup>11</sup> With regard to the importance of Article 2 of the ECHR in a democratic society, the justifiability of an interference with the right to life must be assessed in accordance with the most detailed and strict criteria. In such framework, the ECtHR assesses whether the death of a person was caused intentionally by the use of force, and in doing so it takes into consideration not only that the action was caused by the representatives of the state who in fact control the force, but also other circumstances, such as the planning and supervision of measures taken involving the use of force. According to the ECtHR, when what is at issue is the use of force by the Police, it is difficult to distinguish between the negative and positive obligations of the state on the basis of the ECHR. In such instances, the ECtHR assesses whether the police action was planned with a sufficient degree of diligence and whether it was supervised by the competent authorities, all with a view to maximally reducing the possibility of a fatal outcome. It also assesses whether all precautionary measures were taken when choosing the means and methods with regard to the safety of the action carried out.<sup>12</sup> The requirement of there being an investigation and the indisputable problems that accompany the combatting of criminality cannot justify a limitation of the protection that is ensured with regard to the right to life and the right to one’s physical integrity. In such respect, the ECtHR stresses that also when combatting terrorism and organised crime, the ECHR absolutely prohibits torture and inhuman or degrading treatment, as well as the deprivation of life, regardless of the victim’s conduct. If during the process of arresting a person or while a person is under police supervision consequences occur that are fatal for his or her life (or physical integrity), reasonable doubt arises with regard to the conformity of the conduct from the viewpoint of the above-mentioned standards that impose on the state not only negative, but also positive obligations with regard to the protection of the right to life (or the right to the protection of one’s physical integrity). For such reason, the state must present credible and plausible arguments on the basis of which it can explain or justify the type of force that it applied during the police operation.<sup>13</sup>

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- 10 This means that the necessity of such measure must be assessed more strictly and more diligently than normally during the assessment of whether a measure by the state is “necessary in a democratic society.”
- 11 Cf. judgment of the ECtHR in *Kelly and Others v. the United Kingdom*, dated 4 May 2001.
- 12 Cf. judgments of the ECtHR in *McCann and Others v. the United Kingdom*, dated 27 September 1995; *Andronicou and Constantinou v. Cyprus*; *Ergi v. Turkey*, dated 28 July 1998; *Hugh Jordan v. the United Kingdom*, dated 4 May 2001; *Makaratzis v. Greece*, dated 20 December 2004; and *Finogenov and Others v. Russia*, dated 20 December 2011.
- 13 Cf. judgments of the ECtHR in *Rehbock v. Slovenia*, dated 28 November 2000; *Matko v. Slovenia*, dated 2 November 2006; and *Butolen v. Slovenia*, dated 26 April 2012. In all the mentioned cases the Republic of Slovenia was convicted due to a violation of Article 3 of the ECHR because the Government failed to submit credible and plausible arguments by which it could explain or justify the type of force that it applied during the police action depriving the individuals involved of their liberty. Consequently, the ECtHR established, by taking into consideration the circumstances of each mentioned case, that the force applied was excessive and unjustified.

11. When the state does not act in accordance with the obligations that follow from Article 17 of the Constitution and Article 2 of the ECHR, the question of its liability for damages determined by Article 26 of the Constitution inevitably arises. In conformity with the first paragraph of Article 26 of the Constitution, everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority performing such function or activity within a state or local community authority or as a bearer of public authority. From this human right there follows, first and foremost, the general prohibition of exercising power in an unlawful manner, namely regardless of through which branch of power the damage is caused.<sup>14</sup> By establishing the liability of the state for damages, affected individuals are protected in the event damage occurs due to the authoritative actions of authorities.<sup>15</sup> The basis of such responsibility is (1) the unlawful conduct of a state authority, local community authority, or bearer of public authority (2) when exercising power or in relation to such being exercised, a consequence of which is (3) the occurrence of damage.<sup>16</sup> The complex relationship between the state as the power and individuals, within the framework of which also falls the liability of the state for damages, is essentially a public law relationship (a vertical legal relationship). When exercising power, or with regard to its exercise, the state enters such legal relationship vertically and is, with regard to such, bound by the constitutional prohibition of unlawful authoritative conduct.<sup>17</sup> The liability of the state for damage caused when exercising the function of authority, or with regard to its exercise, establishes the responsibility of the state for *ex iure imperii* conduct.<sup>18</sup>

14 Cf. J. Zobec, *Odškodninska odgovornost sodnika in odgovornost države zanj* [Liability of a Judge for Damages and the Liability of the State for such Judge], *Pravni letopis* 2013, p. 201.

15 This is stated by I. Crnić, *Odgovornost države za štetu, Pravo u gospodarstvu*, Zagreb, 1–2, 1996, p. 117.

16 The majority standpoint in legal theory and also an established standpoint in the case law places the institute of the liability of the state for damages within the system of civil non-contractual liability for damages and applies for such the general rules of the law of obligations determined by the Code of Obligations, Official Gazette RS, No. 97/07 – official consolidated text – hereinafter referred to as the CO (and, before [it entered into force], the rules determined by the OA), namely the institute of vicarious liability for damages (Articles 147 and 148 of the CO, which regulate the liability of employers and legal entities). For more details, see D. Možina, *Odškodninska odgovornost države v sistemu obligacijskega prava* [Liability of the State for Damages Within the System of the Law of Obligations], *Gradivo za dneve civilnega in gospodarskega prava* [Materials for the Civil and Commercial Law Days], Portorož 2013, p. 56.

17 This is stated by J. Zobec, *op. cit.*, pp. 185–228.

18 Cf. R. Pirnat, *Protipravnost ravnanja javnih oblasti kot element odškodninske odgovornosti javnih oblasti* [The Unlawfulness of the Conduct of Public Authorities as an Element of the Liability of Public Authorities for Damages], in: *Odgovornost države, lokalnih skupnosti in drugih nosilcev javnih pooblastil za ravnanje svojih organov in uslužbencev* [The Liability of the State, Local Communities, and Other Bearers of Public Authority for the Conduct of their Authorities and Officials], *Zbornik Inštituta za primerjalno pravo* [Proceedings of the Institute for Comparative Law], III. dnevi civilnega prava [3rd Civil Law Days], Ljubljana 2005, p. 21. From this paper it follows that special rules for liability refer to *ex iure imperii* conduct of public officials and authorities, and not to *ex iure gestionis* conduct. The state, local communities, and bearers of public authority can, of course, as is the case with any other person, be liable in accordance with the general rules of the law of obligations, but

What is at issue is a specific form of liability that originates from the special position of the state vis-à-vis persons and entities (citizens and legal entities, as well as other persons on its territory). With regard to such, it is evident that in order to assess the liability of the state for damages, the classic rules of vicarious civil liability for damages do not suffice; when assessing individual prerequisites as regards the responsibility of the state, specificities that originate from the authoritative nature of the functioning of its authorities, officials, and employees must be taken into consideration.<sup>19</sup>

12. In light of the mentioned starting points, also the content of the legal standard of unlawfulness is different than it is in classic civil law relationships regarding damages (where unlawfulness entails the violation of a right or a legally protected interest).<sup>20</sup> With regard to so-called public law unlawfulness, the question regarding the due action by the state as the entity of authority arises, i.e. how a state authority or another bearer of public authority should act in an individual case and what the concrete and objectively necessary diligence of the authority is when performing the function of authority.<sup>21</sup> The foundation of the liability of the state for damages thus lies in the obligations of the state and its authorities that are particularly emphasised when human rights that protect the fundamental values of democratic society (such as the right determined by Article 17 of the Constitution) are at issue: the state is not only obliged to refrain from taking measures by which it would interfere in an inadmissible manner with the protected interests of individuals or their human rights, but it also must protect these interests and rights by its active conduct or measures.
13. From Decision of the Constitutional Court No. Up-555/03, Up-827/04, there follow important starting points for the courts deciding in the civil dispute at issue with regard to the assessment of the liability of the defendant for damages. In that Decision, the Constitutional Court accentuated the procedural aspect of the obligation of the state with regard to the protection of the right to life. With regard to the fact that during the action of the repressive authorities of the state a person died, the state should, in conformity with the fourth paragraph of Article 15 of the Constitution in relation to Article 13 of the ECHR, carry out an independent investigation of the circumstances of the incident and enable the relatives of the deceased (the complainants) effective access to such investigation. The state did not carry out such an investigation within the framework of the criminal procedure, nor did it carry out any other investigation that would fulfil the mentioned criteria.<sup>22</sup> In such context,

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only with regard to acts concerning their operations.

<sup>19</sup> *Ibidem*.

<sup>20</sup> J. Zobec, *op. cit.*, p. 202.

<sup>21</sup> In Germany, Austria, and Slovenia, objective diligence with regard to conduct is one of the decisive aspects of the assessment of unlawfulness; in order for unlawfulness to be established, it is required that what is at issue is a violation of specific and objectively necessary diligence. For more details on this subject, see M. Bukovec, *Odškodninska odgovornost države* [The Liability of the State for Damages], doctoral dissertation, Faculty of Law, University of Ljubljana, Ljubljana 2008, pp. 171–172.

<sup>22</sup> In fact, within the Police Administration of Ljubljana, a commission was founded whose task was to determine the circumstances of the performance [of the action] and course of the incident at issue; however, the

it must be emphasised that in order for the procedural obligation of the state with regard to the protection of the right to life to be fulfilled, it is not necessary that such investigation be ensured within the framework of the criminal procedure. In fact, the state cannot satisfy this obligation by mere proceedings for damages; however, if such proceedings are initiated, the relatives of the deceased must have the possibility in adversarial proceedings (as an independent investigation was not carried out) to impartially and objectively investigate and determine the circumstances of the death and the possible liability of the state for the death of the individual when he or she was under the physical supervision of its repressive authorities. In such proceedings for damages, it is the state that must dispel any doubt with regard to [the question of whether] the conduct of its authorities was in conformity with the fundamental constitutional requirements and the requirements of the Convention. If the state does not succeed in credibly and plausibly substantiating its allegations regarding its lawful and sufficiently diligent conduct (the planning and supervision over the carrying out of the action) in the circumstances of an individual case, in particular also that it has done everything in its power to prevent the occurrence of consequences fatal to persons, this suffices to conclude that there was unlawfulness as one of the fundamental conditions for the liability of the state for damages.<sup>23</sup>

14. The assessment of the courts in the challenged judgments is not in conformity with the mentioned constitutional requirements. The challenged decision imposes on the complainants the burden of taking a position and proving the unlawfulness of the conduct of the police in the police procedure against the deceased Samo Pibernik. Both the court of first instance and the Higher Court adopted the position that Decision of the Constitutional Court No. Up-555/03, Up-827/04 cannot influence the assessment with regard to whether the prerequisites for the liability of the defendant for damages are fulfilled. Such standpoint of the courts is fundamentally unacceptable from the viewpoint of the right protected by Article 26 of the Constitution. The assessment of the courts thereby negates the importance of the constitutionally imposed procedural duty of the state to ensure an independent, objective, and effective investigation of the circumstances of the death, which extends to the interpretation of the term unlawfulness from Article 26 of the Constitution. The reason for this is that such interpretation does not take into consideration that doubt as to the constitutional conformity of the conduct of authorities with regard to the protection of the

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complainants had no influence on whom this commission was composed of. With regard to that, also this investigation of the circumstances of the incident did not fulfil the criteria that the ECtHR established with regard to the right to an effective legal remedy determined by Article 13 of the ECHR.

- 23 Cf. judgment of the ECtHR in *Shchiborshch and Kuzmina v. Russia*, dated 16 January 2014. In that case, the ECtHR established a violation of the substantive aspect of the right to life, which is protected by Article 2 of the ECHR. In its reasoning, the Court stressed that the police action (the purpose of which was the forced hospitalisation of Shchiborshch) was carried out in an uncontrolled and careless manner and that the measures applied by the police were not in conformity with the standard of caution to be expected from law enforcement officers in a democratic society, in particular not with the principle of minimising to the greatest extent possible any risk to the life and health of Shchiborshch.

right to life was not eliminated, therefore in a dispute regarding damages one must proceed from the presumption that the death occurred due to the unlawful conduct of the authorities. Consequently, the court should impose on the state the burden to plausibly substantiate that it acted lawfully when carrying out the police action, that the use of force was proportionate, and that it implemented, to the highest possible degree, measures by which it was to prevent any foreseeable risk as regards the life and health of the persons investigated.

15. The courts limited their assessment only to the question of whether in the action the police officers acted lawfully and in conformity with the police authorisations in force at that time and whether there existed a lawful basis for their actions. According to the findings of the courts, the police officers had such a legal basis in the Order of the investigating judge on duty, No. I Kpd 381/2000, dated 3 April 2000, which was issued on the basis of Articles 215 through 218 of the CrPA in force at the time. However, in the circumstances of the case at issue, the mere existence of a court order for a house search is not a sufficient reason to conclude that the conduct of the police officers was in conformity with the constitutional requirements and the requirements of the Convention with regard to the protection of the right to life. Moreover, the reference of the courts to the Instructions on the Use of Measures Involving the Use of Force (Official Gazette SRS, No. 25/81) as the [legal] basis for the use of force and the finding that the police officers used measures involving the use of force justifiably, because the deceased did not obey their orders, but tried to escape from the hallway into an apartment protected by a security door, also do not suffice. In the assessment it is necessary to proceed from the nature of a house search, which in itself is not an invasive measure and does not, as a general rule, represent a risk for the life or health of the investigated person. The task of the police when carrying out a house search is limited only to preventing the obstruction of the investigation. Therefore, the defendant (i.e. the state) had to prove that the force used when performing the mentioned investigative act was limited to the least degree necessary. The centre of gravity of the assessment of the courts should be in establishing whether during the performance of the investigative measure ordered the police officers did everything [in their power] to protect the life and health of the person investigated and to prevent the risk to such person. The reasoning of the challenged judgments does not contain concrete findings or an assessment of the circumstances of the performance of the mentioned investigative act on the basis of which it would be possible to conclude that the police officers acted in conformity with the principle of applying the least force necessary and that they prepared and supervised the action diligently enough in order to exclude any foreseeable risk for the life and health of individuals.
16. With regard to the above, the position of the courts in accordance with which the complainants failed to prove the unlawfulness of the conduct of the police officers is unacceptable from the viewpoint of the right to compensation for damage protected by Article 26 of the Constitution. Therefore, the Constitutional Court abrogated the challenged judgments in the part in which the claims of Janko Pibernik,

Slavka Pibernik, Mojca Pibernik, and Kana Pibernik were dismissed and in this part remanded the case to the court of first instance for new adjudication. With regard to the fact that it abrogated the challenged judgments due to a violation of the right determined by Article 26 of the Constitution, the Constitutional Court did not examine the other alleged violations of human rights.

### C

17. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr Jadranka Sovdat, Vice President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, and Jan Zobec. The decision was reached unanimously.

*Dr Jadranka Sovdat*  
*Vice President*

Decision No. **U-I-292/09, Up-1427/09**, dated 20 October 2011

## DECISION

At a session held on 20 October 2011 in proceedings to examine a petition for the review of constitutionality and to decide upon the constitutional complaint of A. B. and C. D., both from X., represented by Mag. Matevž Krivic, Spodnje Pirniče, and E. F. and G. H., represented by Mag. Matevž Krivic on the basis of the power of attorney granted by their legal representatives A. B. and C. D., the Constitutional Court

*decided as follows:*

- 1 The third paragraph of Article 22 of the International Protection Act (Official Gazette RS, No. 11/11 – official consolidated text) is abrogated.
- 2 Supreme Court Judgment No. I Up 425/2009, dated 7 October 2009, is abrogated and the case is remanded to the Supreme Court for new adjudication.
- 3 The petition for the initiation of proceedings to review the constitutionality of the fifth indent of the third paragraph of Article 21 and Article 26 of the International Protection Act is rejected.

*Reasoning*

### A

1. On the basis of the second indent of the first paragraph of Article 52 in relation to the first indent of Article 53 of the International Protection Act (hereinafter referred to as the IPA), the Ministry of the Interior (hereinafter referred to as the MI) dismissed the applications of the complainants for international protection. At the same time, it decided that the complainants must leave the Republic of Slovenia in seven days after the decision becomes final. Due to the fact that the complainants in the procedure did not submit any evidence (not even personal documents by which they could have demonstrated their identity), but substantiated their applications merely by their allegations, the MI carried out an assessment on the basis of the third paragraph of Article 21 of the IPA. In the framework of such assessment, the MI established that the majority of the allegations by which the complainants substanti-

ated their applications for international protection were not convincing or probable. On the basis of a comprehensive assessment of all the allegations and the conduct of the complainants in the procedure, the MI assessed that they are in general not credible. The Administrative Court found for the complainants [who had filed an] action, annulled the challenged decision of the MI, and remanded the case to the MI for a new procedure. The Administrative Court assessed that the findings of the MI do not suffice for adopting an assessment of the evidence entailing that the [allegations of] the complainants are in general not credible. The MI filed an appeal against the Administrative Court Judgment, which the Supreme Court granted and changed the Administrative Court Judgment so as to dismiss the action. The Supreme Court concurred with the assessment of the MI that the adult complainants did not make enough effort to base their allegations on evidence and to demonstrate their credibility in general. Since in the assessment of the Supreme Court the assessment of the MI that the complainants did not demonstrate their general credibility was well founded, it did not have to verify the information on the country of origin, with respect to the fourth paragraph of Article 22 of the IPA.

2. The complainants claim that the challenged Supreme Court Judgment violates their rights determined by Article 22 of the Constitution. They stress that the reasons stated in the Judgment regarding one of the decisive facts (i.e. the citizenship of the complainants) are unclear, contradictory, and inconsistent with the case file. Allegedly, the MI clearly established in its decision that the complainants are Chinese citizens. Consequently, when the Supreme Court stated that the MI only presumed, on the basis of the legislation and the case law studied, that they are most probably Chinese citizens, it only created an unclarity. In the opinion of the complainants, this entails a manifestly erroneous finding (which is inconsistent with the case file). They also allege that the statement of reasons for the adopted decision, which are allegedly not true and are inconsistent with the case file, in Paragraphs 16 and 17 of the reasoning of the judgment, entails a violation of the right determined by Article 22 of the Constitution. In the opinion of the complainants, the Decision of the MI is unlawful, because the MI did not assess the conditions for granting a subsidiary form of protection therein (as an obligatory element of the assessment in the procedure for granting international protection), but it only hypothetically (subordinately) stated that in the event the complainants are without citizenship, they cannot in any manner be refouled to China, “resulting in the fact that no subsidiary protection is then possible.” Furthermore, the complainants draw attention to the fact that the Supreme Court Judgment is unsubstantiated in the part that refers to the alleged inadmissibility of the application of the fourth paragraph of Article 22 of the IPA. In this respect, the Administrative Court Judgment includes a very detailed reasoning, whereas the Supreme Court did not substantiate its position that differed from the position of the court of first instance. The complainants also allege a violation of the right to asylum as a right that follows from the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees (Official Gazette of the Federal People’s Republic of Yugoslavia, MP, No. 7/60; Official Gazette

of the Socialist Federal Republic of Yugoslavia, MP, No. 15/67; Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the Geneva Convention) and from Article 35 of the Constitution. They are of the opinion that the MI should have treated them as applicants *sur place* – i.e. as applicants who are under threat of being persecuted in China, their country of origin, and who fled from D. out of fear of being refouled to China. In this part, the applicants allege that the courts erroneously applied substantive law, due to which the right to asylum determined by the Geneva Convention and Article 35 of the Constitution was allegedly directly violated.

3. By Order of a panel of the Constitutional Court, No. Up-1427/09, dated 8 January 2010, the Constitutional Court accepted the constitutional complaint for consideration and decided that until a final decision of the Constitutional Court is adopted, the execution of the decision of the MI is suspended. In conformity with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court notified the Supreme Court thereof. On the basis of the first paragraph of Article 56 of the CCA, the Constitutional Court sent the order on the acceptance and the constitutional complaint to the MI.
4. In its application dated 27 January 2010, the MI proposed that the constitutional complaint be dismissed. The allegation of the complainants with regard to the unclarity regarding the citizenship of the complainants caused by the Supreme Court judgment was, in the assessment of the MI, unfounded. According to the MI, it was clear from the entire context that in the part where the Supreme Court stated that the MI only “presumed” that the adult complainants are Chinese citizens, this was only a clumsy formulation and not a conviction of the Supreme Court. The MI underlined that it established in its decision that the applicants are Chinese citizens. It rejected the allegation that when assessing the conditions for acquiring refugee status it deemed the complainants to be Chinese citizens, whereas in the framework of the assessment of a subsidiary form of protection it deemed them to be persons without citizenship. With regard to the allegation regarding the unlawfulness of the decision, which allegedly did not contain an assessment of the conditions for acquiring subsidiary protection status, the MI underlined that the credibility of the complainants cannot be considered separately when what is at issue is the granting of refugee status or subsidiary protection status, because this is decided on in a uniform procedure. For such reason, the allegation that the MI did not adopt a decision on both statuses is not true. The MI underlined that it did not adopt the assessment that the complainants were in general not credible only on the basis of one statement or only several statements, but it took into consideration the majority of the statements and the conduct of the complainants in the procedure. The allegations of the complainants with regard to citizenship were only a part of the assessment of their credibility, with regard to which it was crucial for an assessment of their statements that during their interview they did not state everything they knew with regard to their citizenship.
5. The Constitutional Court notified the complainants of the positions of the MI with regard to the allegations in the constitutional complaint. In the application dated 9

July 2010, the complainants maintain the allegations and proposals stated in the constitutional complaint. They draw attention to the fact that the position in accordance with which the “refusal to grant the application for international protection does not automatically entail forced removal to the country of origin, which consequently entails that the refusal to grant the application does not result in a violation of the principle of *non-refoulement*, which is something that the state must prevent *ex officio*, due to which in the procedure for granting international protection it does not have to verify the information regarding the country of origin if general non-credibility is established,” is not tolerable. They are of the opinion that when deciding on international protection, it is not admissible to avoid this question.

6. The complainants also filed a petition to initiate proceedings for a review of the constitutionality of the fifth indent of the third paragraph of Article 21, the fourth paragraph of Article 22, and Article 26 of the IPA. The complainants substantiate the alleged unconstitutionality of the fifth indent of the third paragraph of Article 21 of the IPA by claiming that the term *general credibility of the applicant* itself “markedly contradicts fundamental human rights, especially the right to human dignity, and also the right to a fair trial and administrative decision-making.” In their opinion, also the fourth paragraph of Article 22 of the IPA is unconstitutional, which allows the competent authority to disregard the information on the country of origin if the general credibility of the applicant is not established. The complainants are convinced that this Article is contrary to the principle of *non-refoulement*, as one of the fundamental principles of the Geneva Convention. Even if unclarities arise and there are contradictions in the statements of the applicant, in the opinion of the complainants, this cannot entail an admissible reason for the competent authority to not be obliged to verify the information on the country of origin. The complainants also draw attention to an internal contradiction of the provisions of the IPA, which in multiple places envisages comparing the content of the applicant’s statements with the information on the country of origin (*cf.* the third indent of the third paragraph of Article 21 of the IPA and the fourth indent of the first paragraph of Article 55 of the IPA). Therefore, the fourth paragraph of Article 22 of the IPA is, in their opinion, also contrary to the fundamental principles of a state governed by the rule of law, from which follows the requirement of clear and non-contradictory laws. The complainants also allege the inconsistency of Article 26 of the IPA with the Geneva Convention. In conformity with this Convention, applicants for international protection do not have to prove that they have already been persecuted, but must demonstrate a “reasonable fear of persecution.” Allegedly, the result of the fact that Article 26 of the IPA refers to “acts of persecution” is that on the basis of this provision this standard has been legally incorrectly interpreted in the administrative and judicial case law.
7. The Constitutional Court sent the petition to the National Assembly of the Republic of Slovenia, which did not reply thereto.
8. In their application dated 23 February 2010, the complainants added to the petition the argumentation from the action in the *Tenzin* case, which was allegedly considered by the Administrative Court and which allegedly contains a motion to initiate proceed-

ings for the review of the constitutionality of the entire third paragraph of Article 21 of the IPA. They allege that this statutory provision as a whole is severely inconsistent with Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304, 30 September 2004, pp. 12–23 – hereinafter referred to as the Qualification Directive), and consequently also with Article 3a of the Constitution.

## B – I

### **The petition for the initiation of proceedings for a review of the constitutionality of the third paragraph of Article 22 of the IPA**

9. The complainants filed a constitutional complaint against the Supreme Court Judgment (by which that Court modified the Administrative Court Judgment and dismissed the action filed against the decision of the MI), which is, *inter alia*, based on the position that in conformity with the fourth paragraph of Article 22 of the IPA the competent authority did not have to take into consideration the information on the country of origin of the complainants, because their general credibility was not established. In the assessment of the Constitutional Court, the complainants have a legal interest to initiate proceedings for a review of the constitutionality of the mentioned statutory provision. Since the decision on the constitutional complaint also depends on the decision on the petition, the Constitutional Court had to first decide on the latter.
10. In conformity with the second paragraph of Article 22 of the IPA, in the procedure the competent authority verifies the statements of the applicant relating to the information on the country of origin referred to in the eighth and ninth indents of Article 23 of the IPA (i.e. general information on the country of origin, in particular on the social-political situation and the adopted legislation, and specific in-depth detailed information on the country of origin related exclusively to the concrete case, but may also include the manner of implementation of laws and other regulations of the country of origin. The challenged fourth paragraph of Article 22 of the IPA determined: “If the general credibility of the applicant is not established, the competent authority shall disregard the information on the country of origin referred to in the preceding paragraph.” When adopting the Act Amending the International Protection Act (Official Gazette RS, No. 99/10 – hereinafter referred to as the IPA-B), the legislature transferred the content of the challenged fourth paragraph of Article 22 of the IPA to the third paragraph of the same article of the [amended] Act. Since only a modification of the enumeration of the Article was at issue, whereas the content of the challenged statutory provision was not amended, the Constitutional Court assessed the allegations of the petitioners in the framework of the third paragraph of Article 22 of the IPA.
11. The petitioners allege that the challenged statutory provision is contrary to the principle of *non-refoulement*, as one of the fundamental principles of the Geneva Convention. In their opinion, eventual unclarities and contradictions in the statements of the applicant cannot entail an admissible reason for the competent authority to not be obliged to take into consideration the information on the country of origin.

12. The principle of the *non-refoulement* of persons to countries where they may face a certain danger, persecution, or where their life, personal integrity, or freedom is endangered in some other manner is a generally recognised international principle.<sup>1</sup> The obligation to respect this principle follows from the first paragraph of Article 33 of the Geneva Convention and the first paragraph of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette RS, No. 24/93, MP, No. 7/93 – hereinafter referred to as the Convention against Torture).<sup>2</sup> Substantively, this obligation also follows from Article 3 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 prohibits torture and inhuman and degrading treatment or punishment. When assessing asylum cases from the viewpoint of Article 3 of the ECHR, the European Court of Human Rights (hereinafter referred to as the ECtHR) has formed the position that the extradition of an individual to another state is prohibited when there exist weighty reasons that justify the conclusion that there exists a real threat that the person at issue will be subjected to torture, inhuman or degrading treatment, or punishment.<sup>3</sup> The first paragraph of Article 21 of the Qualification Directive determines that Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.
13. In Decision No. Up-78/00, dated 29 June 2000 (Official Gazette RS, No. 66/2000, and OdlUS IX, 295), the Constitutional Court defined the fundamental starting points that must be taken into consideration when deciding on asylum and the extradition of individuals to another state or their expulsion. It included the assessment of the circumstances related to the principle of non-refoulement under Article 18 of the Constitution (the prohibition of torture). In conformity with the established standpoint of the Constitutional Court, this Article prohibits that a person with regard to whom there exists a realistic threat that in the event of his or her return to the country of origin he or she would be subjected to inhuman treatment is extradited to that state or expelled thereto. When adopting such standpoint, the Constitutional Court

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1 S. Rakočević, *Nekatera pravna vprašanja glede priznavanja statusa begunca in načelo nevračanja (non-refoulement)* [Some Legal Questions Regarding Granting Refugee Status and the Principle of Non-Refoulement], *Pravnik*, Vol. 55, Nos. 6–8 (2000), p. 468.

2 In conformity with the first paragraph of Article 33 of the Geneva Convention, it is prohibited to expel or return (“*refouler*”) by force a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Also the first paragraph of Article 3 of the Convention against Torture expressly prohibits expelling, returning (“*refouler*”) or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In conformity with the second paragraph of Article 3 of the Convention against Torture, all relevant considerations including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights, are in such context taken into account.

3 Cf. the judgments of the ECtHR in *Soering v. the United Kingdom* (judgment dated 7 July 1989), *Vilvarajah and Others v. the United Kingdom* (judgment dated 30 October 1991), *Ahmed v. Austria* (judgment dated 17 December 1996), *Salah Sheekh v. the Netherlands* (judgment dated 11 January 2007), and *Saadi v. Italy* (judgment dated 28 February 2008).

also relied on the standpoints of the ECtHR with regard to the content of Article 3 of the ECHR. Due to the fact that the final dismissal of an application for international protection entails that the applicant can be removed by force to the state from which he or she came, the dismissal of an application for international protection must also include, according to the position of the Constitutional Court, an assessment that such removal by force will not cause his or her life or freedom to be jeopardised and that the applicant will not be subjected to torture, inhuman and degrading treatment, or punishment in that state.<sup>4</sup> Furthermore, in the constitutional case law the position was adopted that also the right determined by Article 18 of the Constitution is of an absolute nature, meaning that it cannot be limited even on the basis of the third paragraph of Article 15 of the Constitution.<sup>5</sup>

14. The requirements that follow from the mentioned international legal instruments and Article 18 of the Constitution are binding on the legislature when it regulates the procedure for granting international protection. The procedure for the consideration of applications for international protection must be conceived in such a manner that the applicants are ensured respect for the guarantees determined by Article 18 of the Constitution. This includes, in particular, the possibility to assess all the circumstances that could have an influence on the assessment of the competent authority that the return of the applicant to his or her country of origin will not cause his or her life or freedom to be jeopardised or that he or she will be exposed to torture or inhuman and degrading treatment. With regard thereto, it must be assessed whether the challenged statutory provision that allows the competent authority to disregard information regarding the country of origin if it establishes the general non-credibility of the applicant interferes with Article 18 of the Constitution.
15. The challenged third (previously the fourth) paragraph of Article 22 of the IPA is placed in Chapter III of the IPA, which regulates the assessment of the conditions for international protection. In Article 21 of this Act, the legislature determined the duties of the applicant with regard to the substantiation of the application (the so-called subjective element), and in Article 22 it determined the verification procedure to be carried out by the competent authority (the so-called objective element). Consideration of an application for international protection is carried out by taking into consideration two fundamental elements: the subjective element, in the framework of which the applicant must state all the facts and circumstances that justify his or her fear of persecution or serious harm, and present all the documents and all available evidence by which he or she substantiates his or her application; and the objective element, in the framework of which the competent authority verifies the statements of the applicant from the viewpoint of objective facts and information on the country of origin.<sup>6</sup> For instances where the applicants cannot present any evidence

4 *Cf.* Decision of the Constitutional Court No. U-I-238/06, dated 7 December 2006 (Official Gazette RS, No. 134/06, and OdUS XV, 83), and Decision No. Up-763/09, dated 17 September 2009 (Official Gazette RS, No. 80/09).

5 *Cf.* Decision of the Constitutional Court No. U-I-238/06, Paragraph 14 of the reasoning.

6 *Cf.* R. Thomas, Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined, *European Journal of Migration and Law*, Vol. 8, No. 1 (2006), pp. 79–96. It follows from this article that in the frame-

but substantiate their application merely by their statements, the legislature determined, in the third paragraph of Article 21 of the IPA, special assessment conditions.<sup>7</sup>

16. The regulation in the IPA is based on the principle in conformity with which the applicant must substantiate an application for international protection.<sup>8</sup> From the constitutional viewpoint, the duty of the applicant to cooperate when substantiating the application is in itself not disputable. However, if the guarantees determined by Article 18 of the Constitution are to in fact be ensured, the applicant must not be given too heavy a burden as regards proving his or her endangerment. It follows from Constitutional Decision No. Up-78/00 that by the nature of the matter it is the affected person who must allege that there exist circumstances entailing his or her endangerment. In the procedure, the competent authority must assess (1) whether the circumstances due to which the affected person is requesting international protection are such that he or she can feel endangered and (2) whether such fear is objectively justified. When assessing the existence of the first element, the competent authority must take into consideration the allegations of the affected person in their entirety, as well as possible other evidence, and carry out a reliable assessment of the credibility of these allegations. The assessment of the existence of the second element must include an assessment of the situation in the country to which the applicant would have to return in the event of a decision of dismissal.<sup>9</sup> From the constitutional case law there also follows the standpoint that the competent authority can take into consideration, as one of the assessment conditions, the general credibility of the

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work of the subjective element, the existence of the applicant's subjective fear of persecution is established, whereas in the framework of the objective element, it is verified whether there exist reasonable grounds for the conclusion that the applicant's subjective fear is objectively justified.

- 7 On the basis of the third paragraph of Article 21 of the IPA, in its assessment the competent authority takes into consideration the following conditions:
- that the applicant made his or her best effort to substantiate his or her application;
  - that the applicant presented reasonable grounds why he or she was unable to submit evidence;
  - that his or her statements are coherent and probable and do not contradict available general information related to his or her case;
  - that he or she applied for international protection as soon as possible, unless he or she can present reasonable grounds why he or she did not do so;
  - that his or her general credibility was established.
- 8 In the IPA, the Republic of Slovenia adopted the possibility that the first sentence of the first paragraph of Article 4 of the Qualification Directive offers to Member States, namely that they may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection (i.e. the duty to substantiate the application for international protection). For Member States that apply this principle, also the application of the fifth paragraph of Article 4 of the Qualification Directive is obligatory. The legislature transposed this provision of the Qualification Directive into the third paragraph of Article 21 of the IPA. For more details on the content of Article 4 of the Qualification Directive, see K. Hailbronner (Ed.), *EU Immigration and Asylum Law, Commentary on EU Regulations and Directives*, Verlag C. H. Beck oHG, München 2010, p. 1024 *et seq.*
- 9 Cf. Decision of the Constitutional Court No. Up-78/00.

applicant.<sup>10</sup> The competent authority must, in each individual procedure in which it decides on an application for international protection, give substance to this indefinite legal term by applying methods of interpretation and then determine whether in the case at issue there exist circumstances that correspond to the mentioned term. The establishment of general credibility must always be the result of a comprehensive assessment of the statements and actions of the applicant before and during the procedure for acquiring international protection.<sup>11</sup>

17. Similar requirements follow from the standpoints of the ECtHR adopted in the framework of Article 3 of the ECHR. Also the ECtHR underlines that an applicant is obliged to provide to the greatest possible extent the documentation and information that allow the competent national authorities, as well as the [competent] court, to estimate the risk to which the applicant would be exposed if removed to his or her country of origin.<sup>12</sup> If necessary, the ECtHR also acquires individual pieces of data by itself (*proprio motu*). In each individual case, the ECtHR focuses on an assessment of the predictable consequences in the event the applicant is returned to his or her country of origin, namely both from the viewpoint of the general situation in his or her country of origin and from the viewpoint of the personal circumstances of the applicant. The responsibility of contracting states in the framework of Article 3 of the ECHR is to ensure that the individual is not exposed to torture or inhuman and degrading treatment. Therefore, the existence of risk is primarily assessed with regard to the facts that were known or should have been known to the contracting state during the time of expulsion or extradition of the applicant.<sup>13</sup> Also important for the ECHR is recent information on the situation in the state during the time when the court is adopting its decision, which is [i.e. the information] gathered after the national authorities have adopted their final decision.<sup>14</sup> As a general rule, the ECtHR draws this information from the reports of international organisations on the general situ-

10 Cf. Decisions of the Constitutional Court No. Up-1970/08, dated 2 April 2009 (Official Gazette RS, No. 36/09), and No. Up-2012/08, dated 5 March 2009 (Official Gazette RS, No. 22/09).

11 See also R. Thomas, *op. cit.*, p. 81. The author defines three fundamental criteria for assessing the credibility of the applicant:

- (1) internal inconsistencies in the narrative of the applicant established either within the same interview or written statement or when comparing the applicant's statements in different phases of the procedure, or when comparing the statements of two or more applicants connected by common circumstances;
- (2) external inconsistencies established when comparing the applicant's statements with objective information on the situation in [his or her] country of origin;
- (3) the criterion of the probability of the events such as described by the applicant.

The author underlines that the authority that decides in asylum cases is in a specific position, as only the testimony of the applicant is available to it, which the authority can only verify in such manner that it compares it with objective data on the situation in the [applicant's] country of origin (as opposed to, e.g., in civil procedure, where each party presents its own perspective on the same events and, after the procedure for taking evidence has been carried out, the court decides in favour of one party or the other).

12 Cf. Judgment of the ECtHR in *Said v. the Netherlands*, dated 5 July 2005.

13 Cf. Judgment of the ECtHR in *Vilvarajah and Others v. the United Kingdom*, Para. 107 of the reasoning.

14 Cf. Judgment of the ECtHR in *Chahal v. the United Kingdom*, dated 15 November 1996.

ation in the state to which the applicant is to be extradited. However, the finding that serious violations of human rights do occur in an individual state does not of itself suffice to find for the applicant [before the ECtHR]. Namely, the ECtHR each time assesses whether the personal situation of the applicant is such that his or her extradition to the state of origin would be contrary to Article 3 of the ECHR. In doing so, it also assesses the general credibility of the statements of the applicant that have been given to national authorities and in the procedure before the ECtHR.<sup>15</sup> According to the ECtHR, due to the specific position in which applicants often find themselves, the principle that must be respected is that when in doubt, the decision must be in favour of the applicant. However, the applicant must provide, in the event that with regard to the available information there exists a serious doubt concerning the credibility of his or her statements, a satisfactory interpretation as to the established inconsistencies.<sup>16</sup>

18. What was stated above demonstrates that, with regard to the requirements that follow from Article 18 of the Constitution and international instruments, it is not possible, in the procedure for the consideration of applications for international protection, to avoid an assessment of the circumstances that are important from the viewpoint of respect for the principle of *non-refoulement*. The statements of the applicant with regard to the threat that in the event of his or her return to his or her country of origin he or she would be exposed to torture or inhuman and degrading treatment can only be assessed, by the nature of the matter, in such a manner that the competent authority also includes in its assessment information on the situation in the state to which the applicant would have to return in the event of a decision of dismissal. The scope of establishing these facts and information depends primarily on the allegations and statements of the applicant with regard to his or her subjective endangerment. Nonetheless, the competent authority must also by itself collect all the necessary data and is not limited only to [consideration of] the applicant's allegations or submitted evidence.<sup>17</sup> In the assessment of the Constitutional Court, the legislature interfered with the right determined by Article 18 of the Constitution by allowing the competent authority to disregard information on the country of origin if the general credibility of the applicant is not established. In the assessment of the Constitutional Court, the challenged statutory provision allows the competent authority to dismiss an application for international protection without taking into consideration all the circumstances that could have an influence on the assessment of whether there exist weighty reasons that substantiate the conclusion that there exists a real threat that in the event of the forced removal of the applicant, [the applicant's right determined by] Article 18 of the Constitution would be violated. Taking into consideration the standpoint that the right determined by Article 18 of the Constitution is of an absolute nature, meaning that it cannot be limited even on the basis of the third paragraph of Article

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15 Cf. order of the ECtHR in *Nasimi v. Sweden*, dated 16 March 2004.

16 Cf. orders of the ECtHR in *Collins and Akaziebie v. Sweden*, dated 8 March 2007, *Nasimi v. Sweden*, and *S. M. v. Sweden*, dated 10 February 2009.

17 Cf. Decision of the Constitutional Court No. Up-763/09, Paragraph 6 of the reasoning.

15 of the Constitution, the Constitutional Court assesses that the mentioned interference is not admissible. For such reason, the Constitutional Court abrogated the third paragraph of Article 22 of the IPA (point 1 of the operative provisions).

## **B – II**

### **The decision on the constitutional complaint**

19. Due to the fact that the challenged Supreme Court Decision is based on a provision of the IPA which the Constitutional Court assessed is not in conformity with Article 18 of the Constitution, the Constitutional Court also granted the constitutional complaint, abrogated the challenged Judgment and remanded the case to the Supreme Court for new adjudication (point 2 of the operative provisions). In the new proceedings, the Supreme Court will not be allowed to base its decision on the abrogated statutory provision.<sup>18</sup>
20. Since the Constitutional Court abrogated the challenged Judgment already due to a violation of Article 18 of the Constitution, it did not address the other alleged violations of human rights.

## **B – III**

### **The petition to initiate proceedings for a review of the constitutionality of the fifth indent of the third paragraph of Article 21 and Article 26 of the IPA**

21. By Order No. U-I-55/09, Up-257/09, dated 26 January 2011 (Official Gazette RS, No. 14/11), the Constitutional Court substantiated what a petition for the initiation of proceedings for a review of the constitutionality of a law or another regulation must include.
22. Since in the part where the review of the constitutionality of the fifth indent of the third paragraph of Article 21 of the IPA is proposed the petition does not fulfil the mentioned statutory conditions, the Constitutional Court rejected it (point 3 of the operative provisions) without requesting that the complainants complete it.
23. Due to the fact that the complainants' applications for international protection were not dismissed on the basis of an assessment of the circumstances determined by Article 26 of the IPA, which determines the characteristics of acts of persecution, the complainants do not have legal interest to initiate proceedings for a review of the constitutionality of this statutory provision. Therefore, the Constitutional Court also in this part rejected their petition (point 3 of the operative provisions).
24. The Constitutional Court did not deem the supplement to the petition filed by the complainants on 23 February 2010 to be a petition for the initiation of proceedings for a review of the constitutionality of the entire third paragraph of Article 21 of the IPA. If the Constitutional Court had assessed that this was necessary for [the adoption of] the decision on the constitutional complaint, it could have initiated proceedings for a review of the constitutionality of this statutory provision by itself on the basis of the second paragraph of Article 59 of the CCA.

<sup>18</sup> In conformity with the first paragraph of Article 99 of the IPA-B, procedures initiated in conformity with the International Protection Act (Official Gazette RS, No. 111/07 and 58/09) are to be continued and concluded in conformity with the provisions of this Act.

## C

25. The Constitutional Court adopted this Decision on the basis of Article 43, the first paragraph of Article 59, and the third paragraph of Article 25 of the CCA, composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Penssa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. The decision was reached by seven votes against one. Judge Klampfer voted against. Judge Jadek Penssa submitted a concurring opinion.

*Dr Ernest Petrič*  
*President*

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### CONCURRING OPINION OF JUDGE DR DUNJA JADEK PENSA

In this concurring opinion, I wish to state the reasons [substantiating]

- (1) that the Constitutional Court did not overlook that from the second paragraph of Article 1 of the International Protection Act (Official Gazette RS, No. 11/11 – official consolidated text, hereinafter referred to as the IPA) there follows the finding that this Act is in conformity with multiple directives;
  - (2) why this finding, however, is not true insofar as it refers to the abrogated third paragraph of Article 22 of the IPA; and
  - (3) that, therefore, the need for reflection on the effect of the third paragraph of Article 3a of the Constitution was not expressed before the review of the (un) constitutionality of this latter provision of the IPA.
1. A directive is binding, as to the result to be achieved, upon each Member State to which it is addressed (the third paragraph of Article 288 of the Treaty on the Functioning of the European Union, OJ C 83, 30 March 2010 – consolidated version – hereinafter referred to as the TFEU). The same provision of the TFEU leaves to the national authorities the choice of form and methods for the transposition of directives. In such respect, it is clear (i) that the transposition of a directive into a national legal order with regard to the pursued objective must be carried out in conformity with mandatory regulations in generally binding acts, (ii) [namely] in a manner that will enable, in the European Union (hereinafter referred to as the EU), the harmonisation of a certain segment of the legal order. These two requirements are necessary prerequisites for the construction of a coherent EU legal order in Member States introduced by a certain directive.
  2. In individual cases, the foundation for the implementation and interpretation of (e.g.) laws by which a Member State fulfils its duty to transpose a directive into its national legal order is the concrete wording of these laws. Any corrections to the wording of directives during their transposition entails a basis for a different understanding and thus for the threat that the objectives pursued by the directive that were the exact purpose of harmonisation will not be achieved.<sup>1</sup> This holds true,

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1 This was also one of the main arguments expressed in the British House of Lords when the British law on

*mutatis mutandis*, (i) for the adding of text on the theme of the content comprised by the objectives of the directive and (ii) for the use of legal terms from the transposed directive in the text added in such manner.

3. In this context, it should also be underlined that the transposition of directives into the legal order of Member States brings with it a new (broader) legal context and thus a new legal framework of our thinking. Seeking the true (legal) content of the words and legal terms defined thereby in such laws thus always requires that they be placed within the EU legal space. Due to the fact that also when interpreting such laws the true (legal) meaning of words by which legal terms are defined is still being ascertained, this is the only manner in which a single (and common) starting point for the application of EU law in all Member States can be ensured. This is a further necessary prerequisite for the uniform application of EU law in all Member States, the interpretation of which lies in the jurisdiction of the Court of Justice of the EU (Article 267 of the TFEU).
4. Such a starting point directs me, when defining the meaning of the term “*the general credibility of the applicant*”, to proceed from the content of the provision of the fifth paragraph of Article 4 of Council Directive 2004/83/EC (hereinafter referred to as the Qualification Directive), which introduces this phrase; the IPA, on the other hand, by which the Republic of Slovenia fulfilled its duty to transpose this Directive, (can *only*) also apply this phrase.<sup>2</sup> Therefore, as I understand, in the case at issue, the Qualification Directive is important, and its principal objective was to ensure that Member States shall apply (minimum) *common* criteria for identifying persons genuinely in need of international protection.<sup>3</sup>
5. From the fifth paragraph of Article 4 of the Qualification Directive there follows a *duty* of Member States, if they determine that the applicant must substantiate by him- or herself an application for international protection (such approach was also

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trademarks was being adopted, favouring the highest conformity of the wording of the law with the wording of Directive 89/104/EEC, and which was, at the same time, expressed against otherwise weighty reservations due to unclear definitions of prerequisites for a broadened protection of trademarks with a reputation in this Directive. Taken from Tony Martino, *Trademark Dilution*, London Press, Oxford 1996, p. 103. The author cites the position of Lord Strathclyde: “I, too, wish to avoid anything in the Bill which would appear contradictory or silly. Therefore, I appreciate the noble Lord’s wish to improve the drafting. Again, at the risk of sounding boring, I do not want to run the risk of changing the meaning of a provision which aims to mean the same in all Member States.”

- 2 In other words: In my opinion, the phrase “*the general credibility of the applicant*” in the IPA cannot be simultaneously attributed two [different] meanings: firstly, the meaning that follows from the context of the Qualification Directive, and secondly, the meaning that we would only seek within the context of national law, regardless of the meaning that it has within the context of the Qualification Directive. If we allowed the possibility that the same phrase can have multiple legal meanings within the same law, this would, as I understand it, on the one hand, lead to severe terminological dilemmas, and on the other, such situation would make a favourable basis for substantive differences in individual states in the field of law comprised by the objectives of the Directive to arise. Therefore, I doubt that such an approach could be acceptable.
- 3 Recital 6 of Directive 2004/83/EC in its entirety reads: “The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.”

enacted in the IPA). In such case, Member States must relieve the applicant of this duty if the exhaustively listed conditions in points (a), (b), (c), (d), and (e) are fulfilled.<sup>4</sup> This is the rule of the so-called relaxation of proof.<sup>5</sup>

6. The third paragraph of Article 21 of the IPA is intended to transpose this duty of Member States from the Qualification Directive. In this provision, as in the Qualification Directive, the phrase “*the general credibility of the applicant*” (only) defines one of the conditions for the application of the rule on the relaxation of proof. It logically follows therefrom
  - (1) that the (concrete) assessment of the general credibility of an applicant for international protection is only one of the bases for the application of the rule on the relaxation of proof,
  - (2) which is precisely for such reason inevitably incorporated in the content of the third paragraph of Article 21 of the IPA in such manner that it forms, together with the other [bases], a sensible whole.
7. The wording of the abrogated third paragraph of Article 22 of the IPA defined the *prerequisite* for relieving the competent authority of the duty to verify the statements of the applicant regarding the key reasons for the application for international protection in connection with general and specific information on the situation in the country of origin referred to by the eighth and ninth indents of Article 23 of the IPA. This prerequisite was defined by the phrase that “*the general credibility of the applicant is not established.*” Due to the use of the phrase “*the general credibility of the applicant [...]*,” such definition is imposed in the context of the third paragraph of Article 21 of the IPA (which is intended to transpose the fifth paragraph of Article 4 of the Qualification Directive; *cf.* the sixth paragraph of this opinion). Then, the third indent of the third paragraph of Article 21 of the IPA determines the *duty* of the competent authority (as does point (c) of the fifth paragraph of Article 4 of the Qualification Directive) to assess the conformity and probability of the statements of the applicant on the key reasons for the application in relation to accessible specific and general information on the situation regarding the protection of human rights in the country of origin related to the applicant’s case. In fact, the IPA at one point (in the third indent of the third paragraph of Article 21) determines that the criterion for the assessment of the convincingness of the statements referring to the alleged key reasons for the application is *objective* (i.e. the accessible general and specific information – *cf.* the second paragraph of Article 22 of the IPA and the eighth and ninth indents of Article 23 of the IPA). At another point, i.e. in the abrogated third paragraph of Article 22 of the IPA, a different criterion was determined for verifying the statements of the applicant on these key reasons for the application, namely the assessment of the competent authority that “*the general credibility of the applicant is not established.*” I did not find such a provision in the Qualification Directive.

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4 K. Hailbronner (Ed.), EU Immigration and Asylum Law, Commentary on EU Regulations and Directives, Verlag C. H. Beck oHG, München 2010, p. 1031.

5 *Ibidem.*

8. It is clear that the abrogated provision of the IPA defined the standard for determining which persons need international protection in a manner that *was not* more favourable for the applicants. Therefore, as I understand it, the legislature did not have an authorisation in either recital 8 or Article 3 of the Qualification Directive to choose such definition.<sup>6</sup>
9. To conclude: In my conviction, the abrogated third paragraph of Article 22 of the IPA was neither taken from the Qualification Directive nor was there a basis for such in those provisions of the mentioned Directive that leave the choice of more favourable standards to Member States. As I understand it, the finding of the legislature in the second paragraph of Article 1 of the IPA that this Act is in this part in conformity with the Qualification Directive was therefore erroneous.

*Dr Dunja Jadek Pensa*

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6 “It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals [...] where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.” Taken from recital 8 of the Qualification Directive. The possibility to introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with the Qualification Directive is also expressly given to Member States in Article 3.

Decision No. **Up-75/95**, dated 7 July 1995

### DECISION

At a session held on 7 July 1995 in proceedings to decide upon the constitutional complaint of A. A., represented by attorney B. B., the Constitutional Court

*decided as follows:*

1. Ljubljana Higher Court Order No. Kp 425/95, dated 23 May 1995, and Ljubljana District Court Order No. Ks 532/95, dated 12 May 1995, are abrogated.
2. The case is remanded for new adjudication to the Ljubljana District Court, which has to decide within 48 hours.

*Reasoning*

#### A

1. The complainant challenges the Ljubljana Higher Court Order by which the Higher Court dismissed the appeal against the Order of the court of first instance. By that Order, the three-judge panel for pre-trial appeals extended the duration of the detention of the complainant, which was imposed on 17 May 1994 due to the risk of recidivism. On the basis of an indictment for the continuous criminal offence of grand theft determined by the third paragraph of Article 212 of the Penal Code of the Republic of Slovenia (Official Gazette RS, No. 63/94, hereinafter referred to as the PC), a [criminal] procedure is pending against the complainant. The complainant is of the opinion that the extension of his detention entails a violation of his right with regard to the imposition and duration of detention determined by Article 20 of the Constitution and of his right with regard to the duration of detention determined by Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, MP, No. 7/94, hereinafter referred to as the ECHR).
2. In the complainant's opinion, the imposition of detention due to the risk of recidivism presupposes that he is guilty of a future [criminal] offence, which allegedly violates his right to the presumption of innocence determined by Article 27 of the Constitution. The court's substantiation that due to the scope and gravity of the criminal

offences there exists the risk of recidivism is allegedly not a sufficient reason for imposing the detention. Both courts allegedly unjustifiably refused to take into consideration the circumstances that the complainant allegedly had the possibility to obtain employment, that his mother was allegedly willing to support him, and that allegedly all the members of the gang to which the applicant belonged were in detention, due to which it is allegedly not possible to substantiate the risk of recidivism with the fact that the defendants in the criminal procedure collaborated. The complainant is also of the opinion that with regard to the constitutional requirement that the imposition of detention must be absolutely necessary for reasons of public safety, the risk of recidivism cannot exist merely due to a criminal offence against property.

3. The complainant is of the opinion that the Constitutional Court has the jurisdiction to assess, with regard to the provision of Article 5 of the ECHR, which determines the [right to a] trial within a reasonable time, and the second paragraph of Article 200 of the Criminal Procedure Act (Official Gazette RS, No. 63/94, hereinafter referred to as the CrPA), which determines that detention may only last the shortest possible time, whether the length of the detention in the applicant's case is still reasonable, because he has already been detained for more than one year. The complainant is of the opinion that, regardless of the gravity of the criminal offence due to which the procedure against him is pending and regardless of the complexity of the procedure, the period of time that he has thus far spent in detention is too long and disproportionate to the gravity and nature of the criminal offence, because it could already be compared with the average length of sentences imposed by courts for such criminal offences.
4. The complainant has at the same time also filed a petition for the review of the constitutionality of Article 201 of the CrPA, on which the Constitutional Court will decide in separate proceedings.
5. The complainant proposes that the Constitutional Court release him from detention.
6. By the challenged Order, the Ljubljana District Court extended the detention of the complainant and his co-defendant with the substantiation that the extent and the gravity of the criminal offences alleged by the indictment, as well as the manner of their perpetration, indicate a danger that the complainant and his co-defendant might commit criminal offences again if released. This is allegedly justified by the fact that the complainant allegedly committed the criminal offence of grand theft in collaboration with other defendants in a relatively short period of time, that the defendants constituted an organised gang that engaged in comprehensive and carefully planned criminal activities, and that the defendants demonstrate a higher degree of readiness and determination to commit criminal offences.
7. By the challenged Order, the Ljubljana Higher Court dismissed as unfounded the appeal filed by the defence counsel of the complainant against the Order of the court of first instance. In the reasoning it stated that the court of first instance correctly established that in the complainant's case there exist grounds for detention, namely the risk of recidivism, because the extent and the gravity of the criminal offences (a continuous criminal offence of theft consisting of nine criminal offences) that the complainant allegedly committed in a short period of time are already by themselves

such as to justify the fear that the complainant, when released, might commit further criminal offences. The Higher Court is of the opinion that the statements in the complaint that criminal procedures are pending against all of the alleged criminal offenders and that therefore there is no danger that the gang might recommence its [illegal] activities, are irrelevant, because the risk of recidivism is based on the facts and circumstances from the defendant's past that are [being examined] in this criminal procedure. The Higher Court states another circumstance, namely that the complainant was convicted finally of the criminal offence of theft for having taken possession of the licence plates of someone else's car in 1992. According to the appellate court, the possibility of employment gives no guarantee that the complainant could not possibly continue to commit criminal offences if released, neither is the circumstance that his mother is willing to support him a novelty, because allegedly he was also living with his mother at the time when he allegedly committed the criminal offences with which he is charged.

#### **B – I**

8. At a session held on 15 June 1995, the Constitutional Court accepted the constitutional complaint for consideration.
9. The Constitutional Court examined the criminal case file of the Ljubljana District Court No. K 686/95.

#### **B – II**

10. The second paragraph of Article 19 of the Constitution determines that no one may be deprived of his liberty except in such cases and pursuant to such procedures as are provided by law. The first paragraph of Article 20 determines that a person reasonably suspected of having committed a criminal offence may be detained only on the basis of a court order when this is absolutely necessary for the course of criminal proceedings or for reasons of public safety. In accordance with the provision of the second paragraph of Article 20, detention may last only as long as there are legal grounds for such (the Constitution itself, then, requires further statutory specification of the two constitutional reasons determined by the first paragraph of Article 20).
11. The most important provisions relevant to the case at issue that are determined by the statutory regulation of detention, i.e. in the CrPA, are the following: Article 192 (types of measures, the principle of leniency), Articles 196–199 (provisions on bail as one of such measures), Article 200 (principal and introductory provisions on detention), the second paragraph of Article 201 (grounds for detention), especially point 3, in conformity with which detention may be imposed on a person for which there exists a reasonable suspicion that he or she has committed a criminal offence “if special circumstances justify the fear that the person might again commit a criminal offence, complete an attempted criminal offence, or commit the criminal offence he or she threatens to commit,” and the second paragraph of Article 202, which determines, *inter alia*, that an order of detention must also include “a short reasoning in which the grounds for detention are specifically substantiated.”

12. Since due to the complexity of the issue the Constitutional Court will assess the complainant's petition for the review of the constitutionality of Article 201 of the CrPA at a later date, in the case at issue it was necessary to assess whether the challenged Orders violated the complainant's constitutional rights, although they were issued on the basis of a statutory regulation that the complainant considers to be inconsistent with the Constitution. Since the Constitutional Court established that his rights had been violated and that the challenged Orders therefore had to be abrogated, it was possible and reasonable to decide on the constitutional complaint before a decision regarding the constitutionality of the statutory basis [of these two Orders] is adopted.
13. Pursuant to the provision of the first paragraph of Article 15 of the Constitution, human rights and fundamental freedoms (hereinafter jointly referred to as constitutional rights) are exercised directly on the basis of the Constitution, whereas judges are, in conformity with the provision determined by Article 125 of the Constitution, bound by the Constitution and laws. The cited provision of Article 15 does not relieve judges from being bound by laws in conformity with Article 125 and must be interpreted in the context of Article 15 as a whole, whose second paragraph provides for the possibility of the statutory regulation of the manner of the exercise of constitutional rights, while the third paragraph provides for the possibility of their (statutory) limitation, and the fourth paragraph ensures their judicial protection and the right to have the consequences of their violation remedied, all of which is, of course, also regulated by law. Already in such context, the provision of the first paragraph must be understood in the sense that, on the one hand, the exercise of certain constitutional rights does not require statutory regulation of the manner of their exercise and that, on the other hand, also where such statutory regulation may in fact be admissible and possibly even necessary, its absence or inconsistency with the Constitution does not prevent, as a general rule, that constitutional rights would in such case be exercised directly on the basis of the Constitution. However, where the manner of the exercise, possible limitations, and the judicial protection of these rights are also regulated by law, the judiciary is also bound, in accordance with both Article 15 and Article 125 of the Constitution, by the statutory regulation of these issues. If a judge considers a law that he or she is to apply to be unconstitutional, he or she must, in conformity with Article 156 of the Constitution, stay the proceedings and request a review of the constitutionality of the law in question before the Constitutional Court. This constitutional provision also binds the courts to respect laws until they are abrogated and prevents them from adopting decisions that circumvent laws or that are in conflict with them. Any other interpretation of the first paragraph of Article 15 of the Constitution would also be inconsistent with the constitutional principle of the separation of powers, because it would lead to a situation where the judiciary would not be obliged, in its decision-making, to abide by the laws that the legislative power adopted while exercising its constitutional tasks determined by Article 15 of the Constitution. The only exception in this context is the above-mentioned Article 156 of the Constitution, which determines that courts are not bound to apply an allegedly unconstitutional law until the Constitutional Court decides on its constitutionality.

14. If a deficient or possibly even partly unconstitutional statutory regulation does not prevent courts from nonetheless ensuring, in concrete cases, judicial protection of the allegedly infringed constitutional rights of the affected persons, they are obliged to ensure it in spite of the deficiency. The protection of human rights is namely a fundamental obligation of a state governed by the rule of law; also Article 5 of the Constitution binds the state, i.e. all three branches of power, including the judiciary, to protect constitutional rights.
15. The statutory regulation of detention due to the risk of recidivism, which is the disputable question in the case at issue, is deficient in several points and aspects. The constitutional regulation that also allows detention in cases where this is “absolutely necessary for [...] public safety,” thereby also allows detention due to a so-called risk of recidivism, whereby the law should allow a more reliable implementation of this constitutional provision and the necessary legal certainty by providing courts with clearer criteria for assessing the question of when exactly detention is absolutely necessary to ensure public safety (namely whether public safety can only be jeopardised by criminal offences against life and body or also by, e.g., thefts). Since the law does not regulate this question, but states that only the fear that a person might again commit (any) criminal offence is sufficient grounds for detention, this entails the first issue that the Constitutional Court had to resolve while examining the constitutional complaint at issue, i.e. whether the potential repetition of the criminal offence of grand theft could possibly jeopardise public safety, so that the imposition of detention would be admissible due to the danger of the repetition of such criminal offence. The next question that is raised (if the first question is answered in the affirmative) is to what degree and in what manner such danger must be demonstrated in order to justify the imposition of detention. Also in this respect the law itself does not provide courts with sufficiently clear and useful criteria, because it only requires that “special circumstances” that “justify the fear that a person might again commit the criminal offence” be established; where the statutory regulation is so incomplete, the case law should by all means also directly rely on the constitutional provision that allows detention only in cases where this is “absolutely necessary” to ensure public safety (i.e. when such aim cannot be achieved by any other means and by any other milder measure than that of the deprivation of the suspect’s freedom).
16. The question of whether the above-mentioned deficiencies also entail the unconstitutionality of such statutory regulation is, as already mentioned, an issue on which the Constitutional Court will decide separately due to its complexity. However, regardless of the outcome of that assessment, it was possible to establish beforehand that in the constitutional complaint case at issue the complainant’s constitutional rights were violated despite the fact that courts are bound by the statutory provisions in force, due to which it was necessary to abrogate both challenged Orders on detention and remand the case to the competent court for new adjudication.
17. In doing so, the Constitutional Court did not assess whether the detention had been imposed and extended until the challenged Orders were issued in a manner that entailed a violation of the complainant’s constitutional rights, but it only concentrated on the assessment of the two challenged Orders.

## B – III

18. The Order of the court of first instance was issued at a time when the main hearing had already been announced, i.e. after the indictment had become final. Unless there existed reasonable suspicion that the complainant had committed a criminal offence, the court should have dismissed, for such reason, the indictment even before the main hearing was announced (point 4 of the first paragraph of Article 277 of the CrPA). Therefore, in this respect, it is not possible to reproach the court for not specifically justifying in the reasoning of the Order on the extension of the detention the existence of such reasonable suspicion, which is something that the Constitutional Court otherwise considers to be an obligatory part of the substantiation when imposing detention prior to the initiation of an investigation. When assessing the order on the extension of detention, the Constitutional Court cannot examine the question of whether or not in the criminal case involving the complainant there exists reasonable suspicion, because this issue was already resolved when the indictment became final. However, such does not entail that in deciding on the extension of detention courts are not obliged to substantiate all the other elements that present the argument that detention is absolutely necessary for public safety and that in the complainant's case there exist clear and precisely expressed circumstances on the basis of which it is possible to infer, with the necessary degree of probability, that there exists the risk that the complainant might again commit the same criminal offence.
19. Since detention is one of the most serious interferences with the constitutionally protected personal liberty of humans, courts are obliged to assess, not only when imposing detention, but whenever they must adopt a decision regarding detention (either upon the proposal of the detainee or *ex officio*), whether the constitutional and statutory conditions for detention are fulfilled, and if they are, they also must substantiate them appropriately. Due to the fact that detention entails the deprivation of liberty based merely on a certain degree of probability that a person has committed a criminal offence, whereas with regard to detention based on the risk of recidivism even only on the basis of the probability that the person might again commit the same criminal offence if released, the constitutional and statutory provisions regarding detention must be interpreted even more restrictively.
20. The complainant has already been convicted once for the criminal offence of so-called petty theft, which he allegedly committed two years before the criminal offences that are the subject of the indictment. In the present case, however, the indictment charges the complainant with nine criminal offences of car theft. Both the final conviction and the alleged criminal offences exclusively concern so-called criminal offences against property. Criminal offences against property differ with regard to their content; some of them, such as robbery, for example, at the same time also entail a direct assault on an individual's physical integrity, whereas others are such that by themselves they do not entail a direct threat to a person's life, health, or his or her physical integrity; however, for such reason it is still not possible to generalise that they either do pose or do not pose a threat to public safety.

21. The answer to this question first depends on how we interpret the provision determined by the first paragraph of Article 20 of the Constitution, which states that detention is also possible when this is absolutely necessary for reasons of public safety. Although Article 356 of the PC (subversion) uses the term “public safety” in a sense that is obviously limited to the safety of an individual’s physical integrity, it cannot be concluded with certainty that in the Constitution this term is also used in the same sense. Such (a narrow) interpretation of this term could in fact be accounted for by the fact that the fifth paragraph of Article 36 of the Constitution (inviolability of dwellings) determines that an official may enter the dwelling of another person without a court order and in the absence of witnesses where this is absolutely necessary (*inter alia*) “to protect people or property.” The following interpretation might, then, be possible: an interference with the inviolability of a dwelling is also exceptionally constitutionally admissible in order to protect property, whereas detention as a form of interference with personal liberty, i.e. with a more important value than that of the inviolability of a dwelling, is constitutionally admissible only for the purpose of protecting people and not also their property.
22. However, when comparing the mentioned two constitutional provisions it is not possible to overlook a significant difference: Article 36 refers to the “protection” of people and property, whereas Article 20 refers to public “safety”. However, it is probably difficult to speak of public safety if in practice the state only guaranteed people safety from assaults on their life and body, but not also from assaults on their property, especially that property on which their work, making a living, manner of life, etc., depend to an important degree.
23. Although neither of the above two interpretations is completely reliable, the Constitutional Court has decided, in assessing the case at issue, to give priority to the second, i.e. the broader, interpretation. It is otherwise true that, when in doubt, unclear legal norms by which rights are limited must be interpreted in a narrow sense, not in a broad sense, but in the case at issue this constitutional norm, which due to the exceptional admissibility of detention limits the defendant’s right to personal liberty, must at the same time also be understood as a constitutional norm that should ensure respect for the constitutional right of others to safety, which is guaranteed (together with [the right to] personal dignity) by Article 34 of the Constitution. Too narrow an interpretation of the term “public safety” contained in Article 20 of the Constitution could directly cause too narrow an interpretation of the term ‘everyone’s safety’ referred to in Article 34 of the Constitution, where this term is no longer an element of the norm that limits a right, but an element of the norm that ensures it. What is at issue is a collision of two constitutionally protected values in which in conformity with generally recognised rules of the [legal] profession and also in conformity with the generally recognised foreign constitutional case law, including the case law of the European Court of Human Rights, the principle of proportionality must be applied (and which also the Constitutional Court has already applied several times) in order to resolve such collisions.
24. Therefore, from the content of the phrase ‘absolutely necessary for reasons of public safety’ contained in Article 20 of the Constitution it is not possible to exclude in

advance criminal offences against property by alleging that public safety cannot be jeopardised at all therewith; however, when deciding on detention due to the risk of recidivism, courts must, while applying the principle of proportionality, weigh whether in a concrete case the threat that the release of a defendant might pose to public safety entails such a significant or grave interference with people's constitutional right to safety as to outweigh an interference with the defendant's right to personal liberty, while it has not yet been proved that he or she actually has committed the criminal offence that he or she is charged with (except if the defendant had already been convicted of such offences before) and when it is also not possible to "predict" with certainty whether he or she would again commit such criminal offences if released. Such principled position naturally entails that the threat that the individual would again commit criminal offences against property (even if such threat is established and substantiated more concretely and convincingly than in the hitherto predominant case law) will not be able, as a general rule, to outweigh interferences with personal liberty, except in cases of graver criminal offences with elements of violence or any other interferences with the most important constitutionally protected values of other people.

25. The application of the principle of proportionality entails that courts must, prior to the imposition of an interference with a constitutional right, assess the following: firstly, whether the concrete interference is actually appropriate for achieving the desired constitutionally admissible aim (this standard first step of the assessment of the admissibility of interferences can be omitted when detention is imposed by the judiciary, because this assessment has already been carried out by the legislature); secondly, whether the interference is necessary ("absolutely necessary") in the sense that the desired aim cannot be achieved in any other manner, i.e. by applying a milder measure (milder than those determined by Article 192 of the CrPA – although probably the only appropriate milder measure available "to ensure the defendant's attendance in court and the successful carrying out of a criminal procedure," and for preventing the risk of recidivism would be bail, at least for certain types of criminal offences); and thirdly, whether the interference is reasonably proportionate to the aim, i.e. that value that is to be protected by the interference, and to the reasonably expected effect of such protection (so-called proportionality in the narrower sense).
26. The preceding paragraph provides a principled answer only to the first part of the question raised in paragraph 15 above, namely to what degree and in what manner the risk of recidivism must be demonstrated in order for the imposition of detention to be justified. With regard to the manner in which this should be established, the corresponding provision of the CrPA only requires the establishment of "special circumstances that justify the fear" that the person in question might again commit his or her criminal offence. The constitutional provision regarding the "absolute necessity" must also be applied when interpreting this statutory provision; when in the case law this provision is applied in such manner that the statement of circumstances that give rise to the mere "fear" of a court that the person in question might again commit his or her criminal offence is sufficient, such application will

not, as a general rule, pass the test of the conformity of such judicial decision with constitutionally guaranteed rights. Namely, in order for such interference to be admissible, the Constitution requires judicial establishment of its “absolute necessity”. Therefore, concrete circumstances must be established from which courts can reach a conclusion based on life experience that there truly exists a real danger (and not just a “fear”) that precisely the affected individual might again commit a determined and specific criminal offence (while the question of whether this danger is sufficient in order to justify detention was addressed in the preceding paragraph).

#### **B – IV**

27. The substantiation of the courts as to why and how the circumstances stated in the reasoning of the Orders justify the fear (danger) that the complainant might again commit the same criminal offence is not evident from the challenged Orders. The Orders state that what is at issue is an organised and comprehensive criminal activity, which allegedly entails by itself the risk of recidivism. Such statement is general and abstract, unless the court substantiates why precisely with regard to the complainant this implies the risk of recidivism. As is evident from the criminal file, the other complainants have now been released from detention, which entails that the fact that what is at issue is a comprehensive and organised criminal activity that was carried out during a short period of time is not by itself sufficient grounds, because the court fails to substantiate in any manner why granting liberty to this particular complainant would entail a real danger that he would commit new criminal offences. The court of first instance claims that the defendants demonstrate a higher degree of readiness and determination to commit criminal offences, however the existence of this circumstance regarding either the complainant or other defendants is not in any manner substantiated.
28. The circumstance that the complainant alleged in his favour, namely that there is no danger that the gang might recommence its illegal activities, because criminal procedures are pending against all of the alleged criminal offenders, is merely qualified as “completely irrelevant” in the Order of second instance, without such reasoning being explained in any manner. Surely, the situation would be different from the current situation wherein all the criminal offenders are known and where criminal procedures are pending against all of them if, were the complainant to be released from detention, he could join his accomplices who were still unknown to the authorities. When assessing this question, the court [of second instance] should also have taken into consideration that the initiation of a criminal procedure undoubtedly has a certain influence on defendants’ conduct during the time before the hearing, and should have assessed the possible extent of this effect concretely with regard to the complainant.
29. Above all, from the challenged Orders it is not evident whether the courts actually carried out an assessment of whether in the case at issue detention was in fact absolutely necessary for reasons of public safety, i.e. whether the defendant possibly again committing the criminal offence could affect public safety to such an extent that in order to prevent such danger the deprivation of the liberty of the defendant even before a possible final conviction is really absolutely necessary.

30. Neither is it evident from the challenged Orders whether in the case at issue detention was really applied as the last resort, i.e. whether the courts considered the possibility of preventing the potential risk of recidivism with regard to the criminal offence by applying a milder measure, namely appropriate bail.
31. For such reasons, the Constitutional Court reached the conclusion that the competent courts failed to adopt the decision on the extension of detention in accordance with the conditions determined by Article 20 of the Constitution and point 3 of the second paragraph of Article 201 of the CrPA or that this is at least not evident from the challenged Orders. This entails a violation of the complainant's constitutional right determined by Article 25 of the Constitution, which in accordance with the established case law of the Constitutional Court must be interpreted as the right to an effective legal remedy (which is violated if the reasoning does not contain sufficiently precise grounds on which the decision is based); however, whether in the case at issue also the complainant's right to personal liberty was violated by the possibly unjustified extension of detention will only be possible to assess on the basis of the new decision that the competent courts adopt on the basis of this Decision. On the basis of the authorisation determined by the second paragraph of Article 40 of the Constitutional Court Act, and by *mutatis mutandis* application of the provision determined by the second sentence of the second paragraph of Article 20 of the Constitution, the Constitutional Court imposed on the court of first instance a 48-hour time limit to adopt such decision.
32. In the case at issue, the Constitutional Court decided to adopt such decision regarding the manner of the assessment of the question of whether by the hitherto judicial decision-making also the complainant's right to personal liberty was already violated by taking into consideration the fact that due to the deficient statutory regulation courts were [until now] not provided with sufficiently clear criteria in accordance with which they are obliged to assess whether detention is justified or not; these criteria are laid down more clearly only in this Decision. This Decision does not, of course, prejudice further decision-making by the Constitutional Court with regard to resolving constitutional complaints in cases concerning detention.
33. The complainant also alleges that he has been kept in detention for an unreasonably long period of time, whereby his right to a trial within a reasonable time has allegedly been violated. This right is determined by the first paragraph of Article 23 of the Constitution, which provides that a court must decide on charges without undue delay. For cases where the defendant is also detained, the same right is also expressly determined by the third paragraph of Article 5 of the ECHR, in accordance with which everyone is entitled to a trial within a reasonable time or to release pending trial. Since the Constitutional Court established that the challenged Orders must be abrogated due to the reasons stated above, whereby the process of establishing the existence of this additional reason could further delay the decision-making, the Constitutional Court adopted its decision regarding the constitutional complaint at issue without resolving this question.

## C

34. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the Constitutional Court Act, composed of: Dr Tone Jerovšek, President, and Judges Dr Peter Jambreč, Mag. Matevž Krivic, Mag. Janez Snoj, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. The decision was reached unanimously.

*Dr Tone Jerovšek*  
*President*

Decision No. **U-I-18/93**, dated 11 April 1996

### DECISION

At a session held on 11 April 1996 in proceedings to review constitutionality initiated upon the petitions of Hermej Gobec, Ivo Turnšek and Srečo Seršen, all Ljubljana, Ervin Dokič, Piran, Simon Horvat, Nožice, represented by Miro Senica and Barbara Menart Senica, attorneys in Ljubljana, Darko Zupan, Velenje and Matevž Jenko, Ljubljana, represented by Ervin Dokič, an attorney in Piran, the Constitutional Court

*decided as follows:*

1. The following provisions of the Criminal Procedure Act are abrogated:
  - The first paragraph of Article 201 and the first paragraph of Article 361
  - the part of the second paragraph of Article 202 which reads as follows: “a brief statement specifically explaining the grounds for detention”.
2. Point 3 of the second paragraph of Article 201 of the Criminal Procedure Act and point 2 of the first paragraph of Article 432 of the Criminal Procedure Act are inconsistent with the Constitution.
3. The Criminal Procedure Act is inconsistent with the Constitution insofar as it does not provide any milder measures for the prevention of the risk of recidivism.
4. The provisions of the Criminal Procedure Act governing the decision-making procedure for ordering, extending and releasing an individual from detention are inconsistent with the Constitution.
5. The National Assembly must remedy any established inconsistency with the Constitution within one year.
6. The petition to initiate proceedings to review the constitutionality of points 1 and 2 of the second and third paragraphs of Article 201 of the Criminal Procedure Act is dismissed.

*Reasoning*

### A

1. The petitioners Hermej Gobec, Ivo Turnšek and Srečo Seršen challenge the provision of point 3 of the second paragraph of Article 191 of the Criminal Procedure Act (Of

ficial Gazette of the Socialist Federal Republic of Yugoslavia, nos. 4/77, 14/85, 26/86, 57/89 and 3/90 – hereinafter referred to as the CrPA-77).

2. The petitioners state that the reason for detention due to the risk of recidivism as determined in the challenged provision is imprecisely and abstractly defined and, as such, allows the courts to use it frequently, often without any substantiated reasoning. In the opinion of the petitioners, these grounds for detention cannot be based on Article 20 of the Constitution, pursuant to which detention is allowed only on the basis of a court order when this is absolutely necessary for the course of criminal proceedings or for reasons of public safety. Detention due to the risk of recidivism is also allegedly contrary to Article 27 of the Constitution since during preliminary proceedings it assumes guilt for future acts and offences not yet committed. The petitioners point out that detention should be an extraordinary measure, as the personal liberty of detainees is even more restricted than that of persons convicted by way of a final judgment and serving their sentence. They argue that using the risk of recidivism as grounds for detention represents a violation of human rights and fundamental freedoms pursuant to the third paragraph of Article 15 of the Constitution.
3. In an extensive supplement to his petition, Hermej Gobec emphasises that the risk of recidivism is not in any way related to ensuring that criminal proceedings are conducted smoothly. He draws attention to the differences between the continental and Anglo-Saxon systems of criminal law, and makes references to specific cases of detention orders being issued due to the risk of recidivism, which in his opinion point to unlawful judicial practice. The majority of detainees are kept in detention due to the risk of recidivism. The usual justification for a detention order is merely the fact that the defendant has already committed several criminal offences within a short period of time, that the criminal offences are extremely serious, and that the offender is unemployed or with no means of support. He was unable to find a single case where a court justified a detention as required by the first paragraph of Article 20 of the Constitution. As a state governed by the rule of law, Slovenia should protect the individual, even when that individual is in detention. Given its function, the Constitutional Court should enforce this principle and guide the case-law of the ordinary courts accordingly.
4. The petitioner Hermej Gobec maintains that the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, International Agreements, No. 7/94 – hereinafter referred to as the ECHR) – referring to the provision of point (c) of the first paragraph of Article 5 – only determines the risk of recidivism in relation to arrest, but not detention.
5. All three petitioners propose the challenged provision be abrogated.
6. The petitioner Ervin Dokič challenges the provision of point 3 of the second paragraph of Article 201 of the Criminal Procedure Act (Official Gazette RS, No. 63/94 – hereinafter referred to as the CrPA). He maintains that the legal definition, particularly the reference to “special circumstances”, allows for detention orders to be decided upon arbitrarily, which in his opinion is contrary to Article 2 of the Constitution. The challenged provision is allegedly also contrary to point (c) of the first paragraph of Article 5 of the ECHR, pursuant to which detention may be ordered only

if it would prevent a criminal offence that is already being prepared, or for which individual preparatory steps have been taken, from being committed. He proposes the abrogation of the challenged provision.

7. The petitioners Simon Horvat and Matevž Jenko submitted petitions that are identical in content. They challenge the provision of Article 201 of the CrPA in its entirety. Pursuant to Article 20 of the Constitution, detention is allegedly only permitted in exceptional circumstances. It should therefore first be established whether detention is absolutely necessary in each case. Therefore the provision of the first paragraph of Article 201 which envisages obligatory detention is allegedly contrary to the Constitution. It is allegedly unclear from the provision of the second paragraph of Article 201 that detention may only be used as a last resort, and only when there are no other means to ensure the smooth conduct of criminal proceedings or for reasons of public safety. The statutory provision allegedly requires only an evaluation of the grounds for detention and not whether the same result could be achieved by granting bail. This, the petitioners claim, is especially the case regarding grounds for detention based on the risk of absconding.
8. The petitioners Horvat and Jenko argue that the most questionable aspect from a constitutional perspective is detention due to the risk of recidivism. The risk of repeating a criminal offence allegedly has no connection with ensuring the proceedings are conducted smoothly; and the only logical connection with ensuring public safety is with those criminal offences that could represent a threat thereto. They claim that the statutory provision allowing a detention order on the grounds of risk of recidivism is contrary to the presumption of innocence determined by Article 27 of the Constitution. They claim that the assumption that a new criminal offence will certainly be committed on the basis of a reasonable suspicion that a criminal offence has already been committed cannot be allowed. By ordering detention due to the risk of recidivism, a court presumes guilt for a future action for which not only has guilt not been established, but the said offence has not even been committed. The petitioners believe that, in a society which embraces the principle of the state governed by the rule of law, liberty should be the rule and the deprivation of a person's liberty only a strictly limited exception. They propose the abrogation of the challenged provisions.
9. The petitioner Darko Zupan challenges the provision of point 3 of the second paragraph of Article 201 of the Criminal Procedure Act. He believes that the Criminal Procedure Act provides for a narrowing of the conditions for detention compared to Article 20 of the Constitution. The contested provision allegedly allows a court to neither evaluate nor state the reasons for the degree of real danger to the public and property that is required for a detention order to be issued. Since it allegedly permits a court to decide on a detention order without taking into consideration the provision of the first paragraph of Article 15 of the Constitution, the challenged provision is allegedly also contrary to Article 2 of the Constitution. He proposes the abrogation of the challenged provision.
10. In its reply, the National Assembly states that detention represents a profound interference with human rights and fundamental freedoms, that the basic provisions are already determined by the Constitution itself, and that the contested provision

merely expands upon Article 20 of the Constitution in more detail. In this case, it argues that the challenged provision does not assume the guilt of the defendant, but that this is merely one of the presumptions made to ensure the smooth conduct of criminal proceedings and appropriate public safety. In the opinion of the National Assembly, the challenged provision of the CrPA-77 is not contrary to Articles 15, 20 and 27 of the Constitution. The National Assembly took the same view in its reply to the Constitutional Court's decision to accept the petitions and commence the proceedings to review the constitutionality of the challenged provision of the CrPA- 77.

### **B – I**

11. With Order No. U-I-18/93, dated 13 July 1993, the Constitutional Court accepted the petitions lodged by Hermej Gobec, Ivo Turnšek and Srečo Seršen and commenced the proceedings to review the constitutionality of point 3 of the second paragraph of Article 191 of the CrPA-77 which, pursuant to the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (Official Gazette RS, No. 1/91-I), was applied *mutatis mutandis* as a Slovene regulation insofar as it was not contrary to the legal order of the Republic of Slovenia. The Constitutional Court decided to review whether the challenged statutory provision, pursuant to which a court may order the detention of a defendant due to the risk of recidivism, is consistent with Articles 20 and 27 of the Constitution.
12. The CrPA-77 (including the challenged provision) ceased to be in force when the new CrPA entered into force, i.e. on 1 January 1995. Pursuant to Article 47 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), if an act ceases to be in force during the proceedings and the consequences of its unconstitutionality are not remedied, the Constitutional Court shall decide that the challenged provision is not consistent with the Constitution. Even if the Constitutional Court held that the challenged provision of the CrPA-77 was unconstitutional, this would not have had any consequence for the petitioners. Therefore, the Constitutional Court did not rule explicitly on the challenged provision of the CrPA-77. Since the provision of point 3 of the second paragraph of Article 191 of the CrPA-77 is completely identical in terms of substance to the provision of point 3 of the second paragraph of Article 201 of the new CrPA, this reasoning also applies to the challenged provision of the CrPA-77.
13. The petitioners Ervin Dokič, Simon Horvat, Darko Zupan, and Matevž Jenko challenge the provisions of the new CrPA. The Constitutional Court joined all the cases under petition No. U-I-18/93.
14. The petitioner Ervin Dokič did not demonstrate legal interest with regard to the challenged provision of the second paragraph of Article 201 of the CrPA, and the petitioners Simon Horvat and Matevž Jenko did not demonstrate legal interest with regard to the first paragraph, points one and two of the second paragraph, and the third paragraph of the aforementioned CrPA provision.
15. Pursuant to the provisions of Article 24 of the CCA, legal interest must be demonstrated when a petition to initiate proceedings is lodged. Legal interest is deemed to

be demonstrated if a review of a regulation has been requested by the petitioner and this directly interferes with his rights, legal interests, or legal position.

16. The petitioner Ervin Dokič demonstrated his legal interest simply by claiming that the challenged provision could be applied to him as a citizen of the Republic of Slovenia. Since its Decision No. U-I-330/94, dated 2 February 1995 (OdlUS IV, 7), the Constitutional Court has repeatedly ruled that in claiming such the petitioner does not demonstrate that there has been direct interference with his rights, legal interests or legal position – and the same holds true for this case.
17. The petitioners Simon Horvat and Matevž Jenko demonstrated their legal interest by the fact that their detention was ordered and extended on the basis of the challenged statutory provision. The Constitutional Court holds that the petitioners were kept in detention on the basis of point 3 of the second paragraph of Article 201 of the CrPA. Therefore they only demonstrate direct interference with their rights or legal position in connection with this provision.
18. In the remaining part, the Constitutional Court accepted the petitions to review the constitutionality of point 3 of the second paragraph of Article 201 of the CrPA and proceeded to decide on the merits of the case on the basis of the fourth paragraph of Article 26 of the CCA.
19. Pursuant to Article 30 of the CCA, and for the reasons described below, the Constitutional Court also decided on the constitutionality of the first paragraph of Article 201 of the CrPA, the first paragraph of Article 361 of the CrPA, point 2 of the first paragraph of Article 432 of the CrPA, and the provisions of the CrPA governing the decision-making process for ordering, extending or being released from detention.

## B – II

20. The concept of the state governed by the rule of law as determined in Article 2 of the Constitution contains elements of procedural and substantive law. The rule of law is therefore not only enshrined in the laws of the state – despite trust in the independence and impartiality of the judiciary in principle, it is nevertheless the principle of legality that prevails in criminal procedure and criminal substantive law – but also in its institutions (courts, administration, etc.), and primarily in the manner these institutions actually apply the law in their procedures. Trust in the judiciary, originating from the *habeas corpus* logic of the first paragraph of Article 20 of the Constitution and described below, does warrant a certain measure of discretion, to which independent, impartial courts that are constituted by law are certainly entitled (Article 23 of the Constitution). However, this increased level of constitutional trust in the judiciary (compared to the executive branch of power), and with it the judicial right to discretionary assessment, is not justified merely by a different personal composition of the judiciary. Pursuant to Article 23 of the Constitution, the right to judicial protection is a result of the legally enshrined, genuine independence and impartiality of the courts.
21. Criminal proceedings are not just a means to enforce substantive criminal law. The provisions of the criminal procedure represent a separate issue concerning the prin-

ciple of the state governed by the rule of law in that they specify substantive constitutional provisions concerning the constitutional rights of an individual against arbitrary, malicious or similar use of executive and judicial power in the state. In terms of constitutional law, criminal proceedings are regarded as a procedure of substantive importance in the decisions of constitutional courts. The subject of criminal proceedings determined by law are the substantive constitutional rights of the individual.

22. Within the context of criminal proceedings, a state governed by the rule of law does not treat the procedural rights of an individual arbitrarily and is not willing to sacrifice these rights in the interest of the efficient application of substantive criminal law. Substantive criminal law may not be enforced through a violation of human rights, whether this takes the form of torture or an unfounded deprivation of liberty. The price would be too high.
23. By respecting human rights as imposed by the Constitution and with an effective and professional police force, a state governed by the rule of law must strive to enforce the provisions of substantive law. To ignore a violation of the constitutional rights of an individual in the name of the effectiveness of criminal law enforcement therefore runs contrary to the rule of law. Policing by the state must not compromise the constitutionally protected integrity of an individual in order to be effective.
24. The provisions of the Constitution are explicitly restrictive in nature. Therefore, the fundamental value of the Constitution, which must serve as the basis for matters of this nature, is to protect the individual from any interference with his integrity within the context of the criminal proceedings.

### **B – III**

25. The Constitutional Court's decision is based on two key premises, both of which are contained in the second paragraph of Article 19 of the Constitution.
26. The Constitution first establishes the general rule that everyone has the right to personal liberty; in the second paragraph of the same article, two general conditions are provided under which this right may be restricted: "No one may be deprived of his liberty except in such cases and pursuant to such procedures as are provided by law."
27. These two premises are described in more detail in subsequent provisions of the Constitution. The first premise, regarding detention, is stipulated in the first paragraph of Article 20 of the Constitution, providing that a person (a) reasonably suspected of having committed a criminal offence may be detained only (b) on the basis of a court order (c) when this is absolutely necessary for the (ca) course of criminal proceedings or for (cb) reasons of public safety.
28. The framework for the second premise represent the provisions of Articles 22 (Equal Protection of Rights), 23 (Right to Judicial Protection), 25 (Right to Legal Remedies), 27 (Presumption of Innocence) and 29 (Legal Guarantees in Criminal Proceedings).
29. The Constitution distinguishes between three types of interference with personal liberty in the context of criminal law, with all three involving interference with the same constitutionally-protected human right to personal liberty.
  - (1) Reference is made in the third paragraph of Article 19 of the Constitution to dep-

privation of liberty (arrest). The concepts of arrest and deprivation of liberty refer to temporary interference by the executive branch of power with the freedom of an individual. Already for an arrest to be constitutionally permissible, the Constitution requires this interference to be made in accordance with a procedure determined by law and in cases determined by law.

- (2) Reference is made in Article 20 of the Constitution to detention as being an extended deprivation of liberty which may only be ordered by the judiciary.
  - (3) Article 28 of the Constitution makes reference to a person being punished, which taking into consideration Articles 17 and 18 means that such a person may be sentenced to a custodial sentence (imprisonment) in the worst case scenario.
30. The most important point is that the general provision of Article 19 of the Constitution, which states that no person may be deprived of his liberty except in cases and pursuant to such procedures as provided by law, clearly refers to arrest, as stated in the following paragraph, and even more so to detention (Article 20) and custodial sentences (Article 28), since in these cases the duration of the interference is even longer.
31. The following is clear from the wording of Article 19. Firstly, it follows from the subtitle "Protection of Personal Liberty" that this article contains a general provision concerning this aspect of the Constitution. Secondly, the first paragraph of Article 19 of the Constitution is concise and explicit in stating that: "Everyone has the right to personal liberty". This categorical prescriptive norm is one of the greatest achievements of post-feudal European civilisation. And since, thirdly, Article 17 prohibits the capital punishment and Article 18 prohibits corporal punishment, torture etc., interference with personal liberty is the gravest possible intrusion by the state into the personal integrity of an individual.
32. The second paragraph of Article 19 of the Constitution then goes on to set out two key ideas. The first is that "no one may be deprived of his liberty". The Constitution therefore differentiates between freedom and liberty. [Translator's note: In the Slovene language, the Constitution actually differentiates between the two: *svoboda* (freedom) and *prostost* (liberty).] No one may be deprived of his freedom; it may only be restricted temporarily through deprivation of liberty. The dependent clause that follows provides in general terms that a person may be deprived of liberty but only if this is foreseeable and determined by substantive and procedural law. The third paragraph of Article 19 then deals with deprivation of liberty, and it follows from the remaining wording and context of Article 19 that this applies to arrest etc. (within the meaning this provision has for the criminal procedure).
33. The general nature of the provision of the second paragraph of Article 19 of the Constitution, i.e. that it explicitly refers to every restriction (deprivation) of liberty, be it arrest (the third paragraph of Article 19), detention (Article 20) or a custodial sentence (the first paragraph of Article 28), can be concluded as stated in (a) the subtitle of Article 19 ("Protection of Personal Liberty"), (b) the general nature of the provision of the first paragraph of Article 19 ("Everyone has the right to personal liberty.") and (c) the general wording of the second paragraph of Article 19 itself ("No one may be deprived of his liberty except in such cases and pursuant to such procedures as are provided by law").

34. It follows logically that the provision of the third paragraph of Article 19 (arrest, deprivation of liberty), all of Article 20 (detention) and the provision of the first paragraph of Article 28 of the Constitution (custodial sentence) – as special provisions relating to the general nature of the provision of the second paragraph of Article 19 – should be interpreted in the light of the specific prescriptive and categorical requirements of the second paragraph of Article 19.
35. More specifically, this means that every arrest, detention and custodial sentence must be carried out in accordance with the principle of legality (*lex certa*), and procedural guarantees provided by the Constitution must exist for each of the three types of intrusion into personal liberty that are determined by the Constitution.
36. The Constitution says least about custodial sentences, which is the longest and therefore the most serious interference with the personal liberty. The reason for this, of course, is that all substantive law guarantees are contained in the concept of the “Principle of Legality” (the subtitle of Article 28), and in the exact same expression (“as provided by law”) which the Constitution uses in the general provision of the second paragraph of Article 19.
37. The decisive wording in the Constitution in both cases is that it is provided by law. The Constitution explicitly obliges the legislature not only to regulate every subject of interference with liberty by law, but to do so precisely and unambiguously. Any possibility of a public authority making an arbitrary decision must be excluded. The measures and conditions under which they may be ordered must be foreseeable. Legal certainty (*lex certa*) is a primary element of the rule of law (Article 2 of the Constitution) and would apply as an imperative constitutional starting point even if the Constitution did not explicitly refer to it. All the laws are therefore part of a legal system and subordinate to the Constitution, and every constitution is a part of the civilisation order, which is reflected *inter alia* in international acts.
38. It is therefore logical that the higher the stakes in legal proceedings, the higher level of emphasis must be placed on the requirement of legal certainty, which is a constituent element of lawfulness. Since human liberty (the highest stake) is at issue in criminal proceedings, much emphasis in criminal law is placed on the principle of legal certainty (principle of legality, *lex certa*). The criminal courts are thus required to interpret the law strictly.
39. In the context of the Slovene Constitution, the principle of legality regarding the state’s right to punish is explicitly determined in Article 28 of the Constitution; Article 19 is even more explicit in its demands for determinability (*lex certa*) for all those forms of interference with the personal liberty of an individual by the executive branch of power or judiciary even before the presumption of innocence is upended (from Article 27 of the Constitution). If, in accordance with the first paragraph of Article 39 of the Criminal Code of the Republic of Slovenia (Official Gazette RS, No. 63/94 – hereinafter referred to as the CC), the principle of *nulla poena sine lege praevia* applies for a sentence of, for example, fifteen days, then it is entirely unacceptable from a constitutional perspective that the principle of legality that is at least as strict would not apply to detention which may last sixty times longer, i.e. two and a half

years, pursuant to the provision of the second paragraph of Article 20 of the Constitution and the fifth paragraph of Article 207 of the CrPA.

40. With regard to detention, the general nature of the provision of the second paragraph of Article 19 is the reason why Article 20 of the Constitution contains no such explicit legal limitation. If it was not interpreted in the light of the second paragraph of Article 19, it would result in the impossible conclusion that the Constitution intended to regulate the subject of detention by itself and exhaustively in Article 20.
41. That the Constitution had no intention of exhaustively regulating the subject by itself is clear from the third sentence of the second paragraph of the same Article 20, providing: "Detention may last only as long as there are legal reasons for such [...]". The legal reasons must therefore precisely specify that which is stated in the first paragraph of Article 20 of the Constitution.
42. This precision is substantive in nature ("No one may be deprived of his liberty except in such cases as are provided by law.") and procedural in nature ("No one may be deprived of his liberty except pursuant to such procedures as are provided by law."). Neither in respect of the first nor the second does the Constitution differentiate between the various degrees of legal certainty (substantive and procedural) for deprivation of liberty, detention or custodial sentences. The same absolute constitutional requirement of prior definition exists for all three forms of intrusion into personal liberty for cases where a person may be deprived of liberty and that there is a legal determination of the specific procedure following which a person's liberty may be restricted and deprived before the conviction becomes final.

#### B – IV

43. Since this is an extraordinary and preventive interference with personal liberty, the constitutions of most democratic countries stipulate in great detail the conditions under which such interference is possible at all. The first paragraph of Article 20 of the Slovene Constitution stipulates three conditions under which detention may be ordered:  
(1) a court order;  
(2) reasonable suspicion; and  
(3) absolute necessity for the course of criminal proceedings or for reasons of public safety.
44. The fact that the Constitution specifies that a person may be detained only on the basis of a court order means that an explicit constitutional requirement is laid down that this person be delivered to the judiciary through a temporary restriction of liberty carried out by the executive branch of power after the deprivation of liberty (arrest). This is the Slovene version of an ancient human freedom, originally derived from the English Habeas Corpus Act (*ad subjiciendum*) from 1679. Only the judiciary has the right to order anything more than just a temporary deprivation of liberty. Accordingly, the Slovene Constitution must be seen as the heir to the values of our civilisation.
45. The emphasis that detention may only be based on a court order shows that this is a case of *habeas corpus*, as opposed to the third paragraph of Article 19 which refers to a "competent body" in the impersonal (passive) form. Hence it follows, and this is

also common in other constitutional systems, that temporary “deprivation of liberty” (deprivation of liberty, arrest) falls within the remit of the executive branch of power.

46. From (1) the differentiation between the constitutional concept of “deprivation of liberty” (third paragraph of Article 19), which is complete and temporary, and the constitutional concept of “detention” (Article 20), which is incomplete and may last longer, and (2) (a) from the provision of the third paragraph of Article 5 of the ECHR, according to which anyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, and (b) from Article 23 of the Constitution, pursuant to which anyone deprived of their liberty has the right to have a decision made on the deprivation of liberty “without undue delay” by an independent, impartial court constituted by law, i.e. not the executive branch of power, it follows that anyone deprived of their liberty must be delivered by the executive branch of power to the judiciary “without undue delay”.
47. Consequently, the executive branch of power (the police) must bring the person deprived of liberty, albeit the deprivation being entirely in accordance with the Constitution and the law, promptly (without undue delay) to the judiciary. As to whether the provisions of the CrPA governing the deprivation of liberty itself are consistent with the Constitution is a separate issue which had to be resolved in this case.
48. The second condition for ordering detention is a reasonable suspicion that a certain person has committed a criminal offence. The provision of Article 20 of the Constitution only applies where there is a high probability that a person has committed a specific criminal offence for which decision opening the investigation has already been issued. The assumption that a person will repeat a specific criminal offence may actually only be made on the basis of the constitutionally required and actually established reasonable suspicion that the person in question has already committed such an offence. The “recidivism” can only be inferred from something that has already happened. This is, to the extent to which the Constitution allows such a decision at all, based on an incomplete induction and if it is absolutely necessary for the public safety, then the major premise of this conclusion is restricted at least to the reasonable suspicion that the person did commit a specific criminal offence. It is therefore not the Constitution that gives the court general authorisation to deduce that detention is necessary for public safety, but instead the risk that may result from a reasonable suspicion that a specific criminal offence has already been committed. When ordering detention, the Constitution allows for such danger to the public to be inferred only if the danger is causally connected to a criminal offence which is reasonably suspected to have been committed.
49. The constitutional implication here is that the right of the judiciary to order that such a person be detained originates solely in the reasonable suspicion that he has already committed the criminal offence, i.e. in the probability, demonstrated beforehand, that this person, by allegedly committing a criminal offence, infringed the specific constitutionally-protected interest of a particular subject being protected in case of specific criminal offence. If this was not the case, the ascertainment of the reasonable suspicion

that a person has, for example, committed the criminal offence of tax evasion determined by Article 254 of the CC would give the court a blanket right to conclude, for example, that there is a risk that the defendant will commit a criminal offence against life and body, as determined in Chapter XV of the CC. Such conclusion, which goes beyond the constitutionally imposed major premise of reasonable suspicion, would have no constitutional foundation arising from the right of the state to interfere with the right to personal liberty only to the extent to which the defendant infringed a subject protected by the criminal law and if a reasonable suspicion exists for such infringement. The mere ascertainment of a reasonable suspicion that a person has committed a specific criminal offence shall not give full right to the court to order detention due to any danger to the public because the right of the judiciary to assess criminal liability and to order a far more severe interference with personal liberty, i.e. imprisonment, is limited solely to the act which is reasonably suspected to have been committed.

50. This substantive link between the reasonable suspicion for the decision opening the investigation to be issued against the defendant, and the conclusion reached regarding the risk of the defendant repeating or carrying out a criminal offence for which a reasonable suspicion has already been demonstrated, arises from the current provision of point 3 of the second paragraph of Article 201 of the CrPA. The question here is whether this link should also apply to the third concern referred to in this provision, i.e. that the defendant will commit a criminal offence he has threatened to commit. This substantive link will exist every time a perpetrator who is reasonably suspected to have committed a violent criminal offence threatens to carry out the same kind of offence. The current provision of the CrPA describes the natural regression from recidivism to an attempt, and from an attempt to a threat as the precursor to an attempt or the perpetration of the same kind of criminal offence as that for which a reasonable suspicion has already been demonstrated. It is certainly possible for a person charged with a non-violent criminal offence to make a serious threat against a hostile witness. However, such a threat can be dealt with in the context of the risk of obstruction of the proceedings.
51. In addition to the quantitative element of probability, which must first be demonstrated (reasonable suspicion), the Constitution prescribes the qualitative element of a substantive link between the specific criminal offence for which a reasonable suspicion has already been demonstrated and the presumption of an act with which the defendant is allegedly endangering public safety.
52. Article 20 of the Constitution refers to further detention as being “absolutely necessary for the course of (criminal) proceedings or for reasons of public safety”. The expression “course of proceedings” refers mainly to ensuring the presence of the defendant. Since ensuring the presence of the defendant is the first procedural requirement in any legal order and because the first requirement of the legal order is that the parties submit themselves to a legal – and not illegal – solution to the dispute, practically all legal orders regulate the problem of the risk of absconding in one way or another.
53. The part of the provision which refers to “public safety” serves as the foundation for the legislature’s definition of detention due to the risk of recidivism. The Constitutional Court takes the view that the constitutional expression “protection of society”

does not refer only to immediate danger to the life and body of an individual. Life and body are at the very centre of the concentric circles forming an individual's privacy, but public safety may also be endangered by an assault on those objects of criminal law protection that protect other broader aspects of their privacy and safety. This does not concern, for example, just theft turned into robbery as a combined assault on property and body, but an act where the object of protection (also) involves an individual, human rights and freedoms, the individual's health or the health of community, and similar. Public safety lacks credibility if, in practice, the state only guarantees protection against assault on life and body but not against assault on other objects that are subject to criminal law protection.

54. This constitutional norm which, by permitting detention as an exception, restricts the right of the defendant to personal liberty must be understood also as a constitutional norm ensuring respect of the constitutional right of others to safety, which (in addition to personal dignity) is guaranteed by Article 34 of the Constitution. Too strict an interpretation of the concept "public safety" determined by Article 20 of the Constitution could result in an excessively strict interpretation of the concept of "everyone's safety" referred to in Article 34 of the Constitution, this term no longer being an element of a norm restricting a right but instead now an element of a norm guaranteeing a right. For instance, offences against property cannot be precluded in advance and in general from the concept of "public safety" on the grounds that they cannot endanger the public safety in any way. On the other hand, this also means that the risk of recidivism for criminal offences against property cannot as a rule outweigh the interference with personal liberty unless the criminal offences are serious and interfere with the most important, constitutionally-protected interests of others.
55. The Constitution provides an additional restriction: detention must be absolutely necessary for reasons of public safety. Article 20 expressly introduces the principle of proportionality into the Constitution, which is also otherwise recognised as a general constitutional principle deriving from the principle of the state governed by the rule of law. As a result, when determining the conditions for ordering detention, the legislature is required to provide the courts with the option, on the one hand, to assess whether intervention is necessary because there are no milder measures available to achieve the desired aim. On the other hand, it imposes upon the legislature the obligation to restrict the possibility of ordering detention for cases where such intervention is reasonably proportionate to the aim, i.e. the interests that are to be protected by such intervention, and with the reasonably anticipated effects thereof.
56. At the declaratory level, the legislature embraced the principle that, when deciding which measures to apply in order to ensure the presence of the defendant and in order to successfully carry out the criminal proceedings, the competent body must abide by the conditions that apply to specific measures and ensure that a measure stricter than necessary is not used if the same purpose may be achieved by applying a milder measure (Article 192 of the CrPA).
57. The legislature did not follow this principle when legally defining these measures. In the chapter entitled "Measures to ensure the presence of the defendant and for the suc-

successful conduct of criminal proceedings”, it actually did define several possible measures for the enactment of these procedural requirements, from the mildest (summons) to the most severe (detention), and explicitly provided that specific stricter measures, in addition to the general provision of Article 192, are to be applied in a subsidiary manner if the same aim could not be achieved with the aforementioned milder measures.

58. The chapter referred to also covers the issue of detention due to the risk of recidivism. Systemically, these grounds for detention do not belong to the chapter on measures to ensure the presence of the defendant and for the successful conduct of criminal proceedings. While this erroneous classification of the challenged provision is not unconstitutional in itself, in terms of content it means that the provision of Article 192 of the CrPA is not applicable in relation to this measure because neither this chapter nor any other provision of the CrPA provides the court with any milder measure for the same purpose, i.e. eliminating or reducing the risk of recidivism.
59. The legislature therefore violated the principle of proportionality that requires that, when pursuing a constitutionally permitted aim (in this case, public safety), the legislature chooses measures to interfere with human rights that are based on the proportional criteria of absolute necessity. An assessment made in accordance with the principle of absolute necessity requires that the legislature makes available those alternative measures that are known to legal professionals that are in compliance with the principle of proportionality and suitable for achieving a specific legislative aim. In so doing, it is required to establish whether the desired aim can be achieved by applying milder measures, thereby restricting personal liberty as little as possible. The milder measures that could be used in certain cases to ensure public safety and, at the same time, interfere to the least extent possible with the personal liberty of the defendant, are widely known in theory and enacted in certain other legal orders. These include the obligation to report to the police, a ban on leaving town without the court's permission, a restraining order, supervision and assistance by a body appointed by the court, house arrest and other measures which can reduce the risk of recidivism but at the same time interfere less with the liberty of the defendant than being detained.
60. The legislature did not make any of these measures available to the courts. In terms of public safety, it provided only the measure that interferes the most with the personal liberty of the defendant. In so doing, it violated the principle of proportionality.
61. Furthermore, the CrPA does not give sufficient guarantees that the courts may order (or extend) detention only in cases where the threat to public safety resulting from the release of the defendant would represent such a serious interference with the right to safety that it would outweigh the interference with the right of the defendant to personal liberty, even though it has not yet been proven that he has actually committed the alleged criminal offence nor can it be “predicted” with certainty that he will repeat such an offence once free. Pursuant to the provision of point 3 of the second paragraph of Article 201 of the CrPA, detention may be ordered if special circumstances justify the concern that a specific person will actually repeat a criminal offence, carry out an attempted criminal offence or commit a criminal offence he has threatened to commit. In its decisions on constitutional complaints against detention orders based on the

cited provision, the Constitutional Court has already stated that the actual circumstances must be established from which the court may, from experience, draw a conclusion about whether there is a real danger – and not just a concern – that the individual concerned will repeat a specific criminal offence (Decision No. Up-75/95, dated 7 July 1995). In Decision No. Up 123/95, dated 6 October 1995, the Constitutional Court stated that the circumstances and gravity of the alleged criminal offence do not justify such a conclusion in themselves. This conclusion may only be drawn after the personality of the defendant, the environment and the circumstances in which he lives as well as his previous way of living allow a reliable and specific conclusion to be reached as to the existence of the necessary degree of danger. In Decision No. Up 160/95, dated 26 February 1996, the Constitutional Court stressed that in cases in which there is a risk of repeating criminal offences representing a serious danger to public safety (the case at issue involved the sale of explosives), a lower probability threshold that the criminal offence will be repeated is necessary than in cases in which public safety is not so seriously jeopardised.

62. The challenged statutory provision of point 3 of the second paragraph of Article 201 of the CrPA is contrary to the constitutional requirement that cases where detention may be ordered due to the risk of recidivism shall be determined by law (*lex certa*). Since the Constitution does not prohibit detention due to the risk of recidivism, the Constitutional Court, based on Article 48 of the CCA, established that the challenged provision of the CrPA was unconstitutional and gave the legislature a deadline for this to be remedied. In place of the current formulation, which is not consistent with the Constitution (“special circumstances that justify the concern...”), and in accordance with the Constitution, the legislature will have to require that the courts establish the actual risk of such a criminal offence being repeated and, where there is a real risk that it will be committed, justify in the case in question the interference with the defendant’s personal liberty (in accordance with the principle of proportionality and taking the specific circumstances into account). It will have to precisely specify criminal offences, not merely in terms of the length of the prescribed sentence but also by other criteria, for which it will find that they are of such nature that in an abstract manner they meet the constitutional requirement of danger to public safety – and thereafter the court will have to assess on a case-by-case basis whether, in accordance with the principle of proportionality, such interference is justified. It will be required to stipulate alternative preventive measures that allow the courts to strike a balance between ensuring public safety and ordering less severe interferences with the personal liberty of a suspect or defendant.
63. While reviewing the constitutionality of point 3 of the second paragraph of Article 201 of the CrPA, the Constitutional Court also reviewed the constitutionality of point 2 of the first paragraph of Article 432 of the CrPA (Article 30 of the CCA). Both provisions regulate detention due to the risk of recidivism, the difference being that the first applies to regular procedures while the other to fast-track procedures. In determining the degree of the risk of recidivism of criminal offences that must exist in order for a court to order detention, both provisions use the same wording of “if

special circumstances justify the concern”. For the reasons referred to in the above paragraphs of this reasoning, the Constitutional Court established that the provision of point 2 of the first paragraph of Article 432 of the CrPA was unconstitutional. Accordingly, the legislature will be required to redefine the conditions for ordering (and extending) detention due to the risk of recidivism in the fast-track procedure in accordance with the above.

### B – V

64. The Constitutional Court rejects the petitioners’ allegation that the ECHR does not permit detention due to the risk of recidivism. In point (c) of the first paragraph of Article 5, the ECHR specifies the possibility of ordering detention in cases “when it is reasonably considered necessary to prevent the defendant from committing an offence”. Numerous examples from the case law of the European Court of Human Rights show that detention due to the risk of recidivism is not contrary to the Convention – provided, of course, that the other conditions are met, which are also defined in the Constitution.
65. The Constitutional Court also rejects the petitioners’ allegation that the ordering of detention is contrary to the presumption of innocence referred to in Article 27 of the Constitution. Despite the general assumption that preventive deprivation of liberty is contrary to the presumption of innocence, this is actually true to a much lesser extent than expected. This neglects the role of presumptions in law in general.
66. In particular, the purpose of legal presumption is to allow the court to make a decision even in circumstances when the facts are not yet clear. Since the law normally deals with historical events, which are by definition part of the past and therefore not scientifically accessible (through an experiment), it is clear that in certain circumstances a court cannot completely eliminate all remaining doubts concerning the relevant facts.
67. The fundamental presumption in criminal proceedings is of the innocence of the suspect, the defendant or the accused. It has its origins in the old (enlightened) guideline for the legislative-political decision-making, which avers that it is better to acquit ten guilty people than to sentence one innocent person. However, the presumption of innocence does not primarily entail that everyone is regarded as positively innocent in an absolute manner and actually outside the scope of the criminal law and procedure. If that were true, then it would be impossible to even instigate criminal proceedings against anyone because, due to the presumption of innocence, it would be impossible to talk about a “reasonable suspicion” that the person committed a criminal offence. This reasonable suspicion would be a logical contradiction to the principle of innocence if the latter were interpreted as a static actual state and not as a dynamic procedural transfer of the burden of proof. It is however true that Article 27 of the Constitution states that any person charged with a criminal offence shall be presumed innocent (*praesumptio iuris*) unless found guilty by way of a final judgment. The presumption of innocence therefore applies to guilt under criminal law and encapsulates three concepts: the first is that the burden of proof (*onus probandi*) rests with the plaintiff (the state) and not the defendant. The second is that the state, as the plaintiff, carries the risk of failing to provide proof: “*Actore non probante reus*

*absolvitur*”. And thirdly, which is identical in terms of meaning, is the principle of *in dubio pro reo*, meaning that when in doubt a court must always acquit the accused.

## **B – VI**

68. The second constitutional condition for the deprivation of liberty originates in the second part of the provision of the second paragraph of Article 19 of the Constitution: “No one may be deprived of his liberty except pursuant to such procedures as are provided by law”. Therefore, as is the case when determining the substantive conditions for ordering and extending detention, here the Constitution also defines the framework of the legislative regulation.
69. The first restriction is determined by the provision of the first paragraph of Article 20, pursuant to which detention is only permitted on the basis of a court order. The notion of a court order necessarily includes the guarantees provided by the right to judicial protection determined by Article 23 of the Constitution: only an independent, impartial court constituted by law may decide on detention. A court may be deemed impartial only if prior to making a decision on detention it hears the views of both parties, i.e. when deciding on detention, it must hear the prosecutor and the person whose detention is being decided upon.
70. The requirement of a judicial decision also encompasses the constitutional provisions on the equal protection of rights (Article 22 of the Constitution) and legal guarantees in criminal proceedings (Article 29). The provision of Article 22 guarantees the equal protection of the rights of all in any proceedings before a court. Pursuant to Article 29, anyone charged with a criminal offence must be guaranteed
  - (1) the right to have adequate time and facilities to prepare his defence;
  - (2) the right to be present at his trial and to conduct his defence;
  - (3) the right to produce all evidence to his benefit;
  - (4) the right not to incriminate himself or his relatives or those close to him, or to admit guilt.
71. The provision of Article 22 guarantees a person whose detention is being decided upon by a court the same rights as those enjoyed by the opposite party in the proceedings, i.e. the prosecutor. A minimum level of rights is guaranteed by Article 29. In accordance with the Constitution, the person concerned has the right to be heard and thereby the right to prove (1) the nonexistence of a reasonable suspicion that he has committed the alleged criminal offence; (2) that detention is not absolutely necessary for reasons of public safety, and (3) that in order to ensure public safety, a milder measure of restricting liberty would suffice. The person must be given the opportunity to reply to the evidence presented against him, and submit evidence to support his statements. In order to make this possible, he must be given the opportunity to familiarise himself with the facts and evidence against him.
72. The Constitutional Court stresses in particular that the person concerned is not obliged to prove anything. Under the provision of Article 27 of the Constitution, a court is also subject to restrictions when deciding on detention. The wording of this provision does indeed state that a person must be found guilty in order to overturn

the presumption of innocence. However, if the presumption of innocence applies to criminal offences that have already been committed, then it must apply *a fortiori* in respect of criminal offences that the person concerned may commit at some point in the future. A different interpretation of the provision of Article 27 would imply that the state presumes in advance that someone will commit a criminal offence. The burden of proving the existence of a reasonable suspicion as an absolute necessity for detention because of public safety concerns must rest with the prosecutor. If in doubt, the court must rule that the conditions for detention have not been met.

73. The Constitution guarantees the right to legal remedies for a person against whom detention has been ordered (Article 25). In this regard, note must be made of the provision of the second paragraph of Article 20 of the Constitution which, in relation to the detention order in particular, specifies that a detained person must be provided with the written court order with a statement of reasons, against which he may appeal. In case No. U-I-98/91, dated 10 December 1992 (OdlUS I, 101), the Constitutional Court took the view that the purpose of the provision of Article 25 of the Constitution is not merely to give the person concerned the possibility to file a legal remedy. It is primarily to enable the person concerned to effectively defend his rights or legal interests. The right to legal remedy against a detention order may only be effective if the court decision is explained point by point in a precise (and not general or abstract) manner, thereby enabling an assessment to be made as to whether the state has sufficiently met all the requirements imposed by the aforementioned statutory provisions regarding the burden of allegation and the burden of proof. In view of the requirements that must be met in order to comply with this Decision of the Constitutional Court, the right to effective legal remedy cannot be guaranteed if the detention order only contains the elements explicitly prescribed by the provision of the second paragraph of Article 202 of the CrPA. This provision, in addition to elements of an entirely formal nature, merely requires “a brief statement specifically explaining the grounds for detention” in relation to the substantive elements. Apart from the elements listed therein, a decision to deprive a suspect or an accused person of his liberty due to a risk of recidivism must include a justification as to why the deprivation of liberty is absolutely necessary for reasons of public safety, and list the specific circumstances on the basis of which it is possible to conclude that the suspect or accused person will repeat the criminal offence, carry out an attempted criminal offence or commit an offence he is threatening to commit, and why the court considers this act to represent a danger to public safety.
74. The Constitutional Court finds that the provisions of the CrPA do not provide these procedural guarantees to a person whose detention is being decided by a court. The court may order and extend detention without giving the person concerned the right to be heard and without giving him the opportunity to familiarise himself with the facts and evidence against him (provisions of Articles 202, 203, 205, 207 and 361 of the CrPA). The person concerned has the right to inspect the file only once the investigation has been initiated (fifth paragraph of Article 128 in conjunction with Article 144 of the CrPA); in the event he has a defence counsel, the defence counsel

may then inspect the file after the prosecutor has lodged a request for criminal prosecution (Article 73 of the CrPA). In the detention order the court is required only to provide a brief statement specifically explaining the grounds for detention (second paragraph of Article 202 of the CrPA). The state prosecutor always has the option to state his opinion on the matter before the court of second instance adopts its decision; however, the detainee is not informed of that opinion (first paragraph of Article 377 in conjunction with first paragraph of Article 403 of the CrPA).

75. Since the proceedings for deciding on the ordering, extension and release from detention due to the risk of recidivism for a person whose detention is being decided upon do not provide guarantees provided by the Constitution, they are not consistent with the Constitution. Abrogation of those provisions of the CrPA governing the proceedings for deciding on detention – with the exception of the second paragraph of Article 202 of the CrPA – would mean that the courts could no longer order detention. Based on Article 48 of the CCA the Constitutional Court therefore only found that these provisions are unconstitutional and it set a deadline within which the legislature must remedy the aforementioned unconstitutionality. However, it abrogated that part of the provision of the second paragraph of Article 202 of the CrPA that defines the content of the statement of reasons for a detention order.
76. The Constitutional Court takes the view that, from a procedural law perspective, the legislature must regulate this subject-matter so that, with regard to the risk of recidivism, a special hearing will be provided by law where the judge will adjudicate between the statements made by the state prosecutor and the defence, and where there is doubt, the judge will rule that there is no risk of recidivism. The abrogated provision of the second paragraph of Article 202 of the CrPA can be replaced by defining the content of the detention order in accordance with the views expressed in this decision. The legislature will regulate the procedural subject-matter in detail and, in this regard, the Constitutional Court draws attention to the constitutional requirement that, firstly, every interference with the right to personal liberty must be determined by procedural law and, secondly, that all constitutional guarantees apply in this procedure as they stem from the fact that the person is given over to the judiciary precisely in order to benefit from judicial guarantees which cannot be provided by the executive branch of power (second paragraph of Article 20 of the Constitution). This *habeas corpus* logic would be meaningless if the judicial branch followed the same logic as the executive branch, i.e. predominantly based on the principle of efficiency and not observing the procedural guarantees.

## B – VII

77. When considering point 3 of the second paragraph of Article 201 of the CrPA, the Constitutional Court, in accordance with Article 30 of the CCA, also considered the issue of the constitutionality of the first paragraph of Article 201 and the first paragraph of Article 361 of the CrPA. Since in its review of constitutionality the Constitutional Court is not bound by the proposal of the applicant or petitioner, and it judged the provisions of the first paragraph of Article 201 and the first paragraph of Article 361 of

the CrPA to be related to the constitutional review of point 3 of the second paragraph of Article 201 of the CrPA, it abrogated these two provisions as well.

78. The first paragraph of Article 201 of the CrPA provides for the obligatory detention of a person reasonably suspected to have committed a criminal offence for which a sentence of imprisonment of more than twenty years is prescribed by law. A court may decide that “reasonable grounds exist” for it not to order detention, but the paragraph implies that the legislature provided a presumption that there is a risk of absconding, risk of obstruction of the proceedings or risk of recidivism in all cases when the defendant is facing twenty years of imprisonment. From a criminal procedural law perspective, such presumption is unacceptable and indicates the legislature’s supplementary motivation to allow detention to be ordered due to public disturbance, which is not permitted by the Constitution. Such a presumption also presupposes a constitutional assumption that, in cases which are punishable by twenty years of imprisonment, detention is absolutely necessary either for the course of the criminal proceedings or public safety.
79. In order to establish the legal presumption that it is absolutely necessary for a person who might be sentenced to twenty years of imprisonment to be detained for the criminal proceedings or for reasons of public safety is contrary to the first paragraph of Article 20 of the Constitution. This provision requires a specific court order. The Constitution here builds on the assumption that the legislature will prescribe such legal grounds that allow the court to make a specific decision in each case as to whether such grounds (still) exist. The general legal presumption for the necessity of detention is also constitutionally unacceptable because it does not allow for an assessment of whether detention is really absolutely necessary in each case. This problem is somewhat mitigated, however, by the statutory provision that a court may decide not to order detention if reasonable grounds exist – presumably grounds that would refute the aforementioned general legislative presumption. However, the latter presumption is not even specified, as the first paragraph of Article 201 does not state whether it applies to the risk of absconding, the risk of proceedings being obstructed, the risk of recidivism, or whether it really is just a matter of “public disturbance”. Therefore it is also unclear what, in the legislature’s opinion, would constitute “reasonable grounds” that could refute such a presumption. And because this is not clear, then such provision is contrary to the constitutional right to legal remedies determined by Article 25 of the Constitution; in such circumstances it is not possible for the defence to know what should be stated as “reasonable grounds” for the court to decide not to order detention. Moreover, the CrPA gives the impression that the burden of proof (a mirror image of the legislative presumption) is placed on the investigative judge or the three judge panel for pre-trial appeals, being required to state the “reasonable grounds” that would refute the legislative presumption of the necessity for detention. In reality, the burden of proof is, naturally, on the defence contrary to Article 27 of the Constitution. Reference has already been made to the fact that this article does not exactly introduce actual innocence, but it certainly unequivocally demands that the burden of proof in criminal matters be borne by the

prosecution. There is no reason why this basic constitutional and procedural logic should not apply to detention orders. For these reasons the Constitutional Court abrogated the first paragraph of Article 201 of the CrPA.

80. The first paragraph of Article 361 of the CrPA provides that, if the accused is not already in detention, a court may order detention if it imposes a sentence of imprisonment of five or more years. The legislature does not determine the rules for assessing whether detention should be ordered. This decision is left to the court. This provision is clearly contrary to the first paragraph of Article 20 of the Constitution, which demands a court order that must establish the absolute necessity for the course of criminal proceedings or public safety. The Constitutional Court therefore also abrogated the first paragraph of Article 361 of the CrPA.

### C

81. The Constitutional Court adopted this decision pursuant to Articles 30, 43 and 48 of the Constitutional Court Act, composed of: Dr Tone Jerovšek, President, and Judges Dr Peter Jambreč, Mag. Matevž Krivic, Mag. Janez Snoj, Dr Janez Šinkovec, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. The decision was reached unanimously. Judges Krivic, Ude, and Zupančič gave concurring separate opinions.

*Dr Tone Jerovšek*  
*President*

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### CONCURRING OPINION OF JUDGE ZUPANČIČ

In the case in question, I voted in favour of the Operative Provisions of the Decision and the reasoning behind it, given that I agree with them both – to the extent of what they covered. In my opinion, however, they both fell short of what they should have covered. I have listed seven reasons for this position, which in my opinion represent a broader frame of reference, within which we should also examine the issue of detention in terms of the risk of recidivism.

First, it is evident that the Constitution does not support primarily inquisitorial, so-called “mixed” criminal proceedings, but instead supports an adversarial system, which the National Assembly also supported when adopting the currently valid Criminal Procedure Act (hereinafter referred to as the CrPA). It is quite evident from a series of constitutional provisions that the required constitutional concept in criminal proceedings is adversarial (accusatorial).

Here, I must first bring attention to the provision of Article 23 of the Constitution, which grants every individual the right that the charges brought against him or her are decided on by an impartial court. The notion of impartiality is essentially epistemological in nature. As is already evident from the term “impartiality” itself, this implies, in particular, the absence of bias (prejudice). Since the era of Francis Bacon, the lawyer, prosecutor, and father of epistemology, it has been clear that every instance

of research, even empirical and scientific research (in legal terminology: “investigation”), is subject to initial bias. This early bias is derived inevitably from the urgency of creating a working hypothesis that serves as the foundation for every research study and investigation. However, this inevitable bias of the researcher in empirical sciences is ultimately neutralised through scientific experiment, which through the language of objective reality either confirms or dismisses the working hypothesis. Since empirical sciences deal with repetitive events, given that they study natural laws that are permanent, objective and experimental verification is possible in science, thus providing a final verification of the scientific hypotheses.

However, the subject of legal assessment does not cover natural laws that would be permanent and thus could be subject to experimental verification. The subject of legal assessment is a one-time (historical) event. Historical events cannot be repeated through an experiment and as such also cannot be demonstrated in experimental terms.

The sole guarantor of legal impartiality (objectivity) is the objectivity (impartiality) of a court. The latter ultimately decides the accuracy of this or that hypothesis. If a court lacks objectivity, then there is also no other feedback that would ensure that a case would produce an objectively determined truth. Judicial bias is therefore a completely essential element of a state’s rule of law (Article 2 of the Constitution).

So what is the constitutionally presumed bias of the courts?

Epistemological findings clearly indicate that bias is a protracted susceptibility to information, and in legal situations, susceptibility to evidence from both parties to a dispute. This also proceeds from a Slovene proverb that states that the truth can only be learned through the sound of both bells.

Even bias, as the term itself indicates, is no different than (1) a premature and excessive susceptibility to the arguments of one party and as a result of this (2) non-susceptibility to the other party’s arguments in the dispute. The Slovene term “*pred-sodek*” (pre-judging) similarly points to the core issue when it implies that bias prematurely disconnects the communication flow that provides information in conflict with prejudice (evidence). Judicial impartiality is thus a protracted (in)decision – until the court’s final decision is made – in a dispute. Throughout the legal history of Western civilisation it has been shown that legal impartiality (objectivity, undecidedness) is the product of a focused confrontation of two biases. As a result, procedural adversity is nothing but an exchange of the actual burden of proof of both parties in a dispute (the principle of free disposition) which (1) makes the court ambivalent (thus even indecisive), as it lingers between the evidence presented by one or the other party, and which (2) frees the court of its active involvement in the investigation of the criminal case, as it forces it into a passive role.

The court’s ambivalence and passiveness are therefore constitutive elements of judicial impartiality.

It is apparent that there are two leading principles of, in large part, inquisitorial (mixed) criminal proceedings: the *ex officio* principle (in contrast to the principle of free disposition) and the inquisitorial principle – in direct contrast to the constitutionally premised impartiality of courts. How is a criminal court supposed to be im-

partial, without even mentioning the investigating (so-called) “judge”, insofar as the court acts on its own initiative (the *ex officio* principle) and insofar as it is committed to independently investigating the magnitude of the criminal case in question (the inquisitorial principle)?

In both aspects of its work, a criminal court in Slovene criminal proceedings is bound by its initial working hypothesis regarding the defendant’s guilt. Without this hypothesis of guilt, the criminal court itself (according to the *ex officio* principle and the inquisitorial principle) would have no grounds for action. The constitutionally defined presumption of innocence (Article 27), which must include three procedural implications (the burden of proof on the prosecutor, the risk of failing to provide proof that lies with the prosecutor, and *in dubio pro reo*), thus cannot find sufficient expression in our, i.e. Slovene proceedings.

However, even more crucial for the impartiality of a criminal court is the procedural requirement presented before the criminal court indicating that the criminal courts themselves must bear the burden of proof, as they are responsible for the complete and accurate determination of the facts. This systemically forces them into active identification with the initial hypothesis (regarding guilt) and systemically excludes the possibility of their protracted undecidedness (until the end of the main hearing) until a final judgment of acquittal or conviction is reached.

I therefore believe that (1) the term “investigating judge” is a *contradictio in adjecto*, as such an actively involved investigator cannot be unbiased by nature but is literally paid to act from a constitutionally largely problematic hypothesis (presumption, assumption) regarding the guilt of the defendant. The ordering of detention by such an investigator systemically inevitably leads to bias to the detriment of the defendant. This is, *inter alia*, illustrated in detail by the large number of constitutional complaints in detention cases.

In a situation where detention is being decided upon, a completely adversarial hearing should be conducted, at which the burden of proof and the risk of failing to provide proof regarding the substantive criteria associated with the danger the defendant poses to society would be borne by the prosecutor. The court should be in a position to be able to apply the presumption of innocence whenever doubt arises. This is even more true in this case, given that it involves aleatory speculation with regard to some future (not historic) event as to whether the defendant will indeed (or not) repeat the criminal offence, carry out the attempted criminal offence, or in fact commit the offence he is threatening to commit, in the future.

(2) As much as the main criminal hearing is merely a re-enactment of what was established by the investigator during the criminal investigation, and insofar as the criminal court conducting the hearing is committed to the *ex officio* principle and the inquisitorial principle, it is impossible to raise questions about the impartiality of the criminal court conducting the hearing. Despite certain adversarial additions in the current CrPA, the criminal court conducting the hearing has been placed in a role in which it alone bears the “burden of proof” and the “risk of failing to provide proof” – meaning vis-à-vis an appellate court, the latter mostly acting *ex officio* (Article 383 of the CrPA).

Secondly, the adversarial criminal proceedings concept is the only one alongside the constitutionally presumed equality of arms in a dispute between the state and an individual (Article 29 of the Constitution) that satisfies the legality requirement in the sense in which this legality is also imposed on the state by Article 2 of the Constitution. On the other hand, this entails that primarily inquisitorial proceedings are by nature not only unlawful, but also conceal the unlawfulness of repression in the tradition of an undemocratic police state.

The unlawfulness of primarily inquisitorial proceedings increases proportionately to the pressures making the suspect or defendant an object of court proceedings – instead of being the subject of a legal dispute based on equality, as is prescribed by Article 29 of the Constitution. The sole reason a defendant in criminal proceedings is made an object of proceedings (in contrast to, for example, the subjectivity of a procedural party to civil proceedings), is precisely the alleged danger attributed to the defendant, which is also the reason for his prior detention. All those who, on account of the alleged danger of the perpetrator, draw the conclusion that it would be impractical, unrealistic, etc., to speak of criminal proceedings as a dispute of equal parties despite the unambiguous constitutional provision, implicitly renounce the legality of criminal proceedings itself. Why?

Since the era of Hobbes, the fundamental postulate of the rule of law has been the prevention of arbitrariness (using one's own force) as an instrument to resolve disputes. The purpose of law in general, the legality of a state, the rule of law, etc., is to substitute the power of logic for the logic of power. The main function of each specific legal process and of the rule of law in general lies in this relocation of the brute dominance of the superior party (also the state) to the level of the lawful (logical) processing of disputes. This is self-evident in private law, as that is the venue where two equally vulnerable parties confront each other as equals before the law and the court.

However, when the plaintiff is the state, such as in criminal proceedings, some start pointing to the *raison d'état*; they suddenly overlook that the basic condition of any legality should never be changed. If a party to a civil dispute were to prevail over the other party by imposing restrictions on that party's freedom, thus forcing it, for example, to testify to its own detriment, this would be deemed completely unacceptable to that party. But when this occurs during criminal proceedings, this profound inconsistency is often justified by the need to determine the truth in criminal proceedings – albeit at the price of the most serious interferences with an individual's personal integrity, dignity, and privacy. Hobbes already understood that this "truth" in substantive criminal law is mainly an expression of the same predominance of the state, which by way of criminal laws establishes the major premise of criminal liability, and that this "truth" is relative, with no more profound significance than that pursued by the legislature, noting that crimes cease once the laws labelling them as crimes cease to exist (civil laws ceasing, crimes also cease.)

However, precisely on account of this "truth", which often only serves as a veil for the blatant (and unlawful) predominance (of the power) of the state (as a party) in

criminal proceedings, some remain unwilling to see this most fundamental inner absurdity of criminal proceedings that contaminates the legitimacy and legality of criminal proceedings.

Criminal proceedings, where the stakes are the highest - namely a person's liberty as a disputed subject is at stake, have a highly visible symbolic significance in society and in the state. The unlawful contamination of criminal proceedings on account of "effectiveness", "the truth", etc., in the long term compromises the exact same normative integration (general prevention) that is the sole profound moral and social meaning of a society's punitive practice.<sup>1</sup>

Thirdly, in light of the two standpoints mentioned above, it is evident that the state (the executive branch) has no legitimate right to interfere with the privacy, dignity, and personal integrity of citizens in general, if it fails to prove beforehand in a determined, articulated, and specific manner that the citizen in question violated the laws of the state. Taking action against an individual merely on the premise of a reasonable suspicion is seen as some sort of sanction in advance and is clearly contrary to the aforementioned "complete equality" (Article 29 of the Constitution). The state, as a party, is not only given the right to act in criminal proceedings, but also the priority right to actually interfere with the integrity of a citizen.<sup>2</sup> Therefore, it is no coincidence that constitutional courts in democratic states already devote attention to reasonable suspicion as the threshold for the commencement of such interferences.<sup>3</sup> In Slovenia, the term reasonable suspicion, as determined in the Constitution and the CrPA, is still an empty abstraction without the specified positions in the case law of the ordinary courts or the Constitutional Court.

If constitutions allow the prior interference of the state with an individual's integrity, then that is a major exception from the above-mentioned principle of the aforementioned reciprocity between the detriment to an individual or to the state. Whenever detention is at issue, this detriment is much worse than when investigations, seizures, and the temporary deprivation of liberty (arrest) are implemented, even though they all require an articulated, specific, and concrete reasonable suspicion.

Fourthly, this means that (a) the state gains the right to punish a citizen only when

- (1) the facts have been correctly and fully established,
- (2) the substantive legality principle has been strictly adhered to, and
- (3) the constitutional rights of the citizen have been adhered to during the proceedings – the citizen's criminal liability has been demonstrated before an impartial and independent court.

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1 For more on this, see *Prvine pravne kulture* [Elements of Legal Culture], *Proces* [Procedure], Ljubljana 1995, pp. 179-206.

2 See part of the extensive foreign case law regarding this issue in *Ustavno kazensko procesno pravo* [Constitutional Criminal Procedural Law of the Republic of Slovenia], Ljubljana 1995, the chapter entitled *Preiskave in zasegi* [Searches and Seizures], pp. 377-324.

3 See part of the extensive foreign case law regarding this issue in *Ustavno kazensko procesno pravo* [Constitutional Criminal Procedural Law of the Republic of Slovenia], Ljubljana 1995, the chapter entitled *Preiskave in zasegi* [Searches and Seizures], pp. 377-324.

However, the state gains the right to the preventive deprivation of liberty solely on account of an explicit constitutional provision. This detention is restricted to the grounds of jeopardising public safety.

Fifthly, this logically results in the prior deprivation of liberty (detention) on grounds of the risk of recidivism only being a very exceptional advance version of the final punishment.

All the correctness and completeness in determining the factual issues, all the substantive legal criteria, and all the constitutional procedural guarantees to which a suspect and defendant are entitled in the process of determining a person's final criminal liability should be *a fortiori* provided at a time when it is still not even finally resolved that such person is guilty of anything and when an interference with their freedom, dignity, privacy, and civic integrity is ordered against such person based on pure speculation that that person might (or may not) repeat in the future something that has yet to be proven was even committed by this person, carry out an attempted criminal offence for which his liability has yet to be demonstrated, or commit an act that was merely threatened.

Sixthly, this anticipation of punishment and the ensuing detention as its immediate legal consequence represent an anomaly and contradiction in the constitutional dimensions of criminal proceedings. Since the Constitution explicitly states (in its Article 20) that a person reasonably suspected of having committed a criminal offence may be detained only when this is absolutely necessary for reasons of public safety, this anomalous exception should be accepted. A discussion could be initiated as to whether this constitutional provision collides with some other provisions – even, for example, with the presumption of innocence determined in Article 27. However, precisely for that reason, it is clear that a prior interference with the integrity of the accused citizen requires just the opposite logic than that characterising the provisions of the CrPA in question (regarding detention) and as a result the majority of case law based thereupon.

Since detention for the person concerned, regardless of the refinements in legal terminology, is punishment in the present for something he has not committed, and on the basis of criminal liability, which still needs to be, if at all, determined, such (1) determination of reasonable suspicion regarding criminal liability for some act, as well as (2) the determination of the likelihood that the person could possibly commit another criminal offence, should be subject to that much more accurate substantive law and procedural regulation. Since it does not specify special adversarial proceedings and does not specify (*lex certa*) in which cases detention is permitted, the valid CrPA essentially does not separately regulate this type of determination. A provision in the second paragraph of Article 202 best characterises this segment, as it merely requires that a “brief explanation” be provided by the investigating “judge” for the detention order.

Seventhly, I strongly believe that such problems in the valid CrPA are symptomatic of the authoritative and police-centred conception of criminal proceedings. Similarly, I am deeply convinced that this and the same kind of concept of criminal proceedings is completely incompatible with the Constitution.<sup>4</sup>

4 For more on this, see *Med državo in posameznikom: Privilegij zoper samoobtožbo* [Between the State and the

As mentioned above, the Constitution requires the impartiality of the courts (Article 23), while the investigating “judge” and the court ruling on the matter both adhere to the *ex officio* principle and the inquisitorial principle, which are both incompatible with the notion of court impartiality.<sup>5</sup> In Article 29, the Constitution requires the complete equality of parties (between the state and the individual) to criminal proceedings. However, the drafter of the CrPA satisfied this required equality of parties merely formally, despite the National Assembly expressly requesting the drafting of a systemically adversarial criminal procedure during the adoption of this Act. What is the point of speaking of party equality if the CrPA systemically puts the court itself in a biased inquisitorial position that opposes that of the defendant? This also applies to the detention order. Here, the defendant and the investigating “judge”, and not the defendant and the prosecutor, as is normally the case, are put on opposing sides.

There is no wording in the Constitution indicating that criminal proceedings have to be primarily inquisitorial, thus mostly oriented towards the effectiveness of criminal repression. On the contrary, the Slovene Constitution dedicates at least twelve articles (Articles 17, 18, 19, 20, 21, 23, 24, 27, 28, 29, 30, and 31) to the rights of the defendant. The tenor of these provisions is clear and *in favorem defensionis*.

Since the aforementioned provisions include the achievements of Western civilisations from the Magna Carta (1215) to the present day, they cannot be considered merely in the grammatical and exegetical sense.

In that respect the Constitution represents a hermeneutical top of the spiral of civilisation.

The phrases noted in individual constitutional provisions evoke countless and extremely complicated aspects of a person’s freedom. Dozens of principles, hundreds of doctrines, and thousands of rules covering a specific branch of law hide behind the constitutional syntagmas. For example, behind the following sentence in Article 28 of the Constitution: “No one may be punished for an act which had not been declared a criminal offence under law or for which a penalty had not been prescribed at the time the act was performed.”, there lies hidden criminal substantive law that is comprehensive, complex, systemic, and, in its details, highly complicated. Therefore, through its understanding and when assessing the constitutionality of individual statutory provisions, including those covering detention, it is the Constitutional Court’s task to identify the purpose of the Constitution as an advancement of

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Individual: Privilege against Selfincrimination], *Pravnik*, No. 1-3/96, p. 19.

5 For more on this, see the paper *Prispevek k teoriji kontradiktornosti v kazenskem procesu* [A Contribution to the Theory of Adversarial Procedure in Criminal Proceedings], *Kazensko procesno pravo* [Criminal Procedural Law of the Republic of Slovenia], Official Gazette RS, Ljubljana 1991, pp. 285-310. Here, in particular, the epistemological findings regarding impartiality should be emphasised – with regard to the fact that the person investigating an issue alone (the inquisitorial principle, the *ex officio* principle), thus the one who formulates the initial and working hypothesis, cannot be impartial. This initial hypothesis for the court can only be a hypothesis of the guilt of the defendant under the current legislation on criminal proceedings. The formulation of this hypothesis of guilt should be completely shouldered by the prosecutor’s office (the burden of proof), instead of burdening the court via this systemic bias!

civilisation and to assess the specific constitutional beginnings in light of the whole from which they originated.

If the majority were able to see this whole in the case in question, I strongly believe that the present biased context of the inquisitorial ordering of detention would at a minimum be abrogated as it contravenes the constitutional intention. The legislature would thus be given a clear message as to the constitutional inadmissibility of not only such regulatory framework for ordering detention, but also of the primarily inquisitorial conception of the valid Criminal Procedure Act in general. The aforementioned explicit instruction of the National Assembly is one more reason to support such a decision.

The ignominious tradition of a police state, which, after all, is characterised as prioritising the repression of criminal acts over the protection of citizen's subjectivity, which the Slovene Constitution explicitly specifies as its fundamental postulate, would thus be terminated.

*Dr Boštjan M. Zupančič*

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**CONCURRING OPINION OF JUDGE DR LOJZE UDE,  
JOINED BY JUDGE MAG. MATEVŽ KRIVIC**

I voted for the Operative Provisions of the Decision, but I do not entirely agree with the reasoning in the Decision of the Constitutional Court, which was adopted unanimously with regard to the operative provisions. In particular, I would like to point out two definitions in the reasoning that are in my opinion theoretically questionable or that make it possible that too far-reaching conclusions can be drawn thereupon.

1. It is stated in the last sentence of Paragraph 21 of the reasoning (the reasoning under B – II) that at the level of constitutional law the criminal procedure is regarded as a “procedure of a substantive importance” in the decisions of constitutional courts. The substantive constitutional rights of an individual are the legislative subject of the criminal procedure.

Theoretically, it is not acceptable to use the concept of the procedure of a substantive importance. It would appear from the wording of Paragraph 21 that the procedure of a substantive importance allegedly consists of the constitutional procedural rights. It does not entail that certain procedural rights acquire the quality of substantive rights by being determined in the Constitution. Rather, they are procedural rights of such rank that they form a part of the so-called procedural public order. If these fundamental procedural rights are not regulated and guaranteed in a specific procedure, then we cannot speak of proceedings in a civilised society. However, these constitutional rights have a procedural nature. It seems that the definitions in the Decision try to give greater weight to procedural rights by including them within the concept of the “procedure of a substantive importance”. Procedural rights themselves are of such importance and in specific situations even prevail over substantive rights so that

they do not need such a terminological crutch. The constitutional rights determined in particular in Articles 22, 23, 24, and 25 of our Constitution, and with regard to the criminal procedure also in Articles 19 and 20, are of a rather distinctive procedural nature. It is, however, true that in some constitutional provisions procedural and substantive rights are intertwined.

I would not feel the need to respond to the individual terms in the reasoning if some of those terms did not entail a risk of underestimating the purely procedural rights that are actually crucial in judicial proceedings.

2. In Point 4 of the Operative Provisions, the Constitutional Court decided that the provisions of the Criminal Procedure Act governing the decision-making procedure for ordering, extending, and releasing an individual from detention are inconsistent with the Constitution. It further appears from the reasoning that according to the Constitutional Court these provisions are not consistent with the Constitution because the court may order and extend detention without giving the person concerned the possibility to be heard and to familiarise himself with the facts and evidence against him (Paragraph 74 of the reasoning in section B – VI). The state prosecutor always has the possibility to state his opinion on the matter before the court of second instance adopts its decision, however, the detainee is not informed of that opinion.

In general, I agree with such reasoning. At the same time, however, I would like to draw attention to the open issue of the adversarial nature of criminal proceedings. I do not agree with the simplified position that criminal proceedings have to be adversarial in their entirety or that it is exclusively and only adversarial criminal proceedings that satisfy the principle of the state governed by the rule of law referred to in Article 2 of the Constitution. I am not, of course, a proponent of inquisitorial criminal proceedings. But I am of the opinion that the adversarial nature of criminal proceedings still needs to be examined in detail. It has to be taken into account, namely, that criminal proceedings do not involve two parties that have, as in civil proceedings, conflicting interests, i.e. their own interests. In criminal proceedings a state (i.e. an organised society) is represented by the state prosecutor, who does not have his own personal interest in succeeding in criminal proceedings. On the opposite side is the defendant with his own personal interests; furthermore, also the injured party (either as a potential subsidiary prosecutor or as a claimant demanding damages within criminal proceedings) defends his own interests in criminal proceedings. For this reason, the issue of the adversarial nature of criminal proceedings is more complex than in the case of civil proceedings.

Of course, in criminal proceedings the question arises as to whether and to what extent this adversarial principle should be applied during the specific stages of proceedings, for example during the investigation procedure, representing the basis for issuing an indictment or for discontinuing criminal proceedings, or to what extent such adversarial principle should be applied when ordering detention. To apply the adversarial principle in its entirety also while discussing the concept of a “reasonable doubt” would give rise to the question of whether the investigation as a special part of the procedure is reasonable.

I draw attention to these issues because otherwise the requirement to give the defendant the possibility to acquaint himself with the incriminating facts also when the decision is being adopted regarding ordering, extending, or being released from detention, could also be understood in the sense that when a decision regarding detention is being adopted the defendant has to be granted the same rights as during the adversarial main hearing.

*Dr Lojze Ude*

*Mag. Matevž Krivic*

**DECISION**

At a session held on 24 October 1996 in proceedings to decide upon the constitutional complaint of P. K., M., represented by L. Š.-U., attorney in L., the Constitutional Court

*decided as follows:*

The constitutional complaint of P. K. against Kranj District Court Order No. Ks 20/96, dated 30 January 1996, in conjunction with Ljubljana Higher Court Order No. Kp 153/96, dated 13 February 1996, is dismissed, and in the remaining part the constitutional complaint is rejected.

*Reasoning***A**

1. On 30 January 1996, the complainant lodged a constitutional complaint claiming that his detention had expired on 29 January 1996; however, neither he nor his attorney received an order extending his detention.  
The complainant is allegedly being detained without a court order. Consequently, his rights determined by Articles 19, 20, 27, and 32 of the Constitution have allegedly been violated. On 21 February 1996, the complainant supplemented his constitutional complaint by stating that he challenges the Orders referred to in the operative provisions of this Decision as his detention was allegedly extended by a note of the court, not by a court order. In addition, he claims that the risk of absconding on which his detention is grounded does not exist. The complainant proposes that he be released.
2. By the challenged Order, the District Court decided to extend the detention. It decided on the extension prior to the expiry of two months following the last session of the three-judge panel for pre-trial appeals when an order on extension had been issued with the reasoning that it was adopted to remedy the uncertainty in the operative provisions of District Court Order No. Ks 220/95, dated 21 December 1995, with regard to the period for which the detention had been extended. In the opinion of the District Court, the grounds for detention due to the risk of absconding are

substantiated by the existence of concrete circumstances. The District Court refers to the complainant's wish and possibility to take up employment and live in A., which it substantiates by statements of witnesses questioned during the investigation and at the main hearing. The Higher Court rejected the complainant's appeal against this Order as unfounded. It rejected the complainant's statements regarding the date of the decision on his detention on the grounds that the three-judge panel for pre-trial appeals acted in accordance with the provisions of the second paragraph of Article 207 of the Criminal Procedure Act (Official Gazette RS, No. 63/94 – hereinafter referred to as the CrPA). In the opinion of the Higher Court, according to this provision, the three-judge panel for pre-trial appeals must review, following the expiry of two months from the last [detention] order, whether the grounds for detention still exist, and, if it decides to extend the detention, it is not obligated to decide explicitly on the duration of the extension, as the court of first instance is alleged to have needlessly done. The Higher Court also confirmed the reasons in the first instance Order regarding the existence of the grounds for detention due to the risk of absconding.

3. On the basis of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the constitutional complaint was sent to the Kranj District Court and the Ljubljana Higher Court. The courts did not reply to the statements made in the constitutional complaint.

## B

4. The panel of the Constitutional Court accepted for consideration the constitutional complaint against the acts referred to in the operative provisions of this Decision; however, it did not accept the constitutional complaint [in the part] in which the complainant challenged the previously issued detention orders. The reasons for such decision of the Constitutional Court are substantiated in Order No. Up-185/95 of the Constitutional Court, dated 19 June 1996.
5. The Constitutional Court examined the case file of the Kranj District Court in the criminal case against the complainant, No. K 315/95.
6. The complainant alleges that the conditions for detention were not fulfilled, since the grounds for detention due to the risk of absconding did not exist. According to the provision of the second paragraph of Article 19 of the Constitution, no one may be deprived of their liberty except in such cases and pursuant to such procedures as are provided by law.

According to the provision of the first paragraph of Article 20 of the Constitution, a person reasonably suspected of having committed a criminal offence may be detained only on the basis of a court order when this is absolutely necessary for the course of criminal proceedings or for reasons of public safety.

The notion “necessary for the course of criminal proceedings” also refers to ensuring the defendant's presence at the criminal proceedings, as otherwise the criminal proceedings cannot be carried out. Detention on the basis of the so-called grounds for detention due to the risk of absconding may only be ordered if the conditions determined by the Constitution and the law are fulfilled. Point 1 of the second paragraph

of Article 201 of the CrPA determines that detention may be ordered if the [affected] person is in hiding, if it is not possible to ascertain their identity, or if there are other circumstances indicating the risk that they may abscond.

7. A court's conclusion that there exists a risk of absconding must be based on clearly established circumstances on the basis of which it can be concluded with high probability that the interested person would flee. It cannot be substantiated only by the gravity of the criminal offence or the severe penalty prescribed. However, these circumstances may confirm or refute the risk of absconding if they are linked to other circumstances that concern above all the [affected] person's character, residence, profession, assets, family links, and all other ties with domestic or foreign environments, as well as the expectation of a severe sentence. The court must determine if such circumstances exist and assess if the risk of absconding is greater than the uncertainty that an individual would undoubtedly face if he or she absconded. Such a standpoint regarding the risk of absconding as grounds for detention (paragraph 1 (c) of Article 5 of the Convention on the Protection of Human Rights and Fundamental Freedoms; Official Gazette RS, MP, No. 7/94 – hereinafter referred to as the ECHR) has repeatedly been adopted by the European Court of Human Rights (e.g. in the Judgment in the case of *Wemhoff v. Germany*, dated 27 June 1968 – Publ. ECHR, Ser. A, Vol. 7; in the Judgment in the case of *Neumeister v. Austria*, dated 27 June 1968 – Publ. ECHR, Ser. A, Vol. 8; in the Judgment in the case of *B. v. Austria*, dated 28 March 1990 – Publ. ECHR, Ser. A, Vol. 175; in the Judgment in the case of *Letellier v. France*, dated 26 June 1991 – Publ. ECHR, Ser. A, Vol. 207).
8. In relation to the complainant, the courts based the suspicion that he might abscond not only on the gravity of the criminal offence that the complainant was charged with, but also on the other circumstances referred to in Paragraph 2 of the reasoning of this Decision. The courts thus satisfied the above-cited conditions in relation to establishing the risk of absconding. The detention of the complainant was extended in conformity with the conditions determined by Articles 19 and 20 of the Constitution. Consequently, the challenged acts did not violate the complainant's right to personal liberty.
9. The complainant further asserts violations of Articles 27 and 32 of the Constitution, without explaining what allegedly constituted these violations.  
Insofar as the alleged violations may relate to the challenged acts, it has to be noted that ordering or extending detention in accordance with constitutional provisions does not constitute a violation of the presumption of innocence under Article 27 of the Constitution. On the basis of the explicit provision of the first paragraph of Article 20 of the Constitution, an interference with personal liberty is already admissible if reasonable suspicion has been established. In this regard, the Constitutional Court refers to the reasons stated in its Decision No. U-I-18/93, dated 11 April 1996 (OdlUS V, 40) in their entirety. In the cited Decision, the constitutionality of certain provisions of the CrPA regarding detention were decided on. The fact that interferences with personal liberty are admissible, however, entails that interferences with the right determined by Article 32 of the Constitution are admissible as well, and therefore there has also been no violation insofar as the complaint concerns a restriction of freedom of movement.

10. As, in view of the above, the challenged acts did not result in the alleged violations of human rights, it was necessary to dismiss the constitutional complaint as unfounded. Moreover, the alleged violation of the right to personal liberty resulting from the fact that the complainant had been detained for a specific period of time without a court order cannot be part of the constitutional complaint against the challenged acts. The District Court Order can take effect regarding the complainant only from the moment it has been served on him and thus cannot refer to a prior deprivation of liberty. This part of the constitutional complaint may only entail that the complainant's right to personal liberty was violated by a potentially unlawful action that was allegedly not based on a court order. According to the provision of the second paragraph of Article 157 of the Constitution, if other legal protection is not provided, the court having jurisdiction to review administrative acts decides on the legality of individual actions that interfere with constitutional rights. In accordance with the statutory regulation in force, this is the Supreme Court. Therefore, in relation to the violations of rights that the complainant alleges in this part, not all legal remedies have been exhausted.
11. According to the provision of the first paragraph of Article 51 of the CCA, a constitutional complaint may only be lodged after all legal remedies have been exhausted. According to the provision of the second paragraph of this Article, the Constitutional Court may exceptionally decide on a constitutional complaint before the exhaustion of all extraordinary legal remedies if the alleged violation is manifestly obvious and if irreparable consequences for the complainant would result from the implementation of the individual act. In this part, the complainant's proposal that his constitutional complaint be considered as soon as possible may be understood as a proposal for exceptional consideration. The Constitutional Court therefore assessed whether the conditions determined by the second paragraph of Article 51 of the CCA were fulfilled.
12. Before the challenged District Court Order was issued, the complainant had been in detention on the basis of Kranj District Court Order No. Ks 220/95, dated 21 December 1995, in conjunction with Ljubljana Higher Court Order No. Kp 1203/95, dated 29 December 1995. The cited District Court Order was served on the complainant, with 23 November 1995 stated as the date of the session of the Court, and by Order No. Ks 220/95, dated 8 January 1996, the Court issued an order correcting the mistake in relation to the date of the session of the court. The operative provisions of that Order determined that the complainant's detention was to be extended on the grounds of a risk of absconding "for a further two months, i.e. until 29 January 1996." In accordance with the second paragraph of Article 207 of the CrPA, this Order, which was issued on 21 December 1996, could have extended the detention for two months, i.e. until 21 February 1996. Considering the cited provision of the CrPA, a court decision in which the date is not defined would produce effects for two months or until a different decision is adopted. However, the court of first instance added a precise date determining the duration of the detention. It was not required to do so, as the Higher Court observes, and by doing so it generated an inherent contradiction in the operative provisions of the challenged Order.

This contradiction was neither remedied by the appellate court when it decided on the appeal against the extension of the detention, nor by the three-judge panel for pre-trial appeals of the court of first instance, to which the judge presiding over the complainant's trial panel submitted the case file for a decision on the extension of the detention. Such concerns a question of legality, which the Constitutional Court only considers insofar as it may also entail a violation of a constitutional right. According to the provision of the third paragraph of Article 15 of the Constitution, the constitutional right to personal liberty may be limited only by the rights of others and in such cases as are determined by the Constitution. The first paragraph of Article 20 of the Constitution, however, determines that a person may be detained only on the basis of a court order. This entails that detention is only possible if it is "covered" by a judicial decision. An exception, which the Constitution envisages in this regard, is contained in the second paragraph of Article 20. It determines that upon detention, but no later than 24 hours thereafter, the detained person must be handed a written court order with a statement of reasons.

13. The constitutional provision of Article 20 regulates the admissibility of interferences with a constitutional right. The constitutional provision as well as the statutory regulation adopted on the basis thereof to regulate this interference in accordance with the second paragraph of Article 19 of the Constitution must therefore be interpreted restrictively and applied in such manner that there will be no doubt about the manner and the moment of the interference with the constitutional right. In the complainant's case, however, such doubt existed. Therefore, it would have been necessary to presume that the District Court extended the detention until the date that is clearly defined in the operative provisions of the Order, which in the case at issue would have been to the benefit of the complainant. The complainant's detention was ordered on 15 September 1995 at 7:30. Therefore, the extension of the detention until 29 January 1996 entailed an extension until 7:30 on that date. If the court failed to serve on the complainant a reasoned order extending his detention by that time, then, considering the first sentence of the second paragraph of Article 20 of the Constitution, it was required to do so no later than within 24 hours. According to the complainant's statements, confirmed by the documents in the case file, District Court Order No. Ks 20/96, dated 30 January 1996, was served on the complainant on 30 January 1996 at 15:40. The detention of the complainant on 30 January 1996 between 07:30 and 15:40 thus lacked the legal basis required by the provision of the second paragraph of Article 20 of the Constitution. A delay may, of course, occur in the implementation of a court decision to annul [a detention order] or to not extend detention. In the complainant's case, however, this delay amounted to more than eight hours following the expiry of the constitutional time limit for serving a court order.

As a result, a violation of the first paragraph of Article 19 of the Constitution in this part is manifestly obvious.

14. However, the other condition determined by the second paragraph of Article 51 of the CCA is not fulfilled. It allows the exceptional consideration of a constitutional complaint only if a Constitutional Court decision can prevent the implementation

of an unconstitutional act that would cause the complainant to suffer irreparable detrimental consequences. However, as regards the complainant, these detrimental consequences had already ceased with the serving of the Kranj District Court Order referred to in the operative provisions of this Decision.

In the constitutional complaint the complainant did not demonstrate that he had initiated legal protection against the alleged violation in accordance with the provision of the second paragraph of Article 157 of the Constitution, and the Constitutional Court did not explicitly require him to do so, as the above-mentioned condition for exceptional consideration of the constitutional complaint was in any event not fulfilled. The part of the constitutional complaint that challenges the legality of the interference with the applicant's constitutional rights by an action had to be rejected, in accordance with the provision of the second indent of the first paragraph of Article 55 of the CCA, because the procedural conditions for its consideration are thus not fulfilled.

### C

15. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 and the second indent of the first paragraph of Article 55 of the CCA, composed of: Dr Tone Jerovšek, President, and Judges Mag. Matevž Krivic, Mag. Janez Snoj, Dr Janez Šinkovec, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. The Decision was reached unanimously.

*Dr Tone Jerovšek*  
*President*

**DECISION**

At a session held on 11 December 2003 in proceedings to decide upon the constitutional complaint of A. A., from Z., the Constitutional Court

*decided as follows:*

The constitutional complaint of A. A. against Maribor Higher Court Order No. Kp 556/2001, dated 19 June 2001, in relation to Maribor District Court Order No. Ks 393/2001, dated 12 June 2001, is dismissed.

*Reasoning*

**A**

1. The complainant filed a constitutional complaint against a Maribor Higher Court Order. By that Order the Higher Court dismissed her appeal against the Maribor District Court Order by which home detention imposed on the complainant was extended by an additional month. On 15 March 2001, due to the reasonable suspicion that the complainant had committed the criminal offence of abuse of office or official duties determined by the second paragraph in conjunction with the first paragraph of Article 244 and with Article 25 of the Criminal Code (Official Gazette RS, Nos. 63/94 etc. – hereinafter referred to as the CC), the investigating judge ordered home detention on grounds of the risk of absconding. A three-judge panel for pre-trial appeals (hereinafter referred to as the panel of judges) then extended the home detention until 14 June 2001.
2. Upon the proposal of the investigating judge, on 12 June 2001 the panel of judges again extended the home detention until 14 July 2001 by the challenged Order. In the reasoning of the Order the panel explained that there existed a reasonable suspicion that the complainant had committed the alleged criminal offence, and that the investigation had to be continued. Only after all the evidence had been taken within the framework of the investigation would the State Prosecutor's Office be able to decide whether it should file an indictment against the complainant, and more time was

needed to take this evidence. In the opinion of the panel of judges, the previous course of the investigation had shown that the investigating judge had striven for the investigation to be concluded as quickly as possible. Furthermore, also the complainant allegedly contributed to the duration of the investigation, as in her written statement of defence, which she filed only on 31 May 2001, she had made a motion that certain evidence be taken. The panel of judges assessed that there still existed a real danger that the complainant would avoid criminal proceedings by fleeing abroad, as she was unemployed and also her husband was abroad, as he had left the country right after release from home detention. The measure of having to regularly report to the police station, which the complainant had proposed as a substitute measure, was allegedly not appropriate considering the real risk of absconding and the seriousness of the alleged criminal offence, therefore home detention was allegedly absolutely necessary in order for the criminal proceedings to be carried out. The complainant appealed against the Order issued by the panel of judges to the Higher Court, which dismissed her appeal. It concurred with the findings and reasoning of the court of first instance regarding the existence of the risk of absconding, which is one of the grounds for detention.

3. In the constitutional complaint the complainant *inter alia* alleges that the extension of home detention was simply decided on by the panel of judges of the District Court, and that there were allegedly no grounds for home detention. In the constitutional complaint, which was not drafted by a lawyer, the complainant states certain facts that allow the conclusion that she challenges the existence of the risk of absconding and that she wishes to demonstrate that home detention could be substituted for by a more lenient measure (e.g. that she was willing to surrender her and her children's passports and that the investigation had been instituted against her when she was in Y. Y. Y., after which she had nevertheless returned home).
4. An indictment against the complainant was filed before the Maribor District Court on 31 August 2001.
5. At a session held on 9 October 2001, the panel of the Constitutional Court accepted the constitutional complaint for consideration in the part and regarding the allegations that refer to the two Orders mentioned in the operative provisions of the present Decision. In the remaining part, the constitutional complaint was rejected, and thus that part is not a subject of the present decision.
6. On the basis of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the Constitutional Court sent the constitutional complaint to the District and Higher Courts to reply thereto. None of them replied.
7. On 20 December 2001, the panel of judges released the complainant from home detention. Upon being invited to respond thereto by the Constitutional Court, the complainant replied that she maintained her position as stated in the constitutional complaint.

#### **B – I**

8. At the time of reviewing the constitutional complaint, the challenged judicial decisions imposing home detention had already ceased to be in force. Considering the fact that the complainant persisted with the constitutional complaint, the Constitu-

tional Court first had to establish whether the procedural prerequisites for deciding by the Constitutional Court were still fulfilled. As a general rule, the Constitutional Court deems that in cases where at the time of decision-making an individual act is no longer in force legal interest for deciding by the Constitutional Court is not demonstrated. However, in Decision No. Up-315/00, dated 3 July 2003 (Official Gazette RS, No. 70/03), the Constitutional Court adopted the position that legal interest for deciding on a constitutional complaint is always demonstrated if what is at issue is an interference with the right to personal liberty determined by the first paragraph of Article 19 of the Constitution. An interference with this constitutional right is certainly one of the most severe interferences with human rights and fundamental freedoms. Effective protection of the right to personal liberty thus requires that persons affected be ensured the possibility to obtain a judicial decision on the interferences with the mentioned human right, even if the interference is no longer in effect. Therefore, a decision on whether the Constitutional Court must in such cases establish whether the decision-making of the courts was carried out in conformity with the procedural guarantees provided by the Constitution depends on the answer to the question of whether home detention entails an interference with the right to personal liberty or an interference with the right to the freedom of movement.

9. The first paragraph of Article 32 of the Constitution guarantees the right to the freedom of movement. In conformity with the second paragraph of the same Article, “[t]his right may be limited by law, but only where this is necessary to ensure the course of criminal proceedings,” and in some other cases. Hence, by this provision the Constitution-framers allowed the legislature to limit the right to the freedom of movement in order to ensure the course of criminal proceedings, which is a legitimate goal due to which it is admissible, in accordance with the third paragraph of Article 15 of the Constitution, to limit the right to the freedom of movement. When prescribing a limitation of the mentioned right, the legislature is of course bound by the general principle of proportionality<sup>1</sup> determined by Article 2 of the Constitution, which prohibits excessive interferences by the state with human rights also in cases where they pursue a legitimate aim. This principle is also binding on judges deciding in concrete cases on limitations in proceedings in which constitutional procedural

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1 The assessment of the admissibility of an interference is carried out on the basis of the test known as the strict test of proportionality. The mentioned test includes a review of three aspects of the interference:

- 1) whether an interference is really absolutely necessary (indispensable), in the sense that the aim cannot possibly be achieved without (any) interference, or that the aim cannot be achieved without the assessed interference (at issue) by some other milder interference;
- 2) whether the assessed interference is appropriate for achieving the pursued aim, in the sense that the pursued aim can in fact be achieved by the interference; if such aim cannot be achieved thereby, the interference is not appropriate;
- 3) whether the gravity of the consequences of the assessed interference with the affected human right is proportionate to the value of the pursued aim, i.e. to the benefits that will occur as a result of such interference (i.e. the principle of proportionality in the narrower sense). See Decision of the Constitutional Court No. U-I-18/02, dated 24 October 2003 (Official Gazette RS, No. 108/03).

guarantees are ensured, particularly those determined by Articles 22, 23, 25, and 29 of the Constitution. Finally, in concrete cases also the Constitutional Court reviews the constitutional admissibility of possible interferences with the right to the freedom of movement according to these criteria.

10. The right to personal liberty is ensured by the first paragraph of Article 19 of the Constitution. The second paragraph of this Article determines that no one may be deprived of his liberty except in such cases and pursuant to such procedures as are provided by law. The Constitutional Court stressed in Decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS, No. 25/96, and OdlUS V, 40), that the mentioned two fundamental conditions for the admissibility of interferences with the right to personal liberty are more precisely determined in the following provisions of the Constitution. The first condition (cases in which a person may be deprived of his or her liberty) is determined by Article 20 of the Constitution, while the second one (pursuant to such procedures as are provided by law) is determined by the provisions of Articles 22 (the equal protection of rights), 23 (the right to judicial protection), 25 (the right to legal remedies), 27 (the presumption of innocence), and 29 (legal guarantees in criminal proceedings) of the Constitution, in which the procedural guarantees set out by the Constitution are determined. In accordance with the first paragraph of Article 20 of the Constitution, a person reasonably suspected of having committed a criminal offence may be detained only on the basis of a court order when this is absolutely necessary for the course of criminal proceedings or for reasons of public safety. Hence, when what is at issue is the deprivation of liberty and detention, the Constitution itself determined the constitutional criteria on the basis of which interferences with the right to personal liberty are possible. In concrete cases, courts decide on the admissibility of interferences [with human rights] in proceedings in which constitutional procedural guarantees must also be ensured, particularly those determined by the second paragraph of Article 20 of the Constitution and those determined by Articles 22, 27, and 29 of the Constitution.
11. Similarly as in the Constitution, the right to personal liberty is also guaranteed by the first paragraph of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, and No. 7/94 – hereinafter referred to as the ECHR). The latter contains the same requirement as is determined by the second paragraph of Article 19 of the Constitution, as it exhaustively enumerates the instances in which it is allowed to deprive an individual of his or her liberty. Among these instances, point (c) of the first paragraph [of Article 5] provides for the lawful arrest or detention of a person effected to prevent him or her from fleeing after having committed a criminal offence. Furthermore, the third and fourth paragraphs determine procedural guarantees that must be ensured in proceedings for deciding on the deprivation of liberty (the person must be brought promptly before a judge; adjudication without undue delay or release from detention; the right to initiate proceedings in which a court will decide speedily on the lawfulness of the detention [i.e. the deprivation of liberty], and order release if the detention is not lawful). The right to the freedom of movement is guaranteed by

the first paragraph of Article 2 of Protocol No. 4 to the ECHR.<sup>2</sup> The third and fourth paragraphs thereof determine the possible limitations of this right – those that are determined by law and necessary in a democratic society, *inter alia* for preventing criminal offences or due to the public interest.

12. It is self-evident that the deprivation of liberty encompasses a limitation of the freedom of movement and that at the same time it entails a more severe interference than does an interference with the freedom of movement. Therefore, it is not surprising that the criteria determined by the Constitution and the ECHR for a limitation of the right to personal liberty are stricter than those determined for a limitation of the right to the freedom of movement. If the constitutional provisions are compared, detention must be “absolutely necessary” for the course of criminal proceedings, whereas a limitation of the freedom of movement must only be “necessary” to ensure the course of criminal proceedings. The ECHR exhaustively enumerates the admissible instances of interferences with personal liberty, while it leaves the determination of limitations of the right to the freedom of movement to the legislature; the legislature is bound only by the principle of proportionality. The procedural guarantees determined by the second paragraph of Article 20 of the Constitution require stricter conditions for decision-making by courts, which must proceed with such within very short time limits, as any interference with this fundamental freedom is so severe. In the third paragraph of Article 20 of the Constitution a special sanction is envisaged for cases where an indictment is not filed by the expiration of the time limits determined by the second paragraph of the same Article. Also Article 5 of the ECHR provides substantively similar procedural guarantees for detention cases.
13. Article 20 of the Constitution does not expressly regulate home detention, nor does the ECHR contain special provisions thereon. Therefore, a question may be raised as to whether limitations of human rights caused by ordering home detention particularly regarding their nature, degree, duration, and the manner of carrying out such limitations are such that they only entail a limitation of the freedom of movement, or such that they entail the deprivation of liberty, and thus a limitation of the right to personal liberty.
14. After Decision of the Constitutional Court No. U-I-18/93 was adopted, by which an inconsistency of the Criminal Procedure Act with the Constitution was established, the legislature introduced more lenient measures “as alternatives to detention” (Bulletin of the National Assembly of the Republic of Slovenia, No. 56/97, p. 17), including home detention among them. In accordance with the first paragraph of Article 199a of the Criminal Procedure Act (Official Gazette RS, Nos. 63/94 etc. – hereinafter referred to as the CrPA), home detention may be ordered if the grounds determined by points 1 through 3 of the first paragraph of Article 201 of the mentioned Act exist, and if ordering detention is not absolutely necessary for the safety of people or

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2 The provision reads as follows: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

the course of criminal proceedings. By a home detention order the court determines that the defendant must not leave the premises where he or she resides; a court may restrict or prohibit contact with persons who do not reside with the defendant; it may exceptionally allow the defendant to leave the premises determined for home detention for an assigned period of time, if this is absolutely necessary to provide him- or herself with the minimum necessities for life, or to work (the second and third paragraphs of Article 199a of the CrPA).

15. By the nature of the matter, detention and home detention are fundamentally equal. In both cases a person must reside at a precisely determined place. As regards duration, the same restrictions may apply. The essential difference is the degree (intensity) of the restriction and the manner in which such restriction is carried out. In contrast to detention, where defendants are isolated in a closed public institution in which they are under constant supervision by authorised officials, defendants in home detention are in home environments, in the presence of their families. However, it follows from the statutory regulation that they may only leave their residence after obtaining the express prior permission of a court. The court may only give such permission in the above-mentioned instances and only when this is absolutely necessary. Hence, it follows already from the statutory regulation of home detention that it entails a limitation of human rights that in its intensity and the manner of implementation limits personal liberty. Such view is also in line with the judgments of the European Court of Human Rights (hereinafter referred to as the ECtHR) in which the ECtHR decided on the question of whether the criterion for the review of limitations of human rights is the provision of the first paragraph of Article 5 of the ECHR or that of Article 2 of Protocol No. 4 to the ECHR.<sup>3</sup>

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- 3 1. In *Mancini v. Italy*, the complainant was transferred from detention to home detention. This measure required that the complainant stay at home, and was only allowed to leave home with the prior permission of the competent authorities. The ECtHR stated that the first paragraph of Article 5 of the ECHR indeed does not determine the conditions for ordering detention, and it does not ensure the right to be placed in a less severe form of detention than that of a traditional prison regime. However, also in this case the Court deemed, with regard to the effects and the manner of carrying out home detention, that home detention entails a deprivation of liberty based on the grounds determined by the first paragraph of Article 5 of the ECHR (ECtHR Judgment dated 2 August 2001, Paras. 16-17).
  - 2 In *Raimondo v. Italy*, the complainant was under special police supervision, which included the following – he was prohibited from leaving his residence without prior notification of the police, he had to report at the police station on certain days, he had to return home before nine o'clock in the evening and could not leave before seven o'clock in the morning unless he had justified reasons for leaving and notified the competent authorities prior to leaving. The ECtHR did not consider such limitations to entail limitations of the right to personal liberty but rather limitations of the right to the freedom of movement determined by Article 2 of Protocol No. 4 to the ECHR (Judgment dated 23 September 1993, Paras. 13 and 39).
  - 3 In *Guzzardi v. Italy*, the complainant was placed under special police supervision on the island Asinara, where he had to notify the supervisory authorities of the address of his residence, and was not allowed to leave his residence without prior notification. He had to report to the supervisory authorities twice a day and whenever called upon to do so; he had to lead an honest life, obey regulations, and not give cause for suspicion; he was not allowed to associate with persons who had been convicted of criminal offences, he had to stay at home

16. The complainant was placed under home detention, which was to be carried out at the address of her permanent residence and initially included only limited movement in the garden surrounding the house. Subsequently, the judge allowed her to move around in the garden without restrictions. The investigating judge allowed the complainant to visit a dentist and to consult the criminal investigation file and business documentation in order to prepare her defence, however, he did not allow her to visit a hairdresser, an insurance company, and her daughter's grammar school graduation party. From the above-mentioned concrete circumstances of the case it is evident that while under home detention the complainant was indeed allowed to reside in her home environment but that she was allowed to leave her residence on the basis of the prior permission of the investigating judge only in the instances enumerated in the third paragraph of Article 199a of the CrPA. Hence, also the concrete circumstances of the case allow the conclusion that home detention does in fact entail the deprivation of liberty and as such entails an interference with the right to personal liberty determined by the first paragraph of 19 of the Constitution. In view of the above, the procedural prerequisite for deciding on the complainant's constitutional complaint is fulfilled.

## B – II

17. By establishing that home detention entails an interference with the right to personal liberty, also the framework of the constitutional criteria for the review of the admissibility of the interference with the complainant's right to personal liberty is determined. Article 20 of the Constitution only regulates detention, but not also home detention. It follows from the principle of proportionality and from the criterion of absolute necessity determined by the first paragraph of Article 20 that courts must be given the possibility, in cases where all other conditions for ordering detention are indeed fulfilled but where the constitutionally admissible goal can be achieved by a milder measure, i.e. by home detention, to apply such milder measure. This is also how in the first paragraph of Article 199a of the CrPA the legislature defined the conditions for ordering home detention.
18. Hence, the Constitution does not expressly determine the constitutional guarantees for ordering home detention. However, since home detention entails a measure that is essentially similar to detention, it is necessary to determine in which key circumstances stricter criteria for ordering home detention regarding procedural guarantees (the second paragraph of Article 20 of the Constitution) must apply compared

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between ten o'clock in the evening and seven o'clock in the morning, unless he had to urgently and with prior notification leave home; he was not allowed to bear arms; he was not allowed to visit bars and night clubs and take part in public gatherings. He had to inform the supervisory authorities in advance of the telephone number and the name of any person he wished to have a long distance telephone conversation with. The ECtHR stated that the difference between the deprivation of liberty and the limitation of the freedom of movement is nonetheless merely one of degree and intensity, and not one of the nature or substance of the limitations, and that any one of the factors of such police supervision taken individually cannot be considered to entail the deprivation of liberty; however, since they were carried out cumulatively and in combination, such did entail the deprivation of liberty (Judgment dated 6 November 1980, Paras. 12, 93, 94, and 95).

to the general procedural guarantees that otherwise follow from Articles 22, 23, and 25 of the Constitution. The sixth paragraph of Article 199a of the CrPA determines that, regarding the ordering, duration, extension, and release from home detention, the provisions of the CrPA on detention apply *mutatis mutandis*. By such provision, in the existing regulation there are already built in guarantees that follow from the first three sentences of the second paragraph and from the third paragraph of Article 20 of the Constitution. However, the legislature regulated the manner of judicial decision-making on home detention differently. In instances where the Constitution requires that the Supreme Court decide on the extension of detention, the legislature determined that it is the panel of judges that has competence to decide on the extension of home detention (the seventh paragraph of Article 199a of the CrPA). Consequently, the question is raised whether such different regulation is constitutionally admissible.

19. From the requirement of equality before the law (the second paragraph of Article 14 of the Constitution) there follows the obligation of the legislature to treat equal factual and legal situations equally. The legislature may only treat such situations differently if it has reasonable grounds for differentiation that follow from the nature of the matter. Detention is undoubtedly the most severe interference possible with the right to personal liberty. The Constitution-framers wished to particularly emphasise this fact by expressly determining the competence of the Supreme Court as the highest court in the state to decide on the extension of a term of detention that has lasted for three months and that was ordered and extended even before an indictment was filed (the last sentence of the second paragraph of Article 20 of the Constitution). Home detention is nevertheless, as follows from the above, a milder form of the deprivation of liberty, and the legislature therefore had reasonable grounds to enact a different regulation regarding judicial decision-making on extending detention prior to filing an indictment. Such regulation is also not inconsistent with the general constitutional procedural guarantees, as ordering or extending home detention is decided by a court in proceedings in which the rights determined by Article 22 and the first paragraph of 23 of the Constitution must be ensured, and against the decision thereof the right to appeal is guaranteed (Article 25 of the Constitution).
20. Since home detention entails the deprivation of liberty, which in the majority of the key characteristics is similar to detention, it is clear that the criteria for a constitutional review of the admissibility of an interference with the right to personal liberty by means of home detention must be fundamentally the same as in cases of detention. Exceptions are possible where, as follows from the preceding paragraph of the reasoning, differentiation is admissible due to the nature of the matter. Therefore, in the constitutional review of home detention also the Constitutional Court must proceed from the same criteria and on the basis thereof review whether by ordering or extending home detention all the constitutional guarantees were ensured. On the basis thereof, the Constitutional Court also reviewed the two challenged judicial decisions.

### **B – III**

21. The complainant alleges that it is the Supreme Court that should have decided on the extension of detention and not the panel of judges of the court of first instance. As follows from Paragraph 17 of the present reasoning, by such judicial decision-making the complainant's constitutional guarantees provided by the Constitution could not have been violated. Therefore, this allegation is unfounded.
22. The complainant alleges that the grounds for ordering home detention were not fulfilled. Home detention against the complainant was extended due to the grounds determined by point 1 of Article 201 of the CrPA in relation to the first paragraph of Article 199a of the CrPA, in accordance with which home detention may also be ordered or extended if there exists a so-called risk of absconding. The Constitutional Court stated in Decision No. Up-185/95, dated 24 October 1996 (OdlUS V, 186), that the reasoning of courts on the existence of a risk of absconding must be based on concretely demonstrated circumstances on the basis of which it can be inferred with high probability that there exists a danger of the defendant absconding. Such cannot be assumed merely on the basis of the seriousness of the criminal offence, or the possible prescription of a severe punishment. However, if this circumstance is compounded by other circumstances, which above all concern the character of the person, his or her residence, profession, financial situation, family ties, and everything concerning his or her domestic or foreign environment, the risk of absconding may be confirmed or rebutted, also considering the possible expected severe punishment. Courts must establish whether such circumstances exist, and assess whether the risk of absconding is greater than the uncertainty that an individual would undoubtedly be subjected to in the event of absconding. It follows from the challenged judicial decisions (Paragraph 2 of the reasoning of the present Decision) that the courts at issue carried out this task. In doing so, they in particular reasoned, in conformity with the principle of proportionality, why home detention could not be replaced by an even less severe measure. It cannot be argued that their assessment was unreasonable.
23. It is evident from the above that in deciding on the extension of home detention the courts did not violate constitutionally ensured guarantees, as the complainant claims, and therefore the challenged judicial decisions did not interfere with her right to personal liberty as determined by the first paragraph of Article 19 of the Constitution.

### **B – IV**

24. In her subsequent applications, the complainant furthermore alleges that her human rights and fundamental freedoms determined by Articles 22, 23, 25, and the third paragraph of Article 29 of the Constitution, as well as by Article 6 of the ECHR, were violated. These allegations partly refer to the part of the constitutional complaint that the Constitutional Court already rejected, whereas in the second part the complainant did not demonstrate how her rights had allegedly been violated. Considering the above, the Constitutional Court could not review the allegations stated in the filed constitutional complaint, therefore it did not assess whether these applications had been filed in time (the first paragraph of Article 52 of the CCA).

25. In her application dated 30 January 2002, the complainant proposed that the Constitutional Court exempt her from paying the costs of the proceedings regarding the constitutional complaint at issue. Since court fees are not charged in proceedings before the Constitutional Court, and the complainant was also not required to pay other costs, the proposal of the complainant was pointless, hence the Constitutional Court did not decide thereon. However, if the complainant wishes to be granted a refund of the expenses that she incurred in filing the constitutional complaint, it is here established that she did not declare these expenses, therefore the Constitutional Court could not decide on the possible reimbursement thereof either.

### C

26. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr Dragica Wedam Lukić, President, and Judges Dr Janez Čebulj, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr Ciril Ribičič, Dr Mirjam Škrk, and Jože Tratnik. The decision was reached by seven votes against one. Judge Ribičič voted against and submitted a dissenting opinion.

*Dr Dragica Wedam Lukić*  
President

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### DISSENTING OPINION OF JUDGE DR RIBIČIČ

1. In the present dissenting opinion I will explain the reasons due to which I could not vote in favour of the Decision of the Constitutional Court by which the Court dismissed the constitutional complaint of A. A. But before I explain the reasons for my decision, let me note that I concur with the major part of the reasoning of the mentioned Decision. The only doubt I have refers to the fact that the Constitutional Court in its Decision assessed that the statutory regulation in accordance with which a three-judge panel for pre-trial appeals decides on the extension of home detention in cases similar to those in which the Supreme Court decides on the extension of detention, for which it is competent directly on the basis of the Constitution, is consistent with the Constitution.
2. I agree with the statement in Paragraph 15 of the reasoning of the Decision in accordance with which detention and home detention are by the nature of the matter fundamentally equal. The Constitutional Court correctly established that also home detention entails a limitation of personal liberty and that for this reason the complainant had the right to allege by means of a constitutional complaint violations concerning the ordering of home detention, despite the fact that in the meantime the complainant had been released from home detention. I also agree with the assessment of the Constitutional Court in Paragraph 18 of the reasoning that home detention is essentially similar to detention, due to which, in cases concerning home detention, considering the fact that the Constitution does not expressly determine

the constitutional guarantees for such a measure, the legal guarantees referring to detention must be applied *mutatis mutandis*.

3. The complainant alleges that the Supreme Court should have decided on the extension of home detention, as determined by Article 20 of the Constitution for cases of the extension of detention. The Constitutional Court did not concur with such reasoning, as it found that the legislature had reasonable grounds for enacting a different regulation. According to the position of the Constitutional Court, it is nonetheless necessary that all fundamental legal guarantees be respected in instances of ordering home detention except the provision of Article 20 of the Constitution, which reads as follows: “The Supreme Court may extend the detention a further three months.”<sup>1</sup>
4. Notwithstanding the fact that detention and home detention are different to a certain extent, they both concern such a severe interference with the liberty of an individual that all the legal guarantees determined by the Constitution must be observed without omitting any of them. Therefore, I question such regulation and practice in accordance with which all fundamental legal guarantees determined by the Constitution should be observed when ordering home detention, but not, however, one single part of the puzzle regarding interferences with personal liberty as regulated by the Constitution. In my opinion, following an in depth assessment, the Constitutional Court should have reviewed whether the statutory regulation is consistent with the Constitution, insofar as it gives a three-judge panel for pre-trial appeals the power to extend home detention in cases in which the Constitution grants competence to extend detention to the Supreme Court. The result of such review would then determine whether the Constitutional Court in its decision should establish a violation of the [mentioned] right of the complainant or reject her constitutional complaint. The Constitutional Court did not carry out such a review, but *a priori* proceeded from the assessment that the statutory regulation of home detention is based on reasonable grounds, thereby covertly reviewing the constitutionality of such regulation.
5. Since I cannot concur with only a part of the reasoning of the Decision of the Constitutional Court, I had to vote “against” and submit a dissenting opinion (and not a concurring one), namely due to the fact that my position could also lead to a different decision (i.e. establishing the unconstitutionality of the statutory regulation and issuing a declaratory decision on the violation of the complainant’s constitutional rights) regarding the question of constitutional guarantees concerning home detention than voted in favour of by the majority.

*Dr Ćiril Ribičič*

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1 Notwithstanding the criticisms regarding the constitutional solution in accordance with which only the Supreme Court may extend detention following a period of three months from the day of the deprivation of liberty (these criticisms draw attention to the fact that it could be to the detained persons’ advantage if it was not the highest regular court in the state that was to decide thereon), it must be taken into consideration that what is at issue is a binding constitutional provision that will certainly not be amended in the foreseeable future.

Decision No. **U-I-60/03**, dated 4 December 2003

### DECISION

At a session held on 4 December 2003 in proceedings to review constitutionality initiated upon the petition of A. B., from C, the Constitutional Court

*decided as follows:*

1. Due to the reasons stated in the reasoning of the present Decision, the provisions of Articles 70 through 81 of the Non-litigious Civil Procedure Act (Official Gazette SRS, No. 30/86, and Official Gazette RS, No. 87/02) are inconsistent with the Constitution.
2. The sixth indent of Article 47, Article 48, the first paragraph of Article 49, and the fourth paragraph of Article 51 of the Health Services Act (Official Gazette RS, Nos. 9/92, 37/95, 8/96, 90/99, 31/2000, and 45/01) are not inconsistent with the Constitution.
3. The National Assembly must remedy the inconsistency referred to in Point 1 of the operative provisions within six months from the publication of this Decision in the Official Gazette of the Republic of Slovenia.
4. Until the established inconsistency referred to in Point 1 of the operative provisions is remedied, the following shall be ensured in the procedure for involuntarily committing persons to a mental health care institution:
  - upon the initiation of the procedure, the involuntarily committed person shall *ex officio* be assigned a counsel by a court;
  - the notification of involuntary commitment that the authorised person of the health care institution is obliged to submit to the court shall also contain the grounds substantiating the absolute necessity of the involuntary commitment.

### *Reasoning*

#### **A**

1. The petitioner challenges the provisions of Chapter 7 (Articles 70 through 81) of the Non-litigious Civil Procedure Act (hereinafter referred to as the NLCPA), which regulate the procedure for committing persons to mental health care institutions, and the provision of Article 49 of the Health Services Act (hereinafter referred to as

the HSA), which refers to this procedure.

He claims that the grounds for involuntary commitment to psychiatric health care institutions determined by the statutory regulation in force do not fall within the ambit of the admissible limitations of human rights determined by the Constitution and international acts. The petitioner believes that involuntary commitment primarily entails an interference with the right to personal liberty as guaranteed by Article 19 of the Constitution, Article 5 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), Article 9 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/71, MP, No. 9/92), and Article 9 of the Universal Declaration of Human Rights. In the event the measure of involuntary treatment is carried out it also causes interferences with certain other human rights and fundamental freedoms, such as the freedom of movement (Article 32 of the Constitution), the right to personal dignity and safety (Article 34 of the Constitution), the inviolability of one's physical and mental integrity, privacy, and personal rights (Article 35 of the Constitution), the right to the protection of personal data (Article 38 of the Constitution), and the right to health care (Article 51 of the Constitution). The petitioner alleges that persons involuntarily committed to psychiatric hospitals are not provided even minimal legal certainty under the legislation in force. He believes that the deprivation of liberty of mental patients is completely arbitrary, as the NLCPA and the HSA allow such deprivation of liberty without fulfilling the conditions determined by the Constitution. The petitioner alleges that the provision of Article 49 of the HSA allows the deprivation of the liberty of mental patients even in cases where this is not absolutely necessary, which entails a violation of point (e) of the first paragraph of Article 5 and Articles 8 and 18 of the ECHR, as well as Articles 19 and 20 of the Constitution. Furthermore, the petitioner criticises the fact that the legislation currently in force does not provide for any milder measures that could substitute for involuntary commitment to a closed ward of a psychiatric hospital. The challenged provisions of the NLCPA are, according to the petitioner, inconsistent with the fourth paragraph of Article 5 of the ECHR, which guarantees individuals judicial review of the lawfulness of his or her deprivation of liberty. The petitioner alleges that the provisions of the NLCPA create a misleading impression that courts decide on the involuntary commitment of persons to psychiatric institutions. In fact, psychiatric hospitals firstly commit a patient involuntarily and only then are judicial proceedings initiated *ex officio*, in which courts merely decide whether the patient should remain committed, not whether the original involuntary commitment carried out by the psychiatric hospital was lawful. The petitioner further draws attention to the fact that the legislation currently in force does not ensure an involuntarily committed person the legal assistance of a lawyer or other counsel. According to the petitioner, the legislation should ensure the involuntarily committed person appropriate representation and protective conditions, as well as strict supervision over the execution of each individual medical procedure. The petitioner also believes that the procedural guarantees provided by the third paragraph of Article 19 and the second paragraph of Article 20 of the Con-

stitution apply to all instances of the deprivation of liberty, including the involuntary commitment of mental patients. The only procedural guarantee an involuntarily committed person enjoys under the legislation currently in force is the obligation of the authorised person of a health care institution to notify the court of the involuntary commitment within a period of 48 hours (the second paragraph of Article 71 of the NLCPA). However, such notification does not include the principal grounds justifying the involuntary commitment. Moreover, it is not the involuntarily committed person who receives the notification but only the court. Hence, the legislation in force does not prescribe any procedure that would ensure that the rights of involuntarily committed individuals determined by the third paragraph of Article 19 and the second paragraph of Article 20 of the Constitution are observed. Consequently, an involuntarily committed person also cannot effectively invoke his or her right to legal remedies, which according to the petitioner entails a violation of Article 25 of the Constitution and Article 13 of the ECHR. The petitioner further underlines that the legislation in force does not determine the conditions under which it is admissible to perform medical procedures without the consent of the involuntarily committed patient, nor does it ensure judicial review of the performance of these procedures, especially regarding the appropriateness and necessity of the interference. Since the legislation in force does not provide any protective conditions or procedures for supervision, control, or appeal, the petitioner believes it is inconsistent with Article 7 of the Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: The Convention on Human Rights and Biomedicine (Official Gazette RS, No. 70/98, MP, No. 17/98 – hereinafter referred to as the CHRB). Forced medication against the will of the affected person represents, according to the petitioner, one of the most humiliating acts a person can be subject to and a degradation of the human being as a person, as it constitutes a deprivation of free will and a deprivation of the right to make decisions about oneself. The petitioner, invoking the right to make decisions about oneself guaranteed by Article 35 of the Constitution, Article 8 of the ECHR, and Article 1 of the CHRB, believes that the involuntary commitment of a mental patient to a psychiatric hospital does not per se justify the performance of an involuntary medical procedure.

2. The petitioner also challenges the provisions of the sixth indent of Article 47, Article 48, and the fourth paragraph of Article 51 of the HSA. He alleges that the rights of individuals determined by Article 47 of the HSA are typically violated where persons involuntarily committed to psychiatric hospitals are concerned, with regard to which all violations are justified with the doctor's assessment that the exercise of the right would have a detrimental effect on the patient's health (the sixth indent of Article 47 of the HSA). The petitioner draws attention to the fact that one consequence of the limitation of the right to access medical records is that the affected person is not informed of the purpose, nature, consequences, and risks of the procedure, due to which the affected person cannot effectively exercise the right to complain as guaranteed by the ninth indent of Article 47 of the HSA, or the right to judicial protection guaranteed by the fourth paragraph of Article 15 and Article 23 of the Constitution, and Article 23

of the CHRB. This also entails a violation of Article 25 of the Constitution and Article 13 of the ECHR. According to the petitioner, the sixth indent of Article 47 of the HSA furthermore represents a violation of the rights guaranteed by the third paragraph of Article 38 and the third paragraph of Article 15 of the Constitution. As to the provision of Article 48 of the HSA, the petitioner alleges that it does not determine the person or authority that could substitute for the will of a patient and give consent to an emergency medical procedure, nor does the Act define the term “emergency procedure”. The mentioned provision is, according to the petitioner, inconsistent with the third paragraph of Article 51 of the Constitution, which binds the legislature to precisely determine by law the cases in which involuntary treatment is admissible, and also with the third paragraph of Article 6, Article 7, and Article 8 of the CHRB.

The petitioner alleges that the assessment of the necessity of a medical procedure is left to the sole discretion of the treating physician. In his view, such regulation allows arbitrariness and does not ensure individuals personal safety. The provision of the fourth paragraph of Article 51 of the HSA, on the basis of which only the treating physician can give the patient’s close relatives or guardian information regarding the patient’s health condition, is, in the petitioner’s opinion, inconsistent with Articles 35 and 38 of the Constitution, Article 8 of the ECHR, and also with the first paragraph of Article 10 of the CHRB. According to the petitioner, the mentioned provision allows an interference with the inviolability of the privacy of individuals and with the right to the protection of personal data without fulfilling the conditions determined by the Constitution and international law.

3. The National Assembly did not reply to the petition. In its submitted opinion, the Government assesses that the challenged provisions of the NLCPA and the HSA are not inconsistent with the Constitution and that they ensure individuals appropriate protection of their rights. The provisions of the NLCPA that regulate the procedure for the involuntary commitment of persons to psychiatric health care institutions are, according to the Government, in conformity with Article 19 of the Constitution, which allows the deprivation of liberty in such cases and pursuant to such procedures as are provided by law. The Government stresses that involuntary commitment to psychiatric hospitals is only admissible when a court establishes that the relevant statutory conditions have been fulfilled. The Government also explains in detail the duties of courts in proceedings for involuntary commitment as determined by the NLCPA (e.g. questioning the involuntarily committed person; questioning treating physicians; the order that the involuntarily committed person be examined by a certified psychiatric specialist from another health care institution). As to the challenged provisions of the HSA, the Government believes they are not unconstitutional, and that some provisions of this Act (especially the provision of Article 48) are indeed ambiguous but have to be interpreted in conjunction with other legal acts that regulate human rights. For example, the provision of the sixth indent of Article 47 of the HSA must be interpreted in conjunction with the provisions of the second and third indents of the same Article, and by also taking into consideration the provision of the third paragraph of Article 18 of the Personal Data Protection Act (Official Gazette RS, Nos. 59/99, etc. – hereinafter referred

to as the PDPA), which imposes on personal data file controllers the duty to allow individuals to access and copy personal data [from such files], in accordance with point 1 of the first paragraph of Article 18 of the PDPA, no later than 15 days after receipt of such a request, or else notify the individual within the same period of the grounds why such access and copying cannot be granted. According to the Government, individuals have several possibilities to access their personal data: by invoking their right to obtain a second opinion; by invoking the right to be informed of the diagnosis of their illness, and the scope, manner, quality, and expected length of treatment; and in proceedings for judicial protection under the PDPA. Especially the patient's right to learn of the diagnosis and course of treatment allegedly also enables the patient indirect access to his or her medical records. According to the Government, restrictions on direct access were put in place primarily due to the possibility that patients might falsely interpret entries in their medical records (e.g. x-ray images). Allegedly, the purpose of this restriction is to prevent the potential occurrence of a psychological state that could make treatment less successful. The government stresses that the mentioned provision does not constitute an absolute prohibition of patients' access to their medical records, but merely a restriction on access to entries [in such records] that do not include an explanation in instances where the patients might misunderstand such entries. The absolute denial of patients' right to access their medical records without a written reasoning would, even in the Government's opinion, constitute an unjustifiable interference with their fundamental constitutional rights and freedoms. As regards the provision of Article 48 of the HSA, the Government is of the opinion that it is not overly broad, as it must be interpreted as narrowly as possible. Only cases where the patient is truly incapable of forming his or her true and real will (e.g. due to unconsciousness or a state of reduced consciousness) should thus be considered to be cases where the patient cannot give prior consent to the performance of a certain medical procedure. The Government underlines in such context that the Act addresses emergency medical procedures, i.e. procedures intended primarily to preserve a person's life, not to improve a person's health condition. The mentioned provision allegedly indeed enables that there arises a temporary conflict of interests, namely the interest of the treating physician to carry out treatment, on the one hand, and the interest of the patient to not undergo treatment, on the other. However, the patient's interest is superior to the interest of the doctor. The Government stresses that doctors must always establish the patient's will (by carrying out a conversation with the patient or his or her relatives as soon as possible), and that, in accordance with the fourth indent of Article 47 of the HSA, they must also respect it. According to the Government, also the provisions of the CHRB can be used as an aid in the interpretation of Article 48 of the HSA. The Government believes that such conflicting situations could be eliminated if the Human Rights Ombudsman were authorised to substitute for the patient's will in such cases. The Government also maintains that the provision of the fourth paragraph of Article 51 of the HSA is not inconsistent with the Constitution. The limitation determined by this provision must allegedly be interpreted in the light of the active role of the patient's close relatives in the treatment process. In such context, the Government draws attention to the provi-

sion of the seventh indent of Article 47 of the HSA, which provides the patient the possibility to prohibit the provision of information regarding his or her health condition [to other people,] (even to his or her closest relatives).

4. In his reply to the opinion of the Government, the petitioner expressed disagreement with the Government's claims and draws attention to the fact that the Government even failed to express its position on certain essential allegations referring to the challenged provision of Chapter 7 of the NLCPA and Article 49 of the HSA. The petitioner again stresses that the statutory regulation concerning the involuntary commitment of mental patients entails inadmissible discrimination based on personal circumstances (illness or mental state). According to the petitioner, the legislature had no reasonable grounds to treat mental patients differently, as it cannot be assumed that they are more dangerous than average people (for example, the legislature did not envisage different treatment for other more dangerous groups, such as drug and alcohol addicts). The petitioner believes that an individual who has been subject to involuntary commitment to a psychiatric institution does not enjoy any dignity in today's society and has very little chance of starting to live a dignified life. In the petitioner's opinion, care for persons incapable of taking care of themselves requires a different solution, one which would in particular take into account the fact that the affected person is willing to accept a certain form of help. According to the petitioner, the interests of the doctor and the cooperation of relatives in the treatment should "have no place" in the framework of the regulation of this issue. As for the provisions of the sixth indent of Article 47 and Article 48 of the HSA, the petitioner highlights the statement of the Government, which acknowledged that these two provisions are ambiguous, which allows for unequal implementation of the Act and arbitrary decision-making by state authorities and bearers of public authority.
5. On the basis of the second paragraph of Article 28 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the Constitutional Court obtained the opinion of the Human Rights Ombudsman. The Human Rights Ombudsman states that since the establishment of the office of the Ombudsman it has been assessing, *inter alia*, petitions of persons involuntarily committed to a closed ward of a psychiatric hospital. Moreover, it regularly visits psychiatric hospitals, where it pays special attention to involuntarily committed mental patients. One subject of the Ombudsman's assessment is also the right to voluntary treatment. Concerning this right, the Ombudsman expresses his conviction that involuntary commitment does not automatically include an authorisation for (unlimited) interference with the patient's right to refuse treatment. The Human Rights Ombudsman presented the treatment of persons with mental disorders in greater detail in the Special Report of 1999,<sup>1</sup> in which he also drew attention to the shortcomings of the current legislative framework.

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1 The treatment of persons with mental disorders (an analysis of the current situation based on visits by the Human Rights Ombudsman to certain psychiatric hospitals and social care institutions) – Special Report – Ljubljana, January 1999.

**B – I**

6. By Order No. U-I-60/03, dated 3 April 2003, the Constitutional Court accepted the petition for consideration and decided to consider it as a priority matter.

**B – II**

7. Involuntary commitment to a closed ward of a psychiatric hospital entails a severe interference with a patient's human rights and fundamental freedoms, in particular the right to personal liberty (the first paragraph of Article 19 of the Constitution) and the right to the inviolability of one's mental integrity (Article 35 of the Constitution), as well as the right to voluntary treatment (the third paragraph of Article 51, which guarantees both the right to medical treatment and the right to refuse treatment). However, the human rights and fundamental freedoms guaranteed by the Constitution are not unlimited. The Constitution provides for the possibility of limiting the right to personal liberty by allowing that the cases and procedures in which it is possible to deprive a person of his or her liberty (the second paragraph of Article 19 of the Constitution) be determined by law. As to the right to voluntary treatment, the Constitution allows that exemptions from the principle of voluntary treatment (the third paragraph of Article 51 of the Constitution) be determined by law. The legitimate aim and purpose of involuntary commitment to and treatment in a psychiatric hospital is to avert the danger that the patient poses to him- or herself or to others due to the illness,<sup>2</sup> and also to eliminate the causes due to which involuntary commitment was ordered. However, the constitutional power authorising the legislature to determine limitations on the right to personal liberty and exemptions from the principle of voluntary treatment does not mean that the legislature may determine such limitations arbitrarily.
8. One of the bases for limiting constitutional rights is the general principle that human rights and fundamental freedoms are limited by the equally strong rights and freedoms of others (the third paragraph of Article 15 of the Constitution). This principled limitation of constitutional rights is also the basis for involuntary commitment to a psychiatric hospital when a patient poses a danger to the life of others or causes them serious harm.<sup>3</sup> The situation is different when a patient is involuntarily committed to a psychiatric hospital because he or she poses a danger to his or her own life or causes serious harm to him- or herself. In such cases, when the patient is incapable of making a wilful and deliberate decision on treatment due to the nature of his or her illness, the protection of his or her other rights requires that his or her decision be substituted for by that of the state. In fact, the state also has the duty to do so due to the special constitutional protection of severely disabled persons (the second paragraph of Article 52 of the Constitution). Only if the patient is incapable of making by him- or herself a wilful and deliberate decision on treatment due to his

2 For more detail, see A. Galič, *Prisilna hospitalizacija psihiatričnega bolnika*, *Medicina in pravo*, Izbrana poglavja 1999-2000 [Involuntary Commitment of Mental Patients; in The Medicine and Law, Selected Topics 1999-2000], pp. 47-58.

3 *Ibidem*.

or her mental illness, and if the deprivation of liberty and involuntary treatment are absolutely necessary in order to ensure the protection of the patient's other fundamental human rights, is it acceptable under constitutional law for a law to prescribe the involuntary commitment of those mental patients who pose a danger to themselves due to their illness.<sup>4</sup> The fundamental guiding principle in such instances must be the presumed will of the patient – it is presumed that the patient, were he or she capable of making judgments, would probably agree to such treatment.

9. The task of the statutory regulation is to regulate the involuntary commitment of mental patients to a closed ward of a psychiatric hospital in such a manner so as to ensure effective implementation of the legitimate purpose that justifies such measure (i.e. averting the danger that the patient poses to him- or herself or to others due to his or her mental illness, and the elimination of the reasons causing such danger), while also ensuring respect for the human rights and fundamental freedoms of patients in accordance with international standards for the protection of human rights and taking into account appropriate solutions in comparable modern European legal orders. The catalogue of fundamental human rights comprises both the most basic rights that ensure basic survival (physical integrity), as well as rights that protect the human being as an integral personality and emphasise a person's free development (mental integrity).<sup>5</sup> In addition to the inviolability of physical integrity, Article 35 of the Constitution also guarantees the inviolability of one's mental integrity. The latter entails, in particular, the prohibition of any interference with the freedom to make decisions, stressing the right to self-determination, i.e. the right to make decisions about oneself.<sup>6</sup>
10. The first paragraph of Article 19 of the Constitution guarantees everyone the right to personal liberty. The second paragraph of the same Article then determines two special conditions under which this right may be limited, stating that individuals may only be deprived of their liberty in such cases and pursuant to such procedures as are provided by law. Hence, for any interference with the right to personal liberty the Constitution envisages statutorily determined procedures and cases. In Decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS, No. 25/96, and OdlUS V, 40), which in fact referred to the deprivation of liberty in a criminal procedure, the Constitutional Court defined the conditions under which an interference with an individual's personal liberty is constitutionally admissible. The Constitutional Court stressed in the mentioned Decision that two basic premises can be derived from the provision of the second paragraph of Article 19 of the Constitution. That provision first states that "[n]o one may be deprived of his liberty," whereby the Constitution distinguishes between [two different Slovene expressions for] liberty. No one may be deprived of his or her liberty [in the broader sense], however, the latter may be temporarily limited by the deprivation of liberty [in the narrower sense]. Hence, an

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4 *Ibidem*.

5 A. Polajnar - Pavčnik, *Varstvo ustavnih človekovih pravic med zdravljenjem* [The Protection of Constitutional Human Rights During Treatment], Podjetje in delo, No. 6/98.

6 *Ibidem*.

individual may be deprived of his or her liberty [in the narrower sense], however such must always be envisaged in advance and regulated from both procedural and substantive law aspects. The generality of the provision of the second paragraph of Article 19 of the Constitution, i.e. that this provision expressly refers to any limitation of liberty, can be inferred from

- (a) the subheading of Article 19 (“Protection of Personal Liberty”);
- (b) the generality of the provision of the first paragraph of Article 19 (“Everyone has the right to personal liberty.”); and
- (c) the general wording of the second paragraph of Article 19 (“No one may be deprived of his liberty except in such cases and pursuant to such procedures as are provided by law.”).

11. Also the ECHR determines, in the first paragraph of Article 5, that everyone has the right to liberty and security of person, and that no one shall be deprived of his or her liberty save in the cases exhaustively enumerated in that Article. One such case is precisely the lawful detention of persons of unsound mind (point (e) of the first paragraph of Article 5 of the ECHR). In *Winterwerp v. the Netherlands*,<sup>7</sup> the European Court of Human Rights (hereinafter referred to as the ECtHR) introduced three fundamental requirements that must be fulfilled in order for the detention of mental patients to be lawful. The position of the ECtHR was that the detention of mentally ill persons is only admissible if a mental disorder has been reliably demonstrated on the basis of objective medical expertise, and if the patient’s mental disorder is of such a kind or such a gravity as to make him or her an actual danger to others or to him- or herself. The third requirement refers to the duration of detention. Detention may last only as long as the mental disorder justifying it persists. The ECtHR stresses that psychiatric involuntary commitment must be medically indicated.<sup>8</sup> However, it allows that in emergency cases mental patients be involuntarily committed even without a prior in-depth medical examination.<sup>9</sup> In addition to the existence of a mental illness, the serious danger that the patient poses to others or to him- or herself must always also be demonstrated.

12. The third paragraph of Article 19 of the Constitution determines the procedural safeguards that anyone who has been deprived of his or her liberty must be ensured. Since the involuntary commitment of a mental patient to a closed ward of a psychiatric hospital undoubtedly represents one example of the limitation of personal liberty, these procedural safeguards need to be applied *mutatis mutandis* also in the procedure for the involuntary commitment of persons to a closed ward of a psychiatric hospital. Such requirement also follows from the second paragraph of Article 5 of the ECHR, which states that everyone who is arrested must be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, [i.e. for

7 Ser. A, No. 33, Para. 40.

8 Judgment of the ECtHR in *Varbanov v. Bulgaria* (Reports of Judgments and Decisions 2000-X): In this case, the ECtHR underlined that the expert medical opinion on (the assessment of) the patient must be based on the person’s current health status, not merely on past events.

9 Judgment of the ECtHR in *X v. The United Kingdom*, Ser. A, No. 46, Para. 45.

being deprived of his or her liberty]. The ECtHR adopted the position that this provision refers to all examples of the deprivation of liberty, not only in criminal procedures.<sup>10</sup> The reasons for involuntary commitment of mental patients to a psychiatric hospital must therefore be explained to them in an appropriate manner, taking into account their medical condition. Moreover, they must be informed of their right to the legal assistance of a counsel that they may choose freely.

13. One of the fundamental rights that every involuntarily committed mental patient must be ensured is the right to judicial protection concerning the lawfulness of the detention [i.e. involuntary commitment]. The fourth paragraph of Article 5 of the ECHR determines that everyone who is deprived of his or her liberty by arrest or detention is entitled to initiate proceedings by which the lawfulness of his or her detention is to be decided speedily by a court and his or her release ordered if the detention is not lawful. This provision provides involuntarily committed mental patients the right to judicial protection (judicial review) concerning the lawfulness of their detention, which is undoubtedly one of the most important rights arising from Article 5 of the ECHR. Independent judicial review within the framework of which courts speedily decide whether detention has been ordered lawfully is essential in order to safeguard such patients' rights. The requirement determined by the fourth paragraph of Article 5 of the ECHR is fulfilled if mental patients are guaranteed the possibility to propose that a court verify whether the statutory grounds for involuntary commitment (still) exist, or, if automatic periodic verification is provided for, whether grounds for involuntary commitment still exist. Such position of the ECtHR already follows from the *Winterwerp* case, in which the Court stated that it was essential that the person concerned should have "access to a court" and "the opportunity to be heard either in person or, where necessary, through some form of representation." Hence, the ECtHR requires even in such procedures that the right to an adversarial procedure be respected. The so-called "equality of arms" must be ensured in court proceedings, with regard to which it is important that the involuntarily committed person has the right to access records that contain information on the basis of which he or she was committed, and to submit evidence to the contrary.<sup>11</sup>
14. An involuntarily committed mental patient also has the fundamental procedural right to be represented in court proceedings by a counsel.<sup>12</sup> In particular, in cases

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10 Judgment of the ECtHR in *Van der Leer v. The Netherlands*, Ser. A, No. 170, Para. 27.

11 In *Nikolova v. Bulgaria* (Reports of Judgments and Decisions 1999-II), the ECtHR stated that equality of arms is not ensured if a court denies access to those documents in the investigation file that are essential for the adoption of the decision on the lawfulness of detention.

12 In *Megyeri v. Germany* (Ser. A, No. 237-A), the ECtHR established a violation of the right determined by the fourth paragraph of Article 5 of the ECHR because the applicant was not provided legal representation in proceedings before the court when the court examined the grounds for detention. The ECtHR explained that persons involuntarily committed to a psychiatric hospital for having committed a criminal offence, which they cannot be held responsible for on account of their mental illness, must be provided legal representation not only in the procedure for ordering involuntary commitment, but also for determining the duration of such measure and release from the psychiatric hospital.

where the patient is incapable of ensuring the exercise of his or her own rights in the proceedings, it is necessary to provide him or her legal representation, as the right to judicial protection would otherwise be merely ink on paper. According to the ECtHR, the court carrying out the proceedings should assess on a case-by-case basis and considering the circumstances of the case, whether the person concerned is capable of exercising his or her rights in the proceedings him- or herself. Were it to conclude that this is not the case, the involuntarily committed person must be provided legal representation at the state's expense. The importance of the protected value (i.e. the protection of personal liberty) and the situation of a patient who is in a state of diminished mental capacity, certainly justify the conclusion that the patient must be provided appropriate representation in such proceedings.

15. Article 8 of the ECHR is important from the viewpoint of the patient's rights during treatment in a psychiatric hospital; on the basis of this Article everyone has the right to respect for his or her family life, home, and correspondence. Public authorities may not interfere with the exercise of this right unless such is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (the second paragraph of Article 8 of the ECHR). The position of the ECtHR is that the right to private life also includes one's mental integrity. In the event of psychiatric detention [i.e. commitment], Article 8 of the ECHR is relevant from various perspectives, for example from the perspective of the freedom of correspondence, the right to adequate housing, access to non-pharmacological treatment, access to fresh air and recreation, the privacy of visits, the confidentiality of medical information, the right to be aware of current events, etc. Any interference with privacy must be in conformity with the law and justified by the achievement of a (certain) legitimate goal. The more serious an interference with an individual's rights is, the more it must be justified and substantiated by the state. Article 8 of the ECHR not only provides for the right to correspondence, but also to telephone and electronic communication. The "right to communicate" is emphasised, due to which the state must not limit communications, except in the cases stated in the second paragraph of Article 8 of the ECHR. The right to correspondence and consultation with one's counsel is particularly important from the viewpoint of the protection of human rights.

The ECtHR emphasises that privacy and confidentiality must be ensured in such context. Any limitation of the right to send documents to the court and to receive documents from it would also constitute a violation of Article 8 of the ECHR. Furthermore, the provision of Article 3 of the ECHR must be noted, which prohibits torture and inhuman or degrading treatment or punishment of individuals. The prohibition is absolute. The ECtHR stresses that this is a fundamental right that allows no exceptions or limitations. Considering the particular vulnerability of persons with mental disorders, this must be given special attention in cases of involuntary commitment to a psychiatric hospital so as to avoid any violation of Article 3 of the ECHR. This

applies in particular to the application of compulsory treatment and coercive and confinement measures (see Paragraphs 22 and 23 of the reasoning).

16. The provisions on the protection of the rights of mental patients are also included in the CHRБ, which is considered the first international human rights document that refers to biology and medicine.

It regulates very sensitive issues regarding interferences with one's physical and mental integrity.<sup>13</sup> Article 7 of the Convention expressly regulates the protection of persons with mental disorders. A person who has a mental disorder of a serious nature may be subjected, without his or her consent, to a medical procedure aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health, with regard to which it is necessary to observe the protective conditions prescribed by law, including supervisory, control, and appeal procedures. In emergency medical cases, where the appropriate consent cannot be obtained, any medically necessary procedures may be carried out immediately for the benefit of the health of the individual concerned (Article 8 of the CHRБ). However, in such cases the individual's will and the desires he or she expressed prior to the occurrence of the circumstance that rendered him or her incapable of giving valid consent need to be taken into account (Article 9 of the CHRБ). Article 10 of the CHRБ guarantees the right to privacy and the right to be informed [of his or her health]. On the basis of this provision, everyone has the right to have his or her privacy concerning the information regarding his or her health respected.

Everyone has the right to be informed of all collected information regarding his or her health. However, an individual's wish that such information not be communicated to him or her must also be respected. Only as an exception may the exercise of these rights be limited by law for the patient's benefit.

### B – III

17. By enacting involuntary commitment to a closed ward of a psychiatric hospital, the legislature indeed interfered with the right to personal liberty (the first paragraph of Article 19 of the Constitution), the right to the protection of one's mental integrity (Article 35 of the Constitution), and the right to voluntary treatment (the third paragraph of Article 51 of the Constitution); however, the legislature had a legitimate, i.e. objectively justifiable, aim for such interference (see Paragraphs 7 and 8 of the reasoning). From this perspective, the interference at issue is not inadmissible, as the third paragraph of Article 15 of the Constitution determines that human rights and fundamental freedoms may be limited by the rights of others or due to the public interest. While an interference with human rights may only be based on a legitimate, objectively justifiable aim, the established constitutional case law also requires that it must always be assessed whether such aim is in accordance with the principles of a state governed by the rule of law (Article 2 of the Constitution), namely with that

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13 See V. Žnidaršič, *Konvenција o človekovih pravicah v zvezi z biomedicino* [Convention on Human Rights and Biomedicine], *Pravna praksa*, No. 22/98.

principle that prohibits excessive interferences by the state even in cases where such pursue a legitimate aim (the general principle of proportionality). The Constitutional Court carries out the assessment of whether an interference is excessive on the basis of the so-called strict test of proportionality. This test comprises an assessment of three aspects of the interference:

- 1) whether an interference is really absolutely necessary (indispensable), in the sense that the aim cannot possibly be achieved without (any) interference, or that the aim cannot be achieved without the assessed interference (at issue) by some other, milder, interference;
- 2) whether the assessed interference is appropriate for achieving the pursued aim, in the sense that the pursued aim can in fact be achieved by the interference; if such aim cannot be achieved thereby, the interference is not appropriate;
- 3) whether the gravity of the consequences of the assessed interference with the affected human right is proportionate to the value of the pursued aim and the benefits that will occur as a result of such interference (the principle of proportionality in the narrower sense or, [simply,] the principle of proportionality).

Only if the interference passes all three phases of the test is it constitutionally admissible. This also applies to cases where the interference is admissible due to the rights of others or the public interest, as well as to cases where the limitation of a human right is expressly allowed by the Constitution. Even the constitutional authorisation granted to the legislature to limit a human right (in the case at issue, the authorisation to limit individuals' right to personal liberty and to prescribe exemptions from voluntary treatment) does not entail that the legislature may determine limitations or interferences arbitrarily. The general constitutional principle of proportionality must be considered in every limitation of human rights and fundamental freedoms, regardless of the basis on which the legitimacy of the limitation rests.

*The Review of the Provisions of Chapter 7 of the NLCPA*

18. Chapter 7 (Articles 70–81) of the NLCPA regulates the procedure for involuntarily committing persons to psychiatric health care institutions. In the procedure for involuntarily committing persons to psychiatric health care institutions and other institutions or departments of institutions that are intended for the treatment of mental patients (hereinafter referred to as health care institutions), a court must decide, on the basis of Article 70 of the NLCPA, on the involuntary commitment of persons to a closed ward of a health care institution if due to the nature of the mental disorder or the person's mental state it is absolutely necessary that his or her freedom of movement be limited or that the person be prevented from having contact with the outside world because he or she poses a danger to his or her own life or the lives of others, or causes serious harm to him- or herself or to others. If a health care institution commits a person to a closed ward for treatment without his or her consent or without a court order, the authorised person of this institution must, without delay, and at the latest within 48 hours, notify the court of local jurisdiction thereof (the first paragraph of Article 71 of the NLCPA). The notification of involuntary commit-

ment must comprise information regarding the committed person, his or her health status, and the person who brought him or her to the health care institution (the second paragraph of Article 71 of the NLCPA). It is deemed that a person is committed to a health care institution involuntarily if his or her actions, medical findings regarding his or her mental state, and other circumstances indicate that the person is capable of expressing his or her will and actually refuses to undergo treatment at the health care institution, or if medical findings regarding the committed person's mental state indicate that he or she cannot express his or her will, or if the committed person is a minor or a person deprived of legal capacity (the third paragraph of Article 71 of the NLCPA). The court must initiate the proceedings *ex officio* as soon as it receives the notification of involuntary commitment or learns in another way of the involuntary commitment of a particular person to a health care institution (the second paragraph of Article 73 of the NLCPA). In the procedure for involuntary commitment, the court must, without delay, and at the latest within three days after it receives the notification of involuntary commitment, visit the involuntarily committed person in the health care institution and question him or her, unless such questioning would harm his or her treatment or if this is impossible considering the person's medical condition (Article 74 of the NLCPA). In the procedure for involuntary commitment, the court must question the doctors who are treating the involuntarily committed person, as well as other persons who can provide information regarding the committed person's mental state. The court orders that the committed person be examined by a psychiatric specialist from another health care institution (Article 75 of the NLCPA). On the basis of the evidence taken, the court decides whether the committed person should remain involuntarily committed to the health care institution or released (the first paragraph of Article 76 of the NLCPA). If the court decides that the person is to remain involuntarily committed to the health care institution, it determines the period of involuntary commitment, which may not exceed one year. The court must issue the decision without delay, and at the latest within 30 days of receipt of the notification of involuntary commitment (the second paragraph of Article 76 of the NLCPA). The health care institution may also transfer the involuntarily committed person from a closed ward to an open ward, or discharge him or her from the health care institution even before the expiry of the time period determined in the involuntary commitment order, provided that it establishes that the grounds for involuntary commitment have ceased to exist. In such case, the health care institution does not have the duty to inform the court of the return of the involuntarily committed person to a closed ward until the expiry of the time period determined in the involuntary commitment order (the third paragraph of Article 76 of the NLCPA). The court must serve the order on the involuntarily committed person, his or her legal representative or guardian, the competent social security authority, and the health care institution (the first paragraph of Article 77 of the NLCPA). The involuntarily committed person, his or her legal representative or guardian, the competent social security authority, his or her spouse or the person with whom the involuntarily committed person lives in a long-term partnership, his

or her lineal or second degree collateral relative, or the health care institution may appeal against the involuntary commitment order (the second paragraph of Article 77 of the NLCPA). The appeal must be filed within three days and it does not suspend the execution of the order (the third and fourth paragraphs of Article 77 of the NLCPA). The court of second instance must decide on the appeal within three days (the fifth paragraph of Article 77 of the NLCPA). An appeal to the Supreme Court is admissible against the decision of the court of second instance (the sixth paragraph of Article 77 of the NLCPA). If the health care institution establishes that the treatment of the involuntarily committed person must continue beyond the expiry of the period determined in the involuntary commitment order, it must propose to the court at least 15 days before the expiry of the time period, or 30 days if the period of involuntary commitment has been longer than three months, that it extend the involuntary commitment. The court must decide on the matter before the expiry of the involuntary commitment period (Article 79 of the NLCPA). On the proposal of the involuntarily committed person, his or her legal representative or guardian, the competent social security authority, his or her spouse or the person with whom the involuntarily committed person lives in a long-term partnership, or his or her lineal or second degree collateral relative, or *ex officio*, the court may decide to release the involuntarily committed person from the closed ward of the health care institution before the expiry of such a time period as determined in the involuntary commitment order, provided that it concludes that the grounds for involuntary commitment have ceased to exist (Article 80 of the NLCPA).

19. The involuntary commitment of a mental patient to a closed ward of a psychiatric hospital undoubtedly constitutes a limitation of personal liberty (the first paragraph of Article 19 of the Constitution). Article 70 of the NLCPA determines the substantive grounds for involuntary commitment, stating that the involuntary commitment of a mentally ill person is only admissible if due to the nature of the mental disorder or the person's mental state it is absolutely necessary that his or her freedom of movement be limited or that the person be prevented from having contact with the outside world because he or she poses a danger to his or her own life or the lives or others, or causes serious harm to him- or herself or to others. As already mentioned, whenever a limitation of human rights and fundamental freedoms is at issue, the general constitutional principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution) must be observed. On the one hand, this constitutional principle requires that in determining conditions for involuntary commitment the legislature provide courts the possibility to assess whether the interference is necessary, in the sense that the desired aim cannot be achieved by any other means. On the other hand, it also imposes on the legislature the duty to restrict the measure of involuntary commitment only to cases where such a measure is in reasonable proportion to the aim, i.e. to the value that is to be protected by such interference, and to the reasonably expected effect of such protection. The Constitutional Court established that the legislature did not fully fulfil the mentioned requirements in the regulation of involuntary commitment. Namely, in addition to the in-

voluntary commitment of a mental patient, the NLCPA does not prescribe any other measures for achieving the same aim. The legislature thereby violated the principle of proportionality, which requires that in pursuing the constitutionally admissible aim (i.e., in the case at issue, averting the danger that the patient poses to him- or herself or to others due to his or her mental illness, and eliminating the causes of the danger) it choose the means by which it interferes with human rights in accordance with the criterion of absolute necessity (indispensability). The assessment in accordance with the criterion of absolute necessity requires that the legislature provide for alternative measures<sup>14</sup> that are in conformity with the principle of proportionality and appropriate for achieving individual legislative aims. Involuntary commitment to a closed ward of a psychiatric hospital is a measure that should only be applied in cases where it is impossible to eliminate the danger by means of other measures outside (a closed ward) of a psychiatric hospital. Since the legislature did not provide for any other measures aside from involuntary commitment to a psychiatric hospital, it interfered, contrary to Article 2 of the Constitution, with personal liberty as guaranteed by the first paragraph of Article 19 of the Constitution.

20. One of the fundamental rights that every involuntarily committed mental patient must be guaranteed is the right to judicial protection concerning the lawfulness of involuntary commitment. This right follows from the first paragraph of Article 23 of the Constitution. An essential part of the right to judicial protection is the right to a trial without undue delay. Its purpose is to ensure the effectiveness of judicial protection; belated judicial protection may namely nullify its effects. If judicial protection is provided too late, the affected person would be in a position equivalent to that if no judicial protection were provided at all.<sup>15</sup> The requirement of prompt judicial protection regarding the lawfulness of detention [i.e. involuntary commitment] in a psychiatric hospital also follows from the provision of the fourth paragraph of Article 5 of the ECHR, on the basis of which everyone who is deprived of his or her liberty by arrest or detention is entitled to initiate proceedings by which the lawfulness of his or her detention is to be decided *speedily* by a court and his or her release ordered if the detention is not lawful. The NLCPA prescribes judicial review of the lawfulness of involuntary commitment. The proceedings are initiated *ex officio* as soon as the court receives notification of involuntary commitment or learns in any other way of the involuntary commitment of a particular person to a health care institution (the second paragraph of Article 73 of the NLCPA). However, the time period for the issuance of the order determined by the second paragraph of Article 76 of the NLCPA

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14 Dutch law, for example, determines that involuntary commitment is only admissible if it is not possible to provide treatment outside a psychiatric hospital (Article 20). Similar is stated by the Austrian and Bavarian laws; Article 3 of the latter determines different forms of help outside a psychiatric hospital. Taken from A. Galič, *Pravna ureditev neprostoVOLjne hospitalizacije v psihiatrični bolnišnici* [The Legal Regulation of Involuntary Commitment to a Psychiatric Hospital]; in A. Polajnar - Pavčnik, D. Wedam Lukić (Eds.), *Pravo in medicina* [The Law and Medicine], in the *Pravna obzorja* collection, Cankarjeva založba, Ljubljana 1998, p. 298.

15 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, p. 253, Para. 2.

(the court must issue the order without delay, and at the latest within thirty days of receipt of the notification of involuntary commitment) may in some cases be too long. The Constitutional Court assesses that in proceedings to review the lawfulness of involuntary commitment to a closed ward of a psychiatric hospital the legislature should have provided for appropriately short time periods for decision-making, as only prompt judicial review of the lawfulness of involuntary commitment can ensure effective protection of patients' rights. The thirty-day time period for the issuance of a court order is (or may be) too long, especially if it transpires that the involuntary commitment to a psychiatric hospital was ordered unlawfully. The legislature can indeed determine a certain reasonably short time period necessary for the observation of the patient when it is not yet certain whether he or she is in fact mentally ill and dangerous as a result thereof.<sup>16</sup> Attention should also be drawn to the deficiency of the provision of the first paragraph of Article 76 of the NLCPA, which states that the court must decide, on the basis of the evidence taken, whether the involuntarily committed person should remain involuntarily committed to the health care institution or released. It can be discerned from the wording of this statutory provision that the court decides merely on whether the involuntarily committed person should "remain involuntarily committed" to the psychiatric hospital, but not on the lawfulness of the original deprivation of liberty (involuntary commitment). Another obstacle in establishing whether the original involuntary commitment had been ordered lawfully is posed by the provision of the second paragraph of Article 71 of the NLCPA, which determines the mandatory content of the notification of involuntary commitment that the authorised person of the health care institution sends to the court. The notification of involuntary commitment must include information regarding the committed person, his or her health status, and the person who brought him or her to the health care institution. The Act does not determine expressly whether the notification should also include the grounds that necessitated ordering that the patient be involuntarily committed. However, only on the basis of these grounds can the court assess whether involuntary commitment was indeed necessary in a particular case (*ultima ratio*). With regard to the above, the Constitutional Court assesses that the challenged statutory provision is inconsistent with the right to (effective) judicial protection as guaranteed by the first paragraph of Article 23 of the Constitution.

21. The right to adversarial judicial proceedings as a fundamental human right requires respect for the principle of the equality of arms. The regulation of proceedings compliant with this principle ensures the equal status of parties and is therefore the most important expression of the right to equal protection of rights before a court (Article 22 of the Constitution). Courts must give each party the opportunity to make a statement regarding the allegations and claims of the opposing party. It follows from the Consti-

16 *B. v. France* (52 Decisions and Reports, Paras. 111 and 125). Taken from A. Galič, *Pravna ureditev neprostoVOLjne hospitalizacije v psihiatrični bolnišnici* [The Legal Regulation of Involuntary Commitment to a Psychiatric Hospital]; in A. Polajnar - Pavčnik, D. Wedam Lukić (Eds.), *Pravo in medicina* [The Law and Medicine], in the *Pravna obzorja* collection, Cankarjeva založba, Ljubljana 1998, p. 290.

tution that proceedings must be carried out by observing the fundamental requirement of equality and the procedural balance of parties, and by observing their right to defend themselves from all procedural acts that may affect their rights or interests. In such manner, proceedings are based on respect for human personality, as they provide everyone the opportunity to have a say in proceedings that affect his or her rights and interests, thereby preventing a person from becoming merely an object of proceedings. Parties to proceedings and everyone with a status equal to that of a party must therefore be allowed to present arguments supporting their positions and to make a statement regarding both points of law and fact. Each party must be ensured the right to state facts and evidence, and to make a statement regarding the claims of the opposing party and the results of the taking of evidence, as well as the right to be present when evidence is taken. The right of a party to make a statement in the proceedings is correlative to the duty of the court to record all allegations made by the party, assess their relevance, and take a position in the reasoning of the judgment on those claims that are crucial for the decision (See Decision of the Constitutional Court No. Up-39/95, dated 16 January 1997, OdlUS VI, 71). The requirement of adversarial proceedings as an expression of the right to the equal protection of rights must be observed in all proceedings, including the procedure for involuntarily committing persons to psychiatric hospitals. Accordingly, Article 4 of the NLCPA determines that parties to proceedings must be given the opportunity to make a statement regarding the claims of other parties, to participate in the taking of evidence, and to discuss the results of the proceedings. Hence, each party must be allowed to actively participate in the proceedings and thereby defend his or her rights and interests before the court. The provision of Article 74 of the NLCPA, which imposes on courts the duty to question the involuntarily committed person unless such questioning would harm his or her treatment or if this is impossible considering the person's medical condition, does not limit the principle of adversarial proceedings. A court may indeed omit the questioning of the patient from the evidentiary material that it uses to create an opinion on his or her health status, however this does not deprive the patient of his or her right to actively participate in the proceedings.<sup>17</sup> It must be emphasised that in any event the court must allow the involuntarily committed person to make a statement, and take his or her statement into account.<sup>18</sup> However, it must also be taken into consideration in such context that due to his or her illness, the patient him- or herself is in most cases unable to or incapable of exercising the right to active participation in the proceedings and thereby to defend his or her rights (including the right to appeal determined by Article 30 of the NLCPA). It is not enough that the Act merely formally recognises the right to active participation before a court (which is a manifestation of equality before a court

17 Taken from A. Galič, *Pravna ureditev neprostovoljne hospitalizacije v psihiatrični bolnišnici* [The Legal Regulation of Involuntary Commitment to a Psychiatric Hospital]; in A. Polajnar - Pavčnik, D. Wedam Lukić (Eds.), *Pravo in medicina* [The Law and Medicine], in the *Pravna obzorja* collection, Cankarjeva založba, Ljubljana 1998, pp. 303, 304.

18 D. Wedam Lukić, A. Polajnar - Pavčnik, *Nepravdni postopek, Zakon s komentarjem* [Non-litigious Civil Procedure, The Act with Commentary], 1989, pp. 14 and 67.

determined by Article 22 of the Constitution) and that it recognises in principle the constitutional right to appeal (Article 25 of the Constitution). From the Constitution there also follows the requirement to ensure effective and actual implementation of constitutional rights. If the law does not provide for the actual implementation of these rights, the constitutional rights to equality before a court and appeal are in effect violated. A patient who is incapable of understanding and invoking his or her rights in the proceedings must therefore be provided appropriate representation, which shall constitute effective protection of the rights and interests of the patient in the proceedings. Since the challenged provisions of the NLCPA do not provide for that, they are inconsistent with Articles 22 and 25 of the Constitution.

22. A further shortcoming of the legislation currently in force is the lack of legal regulation of the status and rights of patients during involuntary commitment in a closed ward of a psychiatric hospital. Neither the NLCPA nor the HSA regulate the rights and legal status of patients in psychiatric hospitals after the issuance of the involuntary commitment order. The obligation to observe the rights of mental patients during their treatment in psychiatric hospitals follows from Article 35 of the Constitution, as well as from Articles 3 and 8 of the ECHR, and Articles 7, 8, and 10 of the CHRB. Special attention is accorded to the protection of the personality rights of mental patients and the protection of their dignity. Limitations of patients' rights are allowed only under conditions expressly determined at the constitutional level and by law.<sup>19</sup> The measure of the involuntary commitment of a patient to a psychiatric hospital is clearly associated with treatment (and thus carried out at a hospital). One of its purposes is to eliminate the causes that led to this measure. Hence, the involuntary commitment of a patient to a psychiatric hospital includes certain types of treatment that follow from the very purpose and nature of such measure. Understandably, this cannot constitute unlimited authorisation to perform any treatment measures without appropriate external supervision. The requirement of supervision over the performance of treatment measures also follows from Article 7 of the CHRB, which states that a person who has a mental disorder of a serious nature may be subjected, without his or her consent, to a medical procedure aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health, with regard to which it is necessary to observe the protective conditions prescribed by law, including supervisory, control, and appeal procedures. Where, according to law, an adult does not have the capacity to consent to a medical procedure because of a mental disability, a disease, or for similar reasons, the procedure may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law. The individual concerned must as far as possible take part in the authorisation

19 In foreign legal systems (e.g. Austrian, Dutch, American), the rights of patients during treatment in a psychiatric hospital are determined in considerable detail (e.g. the right to written communication with the outside world and one's patient advocate, the right to visits, the protection of human personality and dignity, etc.). Therein, the conditions under which it is admissible to limit a patient's movement in a hospital and, in particular, the admissibility of the application of involuntary medical and protective measures during a hospital stay, are expressly determined.

procedure (the third paragraph of Article 6 of the CHRB). It must be taken into consideration that involuntary commitment to a psychiatric hospital in and of itself does not automatically entail that the patient does not have mental capacity and is thus incapable of forming an intention concerning the treatment that is legally valid. Among involuntarily committed mental patients there are also patients who can understand the cause and importance of treatment, and are thus capable of expressing their will; hence, treatment against their will is not admissible.<sup>20</sup> The legislature should therefore have determined, on the one hand, the types of treatment that follow from the very purpose and nature of involuntary commitment and that are logically connected therewith, and the types of treatment that exceed such framework and necessitate the express consent of the patient, on the other. The Constitutional Court established that the lack of legal regulation of the status and rights of patients during their involuntary commitment to psychiatric hospitals represents an unconstitutional legal gap inconsistent with the principle of legal certainty (Article 2 of the Constitution). The challenged statutory regulation is also inconsistent with the third paragraph of Article 51 of the Constitution, which imposes upon the legislature the duty to determine cases in which involuntary treatment is admissible.

23. It is necessary to distinguish treatment measures from coercion and limitation measures, whose purpose is to ensure safety when a patient poses a direct danger to him- or herself or to others in the hospital (other patients or medical personnel). The NLCPA does not state anything regarding the application of these measures, which means that the decision on the application of coercive and limitation measures depends merely on the assessment of the psychiatrist treating individual patients. In order to protect patients' rights, the legislature should have clearly defined the cases and conditions that allow the application of coercive and limitation measures. In addition, a certain form of supervision (control mechanisms) over the application of these measures should have been provided for.<sup>21</sup>
24. Having established that the NLCPA does not regulate certain important issues associated with the involuntary commitment of persons to a closed ward of a psychiatric hospital (see Paragraphs 17 through 23 of the reasoning), the Constitutional Court established, in conformity with the provision of Article 48 of the CCA, the unconstitutionality of the challenged statutory provisions (Point 1 of the operative provisions). The Constitutional Court opted to adopt a declaratory decision because the abrogation of the challenged provisions would cause an unconstitutional legal gap. The interconnectedness of the challenged provisions of the NLCPA namely renders

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20 Cf. the first paragraph of Article 36 of the Austrian *Unterbringungsgesetz*. Treatment against the will of the patient is only admissible for patients with mental incapacity, whereby his or her consent is substituted for by a parent or guardian, who may also express, on the patient's behalf, his or her will as to the treatment (the second paragraph of Article 36 of the Austrian *Unterbringungsgesetz*). If there is no such representative, the admissibility of the measure is decided on by a court (the third paragraph of Article 36 of the Austrian *Unterbringungsgesetz*).

21 Article 33 of the Austrian *Unterbringungsgesetz*, for example, states that the court shall decide without delay on the admissibility of the measure, at the request of the patient or his or her representative.

it impossible to exclude and abrogate only individual provisions of this Chapter. The abrogation of the entire chapter would cause the abolishment of the institute of involuntary commitment to a closed ward of a psychiatric hospital in its entirety. The Constitutional Court set a time limit of six months by which the legislature must regulate anew the procedure for the involuntary commitment of persons to psychiatric hospitals, taking into account the reasons stated in the present Decision. The Constitutional Court decided on such a time limit because it is evident from the report of the Human Rights Ombudsman that a new draft act (entitled the “Mental Health Act”) has already been prepared, which, it has been claimed, comprehensively regulates the institute of involuntary commitment to a closed ward of a psychiatric hospital.

25. In order to provide, until the challenged statutory regulation is harmonised with the requirements set forth in the present Decision, involuntarily committed persons fundamental procedural safeguards in decision-making on involuntary commitment to a closed ward of a psychiatric hospital, the Constitutional Court also determined, on the basis of the second paragraph of Article 40 of the CCA, the manner of the implementation of the Decision (Point 4 of the operative provisions). The Constitutional Court determined that, until the established unconstitutionality is remedied, upon the initiation of the procedure, all involuntarily committed persons shall be *ex officio* assigned a counsel by a court. It furthermore decided that the notification of involuntary commitment that the authorised person of the health care institution is obliged to submit to the court shall also contain the grounds substantiating the absolute necessity of involuntary commitment.

*The Review of the First Paragraph of Article 49 of the HSA*

26. The referral and involuntary commitment of a patient to treatment in a psychiatric hospital are also regulated by the first paragraph of Article 49 of the HSA. The latter regulates the possibility to refer a patient who due to mental illness poses a danger to his or her own life or to the lives of others, or causes serious harm to him- or herself, or to others, to treatment in a psychiatric hospital even without his or her consent. It should be emphasised that the conditions for the referral and involuntary commitment of a patient to treatment in a psychiatric hospital determined by the first paragraph of Article 49 of the HSA are intended solely for the doctor’s assessment. On the basis of objective health standards, the doctor must establish whether a mental illness is present and, from the medical point of view, assess the danger that the patient poses to others or to him- or herself due to such illness. It is on the basis of such assessment that the doctor decides whether referral for treatment in a psychiatric hospital is necessary or not. However, the question of whether the nature of the mental illness requires that the patient’s freedom of movement be limited and that his or her contact with the outside world be prevented is subject to a legal assessment, which is carried out by a court. In proceedings to decide upon the lawfulness of the involuntary commitment of a patient to a closed ward of a psychiatric hospital, the court assesses whether the conditions determined by Article 70 of the NLCPA have been fulfilled. Hence, the basis for the court’s assessment is not the first paragraph

of Article 49 of the HSA, but Article 70 of the NLCPA. Considering the above, the Constitutional Court assesses that the provision of the first paragraph of Article 49 of the HSA is not inconsistent with the Constitution.

#### **B – IV**

##### *The Review of the Sixth Indent of Article 47 of the HSA*

27. In accordance with the provision of the sixth indent of Article 47 of the HSA, everyone has the right under equal conditions and in accordance with the law to access medical records referring to his or her health status, unless a doctor concludes that this could adversely affect the patient's health.
28. The petitioner draws attention to the fact that the limitation of the right to access medical records results in affected persons not being informed of the purpose and nature of the medical procedure, as well as of its consequences and risks, due to which they are unable to effectively exercise their right to complain as guaranteed by the ninth indent of Article 47 of the HSA, and the right to judicial protection guaranteed by the fourth paragraph of Article 15 and Article 23 of the Constitution, and Article 23 of the CHRB. According to the petitioner, the sixth indent of Article 47 of the HSA constitutes a violation of the rights determined by Article 25 of the Constitution, Article 13 of the ECHR, the third paragraph of Article 38 of the Constitution, and the third paragraph of Article 15 of the Constitution.
29. The right of a patient to access his or her medical records constitutes an important underpinning aspect of informed consent in the treatment process, and the limitation of this right constitutes a severe limitation of the patient's right to judicial protection. Without access to his or her records, the patient often cannot decide to seek judicial protection or perhaps to undergo treatment with another doctor or in another health care institution. Moreover, in a given case, once the event has already occurred and all of its consequences are already known, the expertise of a doctor's treatment can only be assessed on the basis of existing medical records.<sup>22</sup>
30. The legislature has limited a patient's right to directly access his or her medical records due to the possibility of false interpretation of the diagnoses in the records. The objective of the legislature was to prevent the potential occurrence of adverse consequences for the patient's health. In such context, the constitutionally protected value is a patient's right to medical treatment as guaranteed by the first paragraph of Article 51 of the Constitution. The limitation of a patient's right to access his or her medical records constitutes an interference with another constitutional right of the patient that is guaranteed by the third paragraph of Article 38 of the Constitution, i.e. the patient's right to access the collected personal data that relates to him or her, and the right to judicial protection in the event of any abuse of such data. The Constitutional Court assesses an interference with a human right on the basis of the so-called strict test of proportionality, as explained in Paragraph 17 of the reasoning of the present

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22 V. Flis, *Medicinska dokumentacija in pravice bolnikov* [Medical Records and the Rights of Patients], *Pravna praksa*, No. 19/98.

Decision. In the case at issue, the Constitutional Court carried out an assessment of whether the interference with the patient's constitutional right to access his medical data is admissible due to the protection of another constitutional right of the patient, i.e. the right to medical treatment. As stated in Paragraph 17 of the reasoning above, limitations of constitutional rights intended to protect the rights of others are only admissible if three [cumulative] conditions of the principle of proportionality are fulfilled: necessity, appropriateness, and proportionality in the narrower sense. The Constitutional Court applied the mentioned criteria also in the case at issue, which concerned a conflict between two human rights of the same person.

31. After assessing whether an interference with a patient's constitutional right to access his or her medical data is necessary to achieve the desired, constitutionally admissible aim of preventing the occurrence of adverse consequences for the patient's health, the Constitutional Court established that indeed the legislature could not have achieved such aim by any milder measure. The very wording of the provision of the sixth indent of Article 47 of the HSA contains the criterion of necessity, as the limitation of a patient's right to access his or her medical records is only admissible where such is necessary to avoid adverse consequences for the patient's health. Neither can there be any doubt regarding the appropriateness of the measure that the legislature selected for achieving its legitimate aim, for it is undoubtedly possible to achieve such an aim by limiting access to one's medical records.
32. In the framework of the assessment of proportionality in the narrower sense, the Constitutional Court weighs the importance of the right affected by the interference against the right to be protected by such interference, and determines the weight of the interference according to how affected the right is. It follows from Article 51 of the Constitution that the state must provide – with respect to the given conditions – appropriate medical treatment possibilities directed towards ensuring an individual's health. Health care may be understood in the broader sense (as including a variety of measures, including preventive ones, that have a direct or indirect positive impact on the preservation or improvement of health), or in the narrower sense as treatment in cases of individuals' direct need for health care. The constitutional right to health care includes both aspects.<sup>23</sup> The limitation of the right to access medical records concerns the broader aspect of the right to health care. It entails a preventive measure whose purpose is to prevent the occurrence of adverse consequences for an individual's health. It should be emphasised in such context that the limitation of the right to access medical records does not interfere with the patient's right to learn of the diagnosis of his or her illness and the scope, manner, quality, and expected length of treatment (the third indent of Article 47 of the HSA). Moreover, the limitation of the right to access medical records must be considered an exception to only be applied where necessary (in exceptional cases).
33. The fourth paragraph of Article 8 of the Health Care Databases Act (Official Gazette

23 B. Kresal, 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, p. 548, Para. 8.

RS, No. 65/2000 – hereinafter referred to as the HCDA) determines that the procedure determining how individual citizens can exercise their right to access their personal health data is prescribed by the minister responsible for health care. As the HCDA does not contain any particular provisions regulating the right to access personal health data, the provisions of the PDPA regulating this right must be taken into account. Article 18 of the PDPA determines that a personal data file controller must enable an individual, upon his or her request, to access personal data contained in the personal data file that refer to him or her, and grant him or her the permission to copy such data (point 1 of the first paragraph of Article 18 of the PDPA), and as well provide such individual a copy of the personal data contained in the personal data file that refer to him or her (point 2 of the first paragraph of Article 18 of the PDPA). The data controller must enable the individual to access and copy personal data in accordance with point 1 of the first paragraph of this Article within a period of 15 days following receipt of the request, or inform him or her in the same period in writing of the grounds due to which access and copying will not be allowed (the third paragraph of Article 18 of the PDPA). Hence, in accordance with the mentioned statutory provision, a patient has the right to access and copy data contained in his or her medical records. The exemption provided for by the sixth indent of Article 47 of the HSA must be interpreted restrictively and used only in exceptional cases where accessing health data could actually harm the patient's health. In comparative legal systems, this limitation is applied precisely in relation to psychiatric records.<sup>24</sup> In any event, should there arise a dispute with the doctor, the patient can request that he or she be granted access to the entirety of his or her medical records through a court. The patient is provided this possibility by the provision of Article 20 of the PDPA, on the basis of which an individual who establishes that his or her rights determined by that Act are being violated may request, by means of an action, judicial protection for as long as the violation persists. If the violation has ceased, the individual may still file an action for a declaration that a violation occurred. Such an action is decided on by the Administrative Court in accordance with the provisions of the law regulating proceedings for the judicial review of administrative acts, unless otherwise determined by the PDPA. The proceedings initiated by such an action are urgent proceedings.

34. As regards the special rules and principles to be applied in addition to the general rules and principles concerning personal data in the field of medicine, in 1997 the Council of Ministers of the Council of Europe adopted a special Recommendation (No. R (97) 5) on the Protection of Medical Data. The Recommendation includes,

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24 For more detail on the regulation of this issue in other countries, see V. Flis, *Medicinska dokumentacija in pravice bolnikov* [Medical Records and the Rights of Patients], *Pravna praksa*, No. 19/98. The German Federal Court restricted the limitation of a patient's right to access his or her own medical records only to individual cases of psychiatric and psychotherapeutic treatment. In accordance with the cited judgment of this Court, also a psychiatric patient has an unlimited right to access all objective medical data (lab reports, x-ray images, etc.), while the psychiatrist may limit or prevent the patient's access to his or her own [i.e. the psychiatrist's] personal notes and assessments in the records, the disclosure of which could severely disturb the treatment process or the psychiatrist-patient relationship.

*inter alia*, provisions on the right to access data. The person to whom the medical data refer should have the right to access such data either directly, through a doctor, or through a health-care professional employed at the institution. The information must be accessible in an understandable form. Access may only be limited if so determined by law and only in expressly determined cases, including, *inter alia*, in the event that access to medical data would harm the health of the person whom the data refer to and who requests access thereto.<sup>25</sup>

35. As already stated, the limitation of the right to access medical records must be considered an exception to only be applied where necessary (in exceptional cases). As a general rule, the doctor must, at the patient's request, at all times and unconditionally enable the patient to access all of his or her objective and original medical data, and to transfer the content of the data (by copying). In exceptional cases, the doctor may limit or prevent access to his or her own personal notes and assessments in the records, the disclosure of which could severely disturb the treatment process or the doctor-patient relationship. This is the only way the challenged provision of the sixth indent of Article 47 of the HSA can be interpreted. It is of essential importance that in the event of a dispute with a doctor, the patient can exercise his or her right to access medical records through a court (in proceedings for the judicial review of administrative acts). Considering all of the above, the Constitutional Court assesses that the challenged provision of the sixth indent of Article 47 of the HSA is not inconsistent with the Constitution.

## B – V

### *The Review of Article 48 of the HSA*

36. On the basis of the provision of Article 48 of the HSA, an emergency medical procedure may be carried out without the prior consent of the patient, but only if the patient is incapable of making a decision thereon due to his or her health condition.
37. The HSA in principle also resolves the issue of the consent of the patient and the associated explanatory duty.<sup>26</sup> On the basis of Article 47 of the HSA, everyone is guaranteed the following rights:
- to learn of the diagnosis of his or her illness and the scope, manner, quality, and expected length of treatment;
  - to give consent to any medical procedure and to be informed in advance of all possible diagnosis and treatment methods, and their consequences and effects;
  - to reject the proposed medical procedures.

For children under the age of 15 and persons under guardianship, these rights are exercised by their parents or guardians (the second paragraph of Article 47 of the HSA). The provision of Article 48, on the other hand, refers to situations where the patient's

25 Taken from J. Čebulj, *Načela varstva osebnih podatkov na področju medicine* [The Principles of the Protection of Personal Data in the Field of Medicine], Pravna praksa, No. 19/98.

26 A. Polajnar - Pavčnik, *Obligacijski vidiki razmerja med bolnikom in zdravnikom* [Aspects under the Law of Obligations concerning the Relationship Between Patient and Doctor]; in A. Polajnar - Pavčnik, D. Wedam Lukić (Eds.), *Pravo in medicina* [The Law and Medicine], in the *Pravna obzorja* collection, Cankarjeva založba, Ljubljana 1998, p. 113.

health condition renders him or her incapable of giving consent to an emergency medical procedure. As a general rule, the doctor must respect the patient's right to make decisions about him- or herself, which is based on appropriate information regarding the relevant facts that refer to the medical procedure.<sup>27</sup> However, in the event that the patient's health condition renders him or her incapable of giving prior consent and the medical procedure must be urgently carried out, the patient's objective interest in being healthy must also be taken into account. In such an event, deeming the patient's right to make decisions about him- or herself to be an absolute right would be excessive.

38. The CHRB, too, determines that in emergency medical cases, where the appropriate consent cannot be obtained, any medically necessary procedures may be carried out immediately for the benefit of the health of the individual concerned (Article 8). In such cases, the wishes of the individual relating to a medical procedure expressed prior to the moment when the situation preventing him or her from giving valid consent arose must be taken into account (Article 9 of the CHRB). Also important is the provision of the first paragraph of Article 6 of the CHRB, which determines that, subject to the provisions of Articles 17 and 20 of the Convention, a medical procedure may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit. Where, according to law, an adult does not have the capacity to consent to a medical procedure because of a mental disability, an illness, or for similar reasons, the procedure may only be carried out with the authorisation of his or her representative, or an authority or a person or body provided for by law (the third paragraph of Article 6 of the CHRB).
39. Article 48 of the HSA deals with the conflict of two personality rights of the patient, the right to life and health, on one hand, and the right to make decisions about oneself, on the other. Both of these two personality rights are also protected at the constitutional level, as they are derived from Article 35 of the Constitution. The aim that the legislature pursued in drafting the provision of Article 48 of the HSA was the protection (preservation) of the patient's life. In order to achieve this aim, the legislature interfered with the patient's right to make decisions about him- or herself. The Constitutional Court therefore assessed whether the interference with the mentioned right of the patient is admissible in order to safeguard another of his or her personality rights, i.e. the right to life and health. As already stated in Paragraph 17 of the reasoning, the Constitutional Court assesses every interference with a human right in accordance with the strict test of proportionality.
40. The Constitutional Court first assessed whether the interference with the right to make decisions about oneself is necessary to achieve the legislature's admissible aim, i.e. to protect the patient's life. It follows from the wording of the Act that only an emergency [i.e. absolutely necessary] medical procedure may be carried out without the prior consent of the patient. The decision on when a medical procedure is absolutely necessary must be left to the medical profession. Only a doctor can decide on the basis of the rules of the medical profession whether the health condition of the

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27 *Ibidem*.

person concerned is such that it is urgently necessary to perform a particular medical procedure. These are cases of extreme urgency, when the person concerned cannot give consent, and the medical procedure cannot be refused.<sup>28</sup> In the context of the assessment of the provision of Article 48 of the HSA, it must be emphasised that personality rights not only include the right to make decisions about oneself, but are also directed towards the protection of life and health.<sup>29</sup> In such cases, the doctor is bound by the ethical maxim to preserve life. In a conflict of personality rights, with the right to make decisions about oneself on the one hand, and the right to life and health, on the other, the latter prevails. These are exceptional cases where the protection of the right to life and health cannot be guaranteed without an interference with the right to make decisions about oneself. Human life is beyond a doubt one of the fundamental values protected by the Constitution. The Constitutional Court thus assesses that the interference with the right to make decisions about oneself that the legislature determined by Article 48 of the HSA is necessary and appropriate for achieving the desired legitimate aim i.e. to protect the patient's life.

41. In the assessment of proportionality in the narrower sense, the Constitutional Court weighs the importance of the right affected by the interference against the right to be protected by such interference, and determines the weight of the interference according to how affected the right is. The very wording of the provision of Article 48 of the HSA contains the criterion of proportionality, as the legislature envisaged an interference with the right to make decisions about oneself only for emergency cases, where the patient's health condition renders him or her incapable of forming a legally relevant intent and the medical procedure is urgently necessary. In emergency cases, the doctor must act so as to save the patient's life. In such cases, the law draws on the conclusion that the doctor, were there to be a violation of the right to make decisions about oneself, will later be able to observe this right; if, however, due to doubt, the doctor had not saved the patient's life, this right would have been lost forever.
42. Considering all of the above, the Constitutional Court decided that the provision of Article 48 of the HSA is not inconsistent with Article 35 of the Constitution.

## B – VI

### *The Review of Article 51 of the HSA*

43. In accordance with the provision of the fourth paragraph of Article 51 of the HSA, only the treating physician can give the patient's close relatives or guardian information regarding the patient's health condition. The petitioner alleges that this provision is inconsistent with Articles 35 and 38 of the Constitution, Article 8 of the ECHR, and also the first paragraph of Article 10 of the CHRB. The mentioned statutory provision allegedly allows an interference with the inviolability of an indi-

28 Cf. A. Finžgar, *Osebnostne pravice* [Personality Rights], Slovenska akademija znanosti in umetnosti, Ljubljana 1985, p. 67.

29 A. Polajnar - Pavčnik: A person's will is pushed to the background also in certain other instances, for example in instances of first aid, treatment following an attempted suicide, and euthanasia, where the doctor does not and must not follow the patient's will, but is bound by the ethical maxim to preserve life (p. 115).

vidual's privacy and the right to the protection of personal data without fulfilling the conditions determined therefor by the Constitution and international legal acts.

44. The petitioner's allegation is unfounded. The mentioned statutory provision must namely be interpreted in conjunction with the provision of the seventh indent of Article 47 of the HSA, on the basis of which anyone may request that medical staff and their co-workers not provide information on his or her health condition to anyone without his or her express consent. Hence, every patient has the possibility to expressly prohibit the provision of any information on his or her health condition, even to his or her closest relatives. This also applies to cases of treatment in a psychiatric hospital.

### C

45. The Constitutional Court adopted this Decision on the basis of Articles 21, 48, and the second paragraph of Article 40 of the CCA, and 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, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr Ciril Ribičič, Dr Mirjam Škrk, and Jože Tratnik. The decision was reached unanimously.

*Dr Dragica Wedam Lukić*  
*President*

Decision No. **U-I-294/12**, dated 10 June 2015

### DECISION

At a session held on 10 June 2015 in proceedings to review constitutionality initiated upon the request of the Human Rights Ombudsman, the Constitutional Court

*decided as follows:*

1. The third sentence of the second paragraph and the third sentence of the third paragraph of Article 74 of the Mental Health Act (Official Gazette RS, No. 77/08) are abrogated.
2. The abrogation shall take effect one year following the publication of the present Decision in the Official Gazette of the Republic of Slovenia.
3. Until a different statutory regulation is adopted or, at the latest, until the expiry of the time limit referred to in the preceding Point, judicial review regarding the deprivation of liberty of persons deprived of legal capacity must be ensured. A person deprived of legal capacity shall be committed to a secure ward of a social care institution with the permission of his or her legal representative. Within eight days of a person's commitment to a secure ward, the social care institution must submit to a court the proposal for the person's commitment in accordance with the procedure determined by Article 75 of the Mental Health Act.
4. In cases where persons deprived of legal capacity have been committed to secure wards on the basis of the regulation referred to in Point 1 of the operative provisions of this Decision and are still committed thereto on the day of the publication of this Decision, social care institutions must submit to a court, within 30 days from the publication of this Decision in the Official Gazette of the Republic of Slovenia, the proposal for the person's commitment in accordance with the procedure determined by Article 75 of the Mental Health Act.

*Reasoning*

### A

1. The applicant challenges the second and third paragraphs of Article 74 of the Mental Health Act (hereinafter referred to as the MHA) in the part in which it regulates the

procedure for committing a person deprived of legal capacity to a secure ward of a social care institution. It is of the opinion that the challenged regulation is inconsistent with the third and fourth paragraphs of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, Nos. 33/94, MP, and 7/94 – hereinafter referred to as the ECHR), as well as with Articles 14, 19, 22, and 23 of the Constitution, because it does not ensure judicial protection to a person deprived of legal capacity in the event he or she is committed to a secure ward of a social care institution with the consent of his or her legal representative. It underlines that the challenged regulation does not even enable a person deprived of legal capacity to participate in the procedure for commitment to a secure ward. The commitment of a person deprived of legal capacity to a secure ward is namely deemed, in accordance with Article 74 of the MHA, to entail voluntary commitment, although it is only the legal representative who gives his or her consent to the commitment. In connection therewith, the MHA also does not determine any form of supervision over the decision made by the person's legal representative. Legal protection is allegedly completely excluded in such cases. Such a regulation allegedly differs significantly from the previous regulation determined by the Non-litigious Civil Procedure Act (Official Gazette SRS, Nos. 30/86, etc. – hereinafter referred to as the NLCPA), which determined, in Article 71, that the commitment of a person deprived of legal capacity entailed involuntary commitment, and provided for judicial review of such. With regard to the above, the applicant is of the opinion that in comparison with the regulation previously in force, the MHA substantially worsened the position of such persons and exposed them to the risk of possible abuses. Any person who with the consent of his or her legal representative is committed to a secure ward should be ensured the procedural safeguards determined by the third and fourth paragraphs of Article 5 of the ECHR. Since this is not so, the challenged regulation is allegedly inconsistent with Article 5 of the ECHR and Article 8 of the Constitution. The applicant is also of the opinion that the challenged regulation is inconsistent with Article 19 of the Constitution, as it concerns a *de facto* deprivation of liberty and an interference with the right to personal liberty (the first paragraph of Article 19 of the Constitution), with regard to which the MHA does not determine a procedure in which, after the procedure for taking evidence is carried out, an appropriate (judicial) authority would decide on a proposal for the limitation of the right to personal liberty of a person deprived of legal capacity. Allegedly, the challenged regulation does not provide such a person even the basic safeguards that would allow the procedure to be fair and adversarial, i.e. the right to a counsel and the right to request that a court-appointed expert witness who is not bound (e.g. contractually) by the institution to which the person is to be committed give his or her opinion on the person's health condition. Such a person is thus allegedly put in a position that is worse than that of a person not deprived of legal capacity. The applicant is of the opinion that in cases where what is at issue is the question of the personal liberty of an individual, the legal representative should only be empowered to assist the person deprived of legal capacity to make a decision and should not be empowered to represent such a

person in expressing his or her will or even to substitute for the will of such person. The applicant draws attention to the fact that this interference with personal liberty has no limitations and that there is no supervision over it. Only the legal representative of such a person can withdraw his or her consent to the commitment thereof to a secure ward. Such an interference with personal freedom is thus allegedly arbitrary and unacceptable. Allegedly, in *Shtukaturv v. Russia*, dated 27 March 2008 and in *Stanev v. Bulgaria*, dated 17 January 2012, also the European Court of Human Rights (hereinafter referred to as the ECtHR) expressly drew attention to the need for judicial review in such cases. Furthermore, various legal acts of the Council of Europe, as well as the Convention on the Rights of Persons with Disabilities (Official Gazette RS, No. 37/08, MP, No. 10/08 – hereinafter referred to as the CRPD), express the need to ensure the protection of the human rights and dignity of persons with mental disorders, especially those who are committed or treated against their will. The challenged regulation is allegedly also inconsistent with Article 23 of the Constitution, as judicial protection regarding the lawfulness of their commitment is not ensured to such persons. Since the challenged regulation also does not determine the possibility of their (active) participation before a court and, hence, does not ensure effective exercise of their rights, it is, allegedly, also inconsistent with Article 22 of the Constitution. Persons deprived of legal capacity who with the consent of their legal representative are committed to a secure ward are allegedly also in an unequal position in comparison with other persons that are involuntarily committed in conformity with the MHA, which allegedly also constitutes a violation of Article 14 of the Constitution. Namely, only in a situation concerning the former does their legal representative exclusively decide on both commitment to and discharge from such a ward.

2. In its reply to the applicant's request, the National Assembly alleges that the challenged regulation is based on the presumption that such a person is not capable of forming an intention and therefore cannot give his or her consent. Since a person deprived of legal capacity is allegedly incapable of consenting, his or her will is substituted for by the will of his or her guardian. The Marriage and Family Relations Act (Official Gazette RS, No. 69/04 – official consolidated text – hereinafter referred to as the MFRA), which regulates the tasks of the guardian of a person deprived of legal capacity, also introduced mechanisms designed to ensure the protection of a ward's interests and determined the obligation of supervision over the guardian's work and his or her obligation to report to a social work centre. For such reason, the National Assembly is of the opinion that in proceedings for depriving such a person of legal capacity, as well as in the procedure in which he or she is placed under guardianship, in the procedure for appointing or discharging a guardian, and in the determination of the scope of the guardian's tasks, such a person is ensured legal, i.e. judicial, protection. Due to the protection of the rights of persons in the field of mental health, the MHA also provided for the institute of a representative. According to the National Assembly, although the challenged regulation interferes with personal liberty, it cannot be equated with the deprivation of liberty within the meaning of the fourth paragraph of Article 5 of the ECHR and Articles 19, 32, 34, and 35 of the Constitu-

tion. It is also of the opinion that the other alleged inconsistencies of the challenged regulation with the Constitution do not exist.

3. Also the Government submitted an opinion, in which it draws attention to the fact that in order to commit a person deprived of legal capacity to a secure ward the conditions set out in the first paragraph of Article 74 of the MHA must be fulfilled and the consent of his or her legal representative must be given. The conditions determined by the first paragraph allegedly entail the principal grounds for commitment to a secure ward. The existence of these grounds must allegedly be monitored and verified throughout the stay of the person concerned in a secure ward. The social care institution should therefore establish by itself that with regard to a certain person there exists a need for permanent care and protection that cannot be provided in any other manner. If during the provision of services to a person in such a ward it is established that the grounds for the placement of this person in such a ward have ceased, i.e. that the conditions determined by the first paragraph of Article 74 of the MHA have ceased, then such a person should allegedly be transferred, i.e. discharged, from the secure ward without the necessity to also obtain the consent of his or her legal representative. The Government also disagrees with the allegation of the applicant that the MHA substantially worsened the position of persons deprived of legal capacity. In its opinion, the NLCPA did not regulate the procedure for committing such persons to a secure ward of a social care institution.
4. The reply of the National Assembly and the opinion of the Government were sent to the applicant. In its reply to the allegations of the National Assembly and the Government, the applicant continues to pursue the request and maintains all the allegations contained therein. Concerning the allegations of the Government that the legal representative merely substitutes for the consent of the person in the procedure for commitment to a secure ward of a social care institution after the conditions set out in the first paragraph of Article 74 of the MHA have been fulfilled, it adds that this is precisely where the key disputable part of the challenged regulation lies. Allegedly, it is precisely for this reason (because it is deemed that the matter concerns voluntary commitment) that a person deprived of legal capacity may not even participate in such a procedure. Furthermore, with regard to the allegation of the Government that the challenged regulation follows the line of the regulation of guardianship in the MFRA, the applicant replies that in a study entitled "*Daleko od očiju*", the Mental Disability Advocacy Centre already drew attention to the disputability of a similar regulation of guardianship in the Republic of Croatia. This study is accessible on the website of that organisation. With regard to the opinion of the Government that before the adoption of the MHA the procedure for committing persons to a secure ward was not statutorily regulated, the applicant states that according to its findings presented in the 2008 Annual Report of the Ombudsman the case law of various local courts differed as regards involuntary commitment to social care institutions and retirement homes.

## **B**

5. The MHA determines the system of health care and social care in the field of mental health, who performs this activity, and the rights of persons during their treatment in a ward under the special supervision of a psychiatric hospital, care in a secure ward of a social care institution, and supervised care (the first paragraph of Article 1 of the MHA). The programmes and services<sup>1</sup> determined by the MHA are carried out as a public service (Article 4 of the MHA).<sup>2</sup>
6. One of the services or programmes determined by the MHA is the provision of care for persons in a secure ward of a social care institution. This entails a form of assistance offered to persons with mental health difficulties whose (psychiatric) treatment has been concluded and with regard to whom the need for acute hospital treatment no longer exists, whose needs, however, do necessitate round-the-clock care, as they are not capable of satisfying by themselves or with the assistance of a home care assistant or relatives their basic life needs (due to which their health might be in danger, and possibly their life as well). Hence, this service covers not only treatment, but also a social care mechanism, due to which care for a person in a secure ward must be deemed to entail a service in which the right to social security determined by the first paragraph of Article 50 of the Constitution and the right to health care determined by the first paragraph of Article 51 of the Constitution are intertwined.
7. A person is committed to a secure ward of a social care institution if all of the following conditions are fulfilled:
  - acute hospital treatment has been concluded or is not necessary;
  - the person needs round-the-clock care that cannot be provided in a domestic environment or otherwise;
  - the person poses a danger to his or her own life or to the life of others, he or she poses a severe danger to his or her own health or to the health of others, or he or she causes substantial material damage to him- or herself, or to others;
  - the danger referred to in the preceding indent is a consequence of a mental disorder due to which the person has a severely disturbed assessment of reality and the capacity to control his or her own actions;
  - the stated causes and dangers referred to in the third and fourth indents of this paragraph cannot be prevented by other forms of assistance (outside of the social care institution, in supervised care);
  - the person fulfils the other conditions for commitment to a social care institu-

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1 In such manner it regulates the procedures for the commitment of persons (individuals with a mental disorder who are treated or cared for within the framework of the network of providers of mental health programmes and services; point 13 of Article 2 of the MHA) to treatment in a ward under the special supervision of a psychiatric hospital, to care in a secure ward of a social care institution, to supervised care, or to care in a community.

2 The MHA was intended to determine the legal framework for long-term and comprehensively conceived mental health protection (Gazette of the National Assembly, No. 61/08, p. 4). It superseded Articles 70 through 81 of the NLCPA, which regulated the procedure for the involuntary commitment of persons to psychiatric health care institutions. By Decision No. U-I-60/03, dated 4 December 2003 (Official Gazette RS, No. 131/03, and OdlUS XII, 93), the Constitutional Court established that the regulation of involuntary commitment to a closed ward of a psychiatric hospital was (for various reasons) inconsistent with the Constitution.

tion determined by the regulations in the field of social care (the first paragraph of Article 74 of the MHA).

8. If all of the mentioned conditions are fulfilled cumulatively, a person is committed to a secure ward with or without his or her consent (Article 73 of the MHA). Commitment to a secure ward without a person's consent is only admissible on the basis of a court order following a procedure in which Articles 40 through 52 of the MHA are applied *mutatis mutandis*; these articles regulate commitment to treatment in a psychiatric hospital without consent, namely in a ward under special supervision, on the basis of a court order (Article 75 of the MHA).<sup>3</sup> In the procedure, obligatory representation by an authorised representative who is an attorney is prescribed (the first paragraph of Article 31 of the MHA). The person concerned is examined on the basis of a court order by a court-appointed expert witness, namely a psychiatric expert, who submits his or her opinion on the person's health condition (the first paragraph of Article 43 of the MHA). A court decides on the commitment of the person on the basis of direct contact with him or her so that, before issuing the order, it sees the person and, if his or her health condition allows it, talks to him or her (the second paragraph of Article 46 of the MHA). If the person does not have legal capacity, the court allows him or her to carry out procedural actions by him- or herself if he or she is able to comprehend the meaning and the legal consequences of such actions (the second paragraph of Article 32 of the MHA). As concerns the discharge of a person from a secured ward, Article 71 of the MHA, which regulates the discharge of a person from a ward under special supervision, applies. In the event a person is committed to a secure ward with his or her consent, such consent must be an expression of the person's free will based on comprehension of the situation and formed on the basis of an appropriate explanation regarding the nature and purpose of care for him or her. The consent must be given in written form (the second paragraph of Article 74 of the MHA). A person who has consented to being committed to a secure ward can, at any time, expressly or by actions from which such can be inferred, withdraw his or her consent and request that he or she be discharged from the secured ward.
9. The consent [in the name] of a person deprived of legal capacity<sup>4</sup> to be committed to a secure ward of a social care institution is given by his or her legal representative.<sup>5</sup>

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3 A person deprived of legal capacity is committed to a psychiatric hospital for treatment in a ward under special supervision on the basis of a court order (Articles 40 through 52 of the MHA). Also the legal representative of such a person may submit a proposal for the commitment thereof to such ward (the second paragraph of Article 40 of the MHA).

4 Persons who due to their mental illness, mental retardation, alcohol or drug dependence, or any other reason that affects their psychophysical condition, are not capable of taking care of themselves and of securing their own rights and interests, shall be partially or entirely deprived of their legal capacity (Article 44 of the NLCPA).

5 Social work centres assign a person deprived of legal capacity a guardian (the first paragraph of Article 206 of the MFRA). A guardian represents his or her ward (the first paragraph of Article 192 of the MFRA). A guardian must in particular foster his or her ward's personality and, in doing so, take into account the reasons due to which the person concerned was deprived of legal capacity. He or she must also strive to eliminate these reasons so as to enable the ward to learn how to live and work independently (Article 207 of the MFRA). In accordance

The latter can also request that his or her ward be discharged, namely by withdrawing his or her consent (the second and third paragraphs of Article 74 of the MHA). In such manner, the legal representative substitutes for the will of the person deprived of legal capacity. For such reason, it is deemed that such a person is being treated and cared for in a secure ward of a social care institution of his or her own volition.

10. The subject of review in the case at issue is the procedure for committing a person deprived of legal capacity to care in a secure ward of a social care institution<sup>6</sup> with the consent of his or her legal representative, as regulated by the third sentence of the second paragraph and the third sentence of the third paragraph of Article 74 of the MHA. The applicant's fundamental allegation is that the challenged regulation, although it is statutorily defined as "voluntary commitment", unconstitutionally interferes with the right of the person deprived of legal capacity to personal liberty determined by the first paragraph of Article 19 of the Constitution and the first paragraph of Article 5 of the EHCR.
11. In the first paragraph of Article 19, the Constitution guarantees the right to personal liberty. The Constitution prescribes special safeguards for all instances of limitations of personal liberty. The general safeguard relating to the limitation of the right to personal liberty is determined by the second and third paragraphs of Article 19 of the Constitution. The second paragraph of Article 19 of the Constitution determines that no one may be deprived of his or her liberty except in such cases and pursuant to such procedures as are provided by law. An interference with the right to personal liberty is thus only admissible in statutorily determined cases and in accordance with statutorily determined procedures for the deprivation of liberty.<sup>7</sup> The third paragraph of Article 19 of the Constitution then determines further safeguards that apply to persons at the moment of being deprived of their liberty (the instruction regarding the grounds for the deprivation of liberty and the instruction regarding certain rights). These procedural safeguards must be taken into account *mutatis*

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with the MHA, a guardian as the legal representative of a person deprived of legal capacity can participate in the procedures and measures regulated by that Act in different ways. For instance, he or she can submit a proposal for such a person to be committed without his or her consent, on the basis of a court order, to treatment in a ward under special supervision (the second paragraph of Article 40 of the MHA), a proposal for treatment in supervised care (Article 81 of the MHA), or a proposal to carry out administrative supervision over the ordering and implementation of a special security measure (the eighth paragraph of Article 29 of the MHA).

- 6 A social care institution is a general or special public social care institution or holder of a concession that provides services within the framework of a network of a public service and is intended for the protection, accommodation, and life [in general] of persons whose acute hospital treatment related to a mental disorder has concluded or is not necessary.
- 7 The Constitutional Court defined the conditions under which an interference with the personal liberty of an individual is constitutionally admissible already in Decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS, No. 25/96, and OdlUS V, 40), which referred to the deprivation of liberty in criminal proceedings. It stressed that the Constitution differentiates between [two different expressions for] liberty. No one may be deprived of his or her liberty [in the broader sense]; however, it is possible to temporarily limit it. An individual may namely be deprived of his or her liberty [in the narrower sense], but this must at all times be envisaged and legally regulated from both the substantive and procedural aspects.

*mutandis* in any procedure for the deprivation of liberty.<sup>8</sup> Hence, it does not follow from the Constitution that regardless of the nature and purpose of the deprivation of liberty the decisions regarding such a measure should (only) be adopted in a criminal procedure or in a procedure that satisfies the safeguards of a criminal procedure.<sup>9</sup>

12. By the second paragraph of Article 19 of the Constitution, the constitution-framers determined that the cases in which it is admissible to interfere with the right to personal liberty and the determination of the procedure in accordance with which competent state authorities must act in such instances shall be regulated by law. In doing so, the legislature must observe other constitutional provisions, in particular, the third paragraph of Article 15 of the Constitution, in accordance with which human rights and fundamental freedoms may be limited only due to the rights of others and in such cases as are provided by the Constitution. It also must observe the principles of a state governed by the rule of law determined by Article 2 of the Constitution, including, *inter alia*, the general principle of proportionality, which binds the legislature when determining limitations of human rights. The Constitutional Court stressed already in Decision No. U-I-18/93 that the two mentioned fundamental conditions (i.e. that the law must determine the instances and the procedure for the deprivation of liberty) for an interference with the right to personal liberty to be admissible are determined in more detail in the provisions of the Constitution that follow, in particular, those that regulate constitutional procedural safeguards (i.e. Articles 22, 23, and 25 of the Constitution). Hence, liberty may only be limited in instances expressly determined by law, and in accordance with a procedure that is, taking into account the constitutional procedural safeguards, determined by law. The fundamental prerequisite of a constitutionally consistent limitation of liberty is the right to be the subject of such a procedure.
13. Similarly as in the Constitution, the right to personal liberty is also guaranteed by the first paragraph of Article 5 of the ECHR. The latter provision contains the same obligation as is determined by the second paragraph of Article 19 of the Constitution, with the only difference being that it exhaustively determines the instances in which it is admissible to deprive an individual of his or her liberty. Among them, in point (e)<sup>10</sup> of the first paragraph of Article 5 it provides for the lawful detention [i.e. involuntary commitment] of persons of unsound mind (*aliénés*). The second paragraph of Article 5 determines that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. The third and fourth paragraphs of Article 5 then deter-

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8 Cf. Decisions of the Constitutional Court No. U-I-60/03, dated 4 December 2003 (Official Gazette RS, No. 131/03, and OdlUS XII, 93, Paragraph 12 of the reasoning), and No. Up-153/05, dated 12 May 2005 (Official Gazette RS, No. 53/05, and OdlUS XIV, 42, Paragraph 5 of the reasoning).

9 Cf. Decisions of the Constitutional Court No. U-I-60/03; No. U-I-344/06, dated 20 November 2008 (Official Gazette RS, No. 113/08, and OdlUS XVII, 61); and No. Up-1116/09, dated 3 March 2011 (Official Gazette RS, No. 22/11).

10 This provision refers to very diverse groups of persons. From the case law of the ECtHR it follows that the reason for the deprivation of the liberty of persons referred to therein can be of a medical and/or social nature (Judgment of the ECtHR in *Witold Litwa v. Poland*, dated 4 April 2000).

mine the procedural safeguards that must be ensured in the procedure for the deprivation of liberty (i.e. bringing the person promptly before a judge; a trial within a reasonable time or his release pending trial; the right to initiate proceedings by which the lawfulness of his detention is decided speedily by a court and his release ordered if the detention is not lawful). The latter safeguard, i.e. the right to judicial protection (judicial review) regarding the lawfulness of detention, is one of the fundamental rights of an involuntarily committed person suffering from a mental disorder. The requirement stated in the fourth paragraph of Article 5 of the ECHR is fulfilled if a person with a mental disorder is ensured the possibility to propose that a court verify whether the statutory grounds for detention (still) exist or if automatic periodic verification of whether grounds for detention still exist is ensured.<sup>11</sup> This position of the ECtHR follows from its judgment in *Winterwerp v. the Netherlands*, dated 24 October 1979, in which the Court stated that it is of essential importance that persons are ensured access to a court and the possibility to make a statement, either by him- or herself, or, whenever this is not possible, by means of some form of representation. Hence, also in such procedures the ECtHR requires that the right to an adversarial procedure be observed. In proceedings before a court the so-called “equality of arms” must be ensured.<sup>12</sup> In such context, it is important that a person who has been detained [or involuntarily committed] has the possibility to access the documents containing the information on the basis of which he or she has been detained, and to present evidence to his or her benefit.<sup>13</sup>

14. In *Winterwerp v. the Netherlands*, the ECtHR introduced three fundamental requirements that must be fulfilled in order for the detention of persons with a mental disorder to be lawful.<sup>14</sup> In accordance with the position of the ECtHR, the detention of persons with a mental disorder is only admissible if on the basis of objective health standards a mental disorder (*troubles mentaux*) is demonstrated and if due to the nature or severity of the mental disorder the patient poses a serious danger to others or to him- or herself. The third requirement refers to the duration of detention. The detention may only last as long as the mental disorder that justifies it persists. The ECtHR stresses that psychiatric involuntary commitment must be medically indicated.<sup>15</sup> However, in cases of emergency it does allow that a person with a mental disorder be involuntarily committed even without a prior exhaustive medical examination.<sup>16</sup> In accordance with the case law of the ECtHR, these requirements do not apply only to instances of involuntary commitment on the basis of a decision by a

11 Cf. the Decision of the Grand Chamber of the ECtHR in *Stanev v. Bulgaria*.

12 See Decision of the Constitutional Court No. U-I-60/03.

13 In *Nikolova v. Bulgaria*, dated 25 March 1999, the ECtHR stated that equality of arms is not ensured if a court denies a party access to those documents which are essential in order for a decision on detention to be made.

14 The ECtHR keeps reiterating and underlining these requirements over and over again. See, e.g. the Judgments in *Shtukaturov v. Russia*, *Stanev v. Bulgaria*, and *Zagidulina v. Russia*, dated 2 May 2013.

15 In *Varbanov v. Bulgaria*, dated 5 October 2000, the ECtHR stressed that an expert medical opinion (assessment) regarding a patient must be based on the current health condition of the person and not merely on past events.

16 Judgment of the ECtHR in *X v. the United Kingdom*, dated 5 November 1981.

court, but also (even more so) to instances where the commitment of a person is a consequence of the decision or proposal of another natural person, i.e. a guardian of the person committed, with regard to which the authorities in power are in different ways included or involved in the procedure for involuntary commitment.<sup>17</sup>

15. With regard to the fact that the MHA treats the commitment of a person deprived of legal capacity to a secure ward of a social care institution in the same manner as the commitment of a person who gave his or her consent by him- or herself, i.e. as voluntary commitment, it is first necessary to answer the question of whether the case at issue concerns an interference with personal liberty. A person who is committed to a secure ward by the consent of his or her legal representative and not by his or her own consent also cannot leave such ward of his or her own volition. He or she may only leave such in the event the social care institution establishes that the conditions determined by the first paragraph of Article 74 of the MHA are no longer fulfilled or if [the consent for] placement in a secure ward is withdrawn by the person's legal representative. In such context, it must furthermore be noted that the MHA does limit the length of time that a person committed to a secure ward by the consent of his or her legal representative may be placed therein, which differs from the [regulation concerning the] placement of persons in such a ward on the basis of a court order. The length of commitment in a secure ward on the basis of a court order can be determined to be up to one year at most. Prolongation of commitment is only possible on the basis of a court order and under the conditions determined by Article 70 of the MHA. It undoubtedly follows from the above that the challenged regulation interferes with the right of these persons to personal liberty, which is determined by the first paragraph of Article 19 of the Constitution.<sup>18</sup>
16. The first requirement for the admissibility of the deprivation of liberty in accordance with the second paragraph of Article 19 of the Constitution is that the case concerns a situation provided by law. The ECHR expressly determines the cases in which it is admissible to deprive an individual of his or her liberty. The ECHR classifies among such cases the lawful detention of persons of unsound mind (point (e) of the first paragraph of Article 5). Both the ECHR and the Constitution provide equal protection of the right to personal liberty. Therefore, the Constitutional Court carried out the assessment of the challenged regulation within the framework of the Constitution.<sup>19</sup> The first paragraph of Article 74 of the MFRA determines the substantive conditions for the commitment of a person to a secure ward. By defining the conditions (cited

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17 See also the Judgments of the ECtHR in *Shtukaturv v. Russia* (concerning an individual who had been committed to a psychiatric hospital); *Mihailovs v. Latvia*, dated 22 January 2013 (concerning an individual who had been committed to a state social care centre); *Storck v. Germany*, dated 16 June 2005 (regarding which the police returned a woman who had escaped from a private clinic). In *D. D. v. Lithuania*, dated 14 February 2012, a guardian proposed that his ward be committed to a social care institution and his proposal was granted by the competent city and social care authorities. These cases are similar to the case at issue.

18 Cf. what was stated above with the Judgments of the ECtHR in *Shtukaturv v. Russia*, *Stanev v. Bulgaria*, and *Kędzior v. Poland*, dated 16 October 2012.

19 Cf. Decision of the Constitutional Court No. U-I-12/12, dated 11 December 2014 (Official Gazette RS, No. 92/14).

in Paragraph 7 of the present reasoning) for the deprivation of the liberty of persons with regard to whom the circumstances set out by the first paragraph of Article 74 of the MHA do exist, the legislature satisfied the requirement to statutorily regulate the interference with the personal liberty of persons suffering from a mental disorder.

17. The second requirement that follows from the second paragraph of Article 19 of the Constitution is that the deprivation of liberty is only carried out “pursuant to such procedures as are provided by law”. In Decision No. U-I-18/93 the Constitutional Court stressed that the Constitution determines the framework of the legislature’s regulation of the procedure. Also the procedure has to be determined in advance and in accordance with the constitutional procedural safeguards. Concerning the requirement of the lawfulness of the procedure for the deprivation of liberty, the ECtHR requires not only that the procedure for the deprivation of liberty is to be regulated by law and that each individual deprivation of liberty is to be carried out in accordance with these rules, but also that the statutory regulation is in conformity with the ECHR, including with the general principles expressed or contained therein.<sup>20</sup> It underlines that the “procedure for the deprivation of liberty prescribed by law” must be a fair and proper procedure, i.e. any measure depriving a person of his or her liberty should issue from and be executed by an appropriate authority and should not be arbitrary.<sup>21</sup> The key purpose of the first paragraph of Article 5 of the ECHR is the protection of individuals from arbitrary actions.<sup>22</sup> The ECtHR also stresses that in order for the deprivation of liberty to be “non-arbitrary” within the meaning of the first paragraph of Article 5 of the ECHR, the possibility of an *ex post* judicial review of the lawfulness of the deprivation of liberty as required by the fourth paragraph of Article 5 of the ECHR does not suffice. The safeguards that follow from the first paragraph of Article 5 of the ECHR cannot be equated with the safeguards that follow from the fourth paragraph of Article 5 of the ECHR. Namely, the first paragraph strictly delimits the circumstances in which a person may be deprived of his or her liberty, whereas the fourth paragraph requires *ex post* judicial review of the lawfulness of the deprivation of liberty.<sup>23</sup> It is thus necessary to equally ensure the fulfilment of the conditions for the deprivation of liberty and the conditions for the *ex post* review thereof.
18. Also the Constitution guarantees the mentioned constitutional procedural safeguards. The right to the equal protection of rights determined by Article 22 of the Constitution and the procedural safeguards that follow therefrom must be ensured in all procedures relating to decision-making on the rights, duties, and legal inter-

20 See the Judgments of the ECtHR in *Winterwerp v. the Netherlands*, *Kędzior v. Poland*, and *Zagidulina v. Russia*.

21 See, e.g., the Judgment of the ECtHR in *Kędzior v. Poland*.

22 The ECtHR stresses in its case law that lawfulness cannot be interpreted narrowly, as it does not concern only legality in the sense of a (mere) regulation by law but something more than that. One can only speak of a lawful deprivation of liberty where a person is deprived thereof in accordance with a procedure upon which not even a shadow of a doubt may be cast regarding its [non-]arbitrariness. See, e.g., the Judgments of the ECtHR in *Winterwerp v. the Netherlands*; *D. D. v. Lithuania*; *Shtukaturov v. Russia*; *Sýkora v. the Czech Republic*, dated 22 November 2012; and *L. M. v. Slovenia*, dated 12 June 2014.

23 See the Judgment of the ECtHR in *H. L. v. the United Kingdom*, dated 5 October 2004.

ests of individuals. The right to make a statement is a direct and the most important expression thereof.<sup>24</sup> It guarantees that everyone has the possibility to make a statement in a procedure that affects his or her rights and interests and thus prevents a person from becoming merely an object of the procedure.<sup>25</sup> The procedure for the commitment of a person deprived of legal capacity to a secure ward of a social care institution does not give such person the right to make a statement or any possibility whatsoever to participate in the procedure for the deprivation of his or her liberty. The fact that in such a procedure persons deprived of legal capacity are denied the rights determined by Article 22 of the Constitution is a consequence of the erroneous presumption (see the reply of the opposing party, Paragraph 2 of the reasoning) that persons without legal capacity<sup>26</sup> also do not have the capacity to give consent to a medical procedure or another similar measure or to refuse such. The assessment of whether an individual (not only a person suffering from a mental disorder) has the capacity to give consent is reserved for a doctor or some other [authorised] provider of medical care. Since a person's consent is required for each individual medical procedure or treatment, a doctor assesses such consent in each individual case of treatment separately. The legislature must expressly prescribe any exceptions to this rule. A necessary precondition for so-called informed consent<sup>27</sup> to be given is that the duty of explanation has been fulfilled, to which a doctor is bound (also) by the third paragraph of Article 51 of the Constitution, in accordance with which no one may be compelled to undergo medical treatment except in cases provided by law.<sup>28</sup> When giving an explanation, a doctor must always proceed from the circumstances of the individual case and must always adapt the explanation to each individual patient.<sup>29</sup> In order for the consent to be legally valid, (merely) the

24 See A. Galič in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, pp. 276–277.

25 See also Decision of the Constitutional Court No. U-I-60/03.

26 Legal capacity is a legally recognised capacity to express one's intention to be legally bound and to thereby form, amend, or terminate legal relations by one's own actions (see Z. Krušič Matè, *Pravica do zasebnosti v medicini* [The Right to Privacy in Medicine], GV Založba, Ljubljana 2010, p. 54).

27 Consent regarding a medical procedure is only legally valid if the patient is fully informed regarding such procedure. The doctor must explain to the patient, in a manner he understands, everything that is necessary for him or her to be appropriately informed of the medical procedure and treatment. Only when the doctor fulfils this obligation can the consent be attributed real meaning, as only the informedness ensures the possibility to decide; once the doctor fulfils this obligation, the patient can shape his or her will in a legally valid manner (A. Polajnar Pavčnik, *Varstvo človekovih pravic med zdravljenjem* [The Protection of Human Rights During Treatment], (Part 1), *Podjetje in delo*, No. 6 (1998)). For more on informed consent, see Z. Krušič Matè, *op. cit.*, pp. 44–108.

28 Cf. B. Ivanc in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, pp. 852–853.

29 See A. Žmitek, *Zakon o duševnem zdravju: problemi v praksi* [The Mental Health Act: Problems in Practice], *Pravna praksa*, No. 33 (2009), pp. 6–9. The author states that from both the human side as well as due to the better cooperation of the patient during the treatment, voluntary commitment is significantly more appropriate

fact that the person has mental capacity – i.e. a certain level of maturity<sup>30</sup> that allows the person to comprehend the meaning of the explanation and to appropriately decide on the basis thereof – suffices.<sup>31</sup> On the other hand, this means that even a person who has been deprived of legal capacity (and placed under guardianship) due to his or her mental health problems might be able to give consent to a medical or similar procedure, and also that a person might not be able to give valid consent to a medical procedure although he or she has not been deprived of legal capacity.<sup>32</sup> Hence, the mere fact that a person has been deprived of legal capacity cannot entail that the person is not capable of comprehending the importance and consequences of his or her decision in other fields where legal capacity is not required in order for his or her decisions to be valid.<sup>33</sup>

19. (In fact,) the MHA derives the criteria for [assessing] the capacity to give or reject consent from the Patient Rights Act (Official Gazette RS, No. 15/08 – hereinafter referred to as the PRA),<sup>34</sup> which in relation to the MHA is a general regulation. When determining the measure at issue, the legislature neglected the positions adopted in legal theory and case law that were stated in the preceding paragraph (and which also the PRA is based on). Therefore, due to the presumption that a person deprived of legal capacity is also incapable of giving or refusing consent to his or her treatment and care in a secure ward, the challenged regulation introduces an automatism that renders the assessment of whether a person is capable of giving or refusing his or her consent completely impossible, and thereby prevents him or her from being included in the procedure for the deprivation of his or her liberty. The will of such person and thereby all the safeguards of a fair trial that are guaranteed to him or her within the framework of Article 22 of the Constitution are replaced by a statement of the person's legal representative. The care that is exercised by the

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than involuntary commitment. See also J. Markič, *Pridržanje oseb z motnjami v duševnem zdravju* [Involuntary Commitment of Persons with Mental Health Disorders], *Pravna praksa*, Nos. 16–17 (2009), pp. 6–7.

- 30 In modern law, the capacity to consent (*aptitude à consentir*) is in general linked with mental capacity in decision-making, i.e. the capacity to comprehend the meaning and consequences of one's decision. See B. Novak, D. Korošec, B. Ivanc, and J. Balažic in: J. Balažic, U. Brulc, B. Ivanc, D. Korošec, K. Kralj, B. Novak, N. Pirc Musar, and A. Robida, *Zakon o pacientovih pravicah s komentarjem* [The Patient Rights Act with Commentary], GV Založba, Ljubljana 2009, p. 42. This is also stated in A. Polajnar-Pavčnik, *Obligacijski vidiki razmerja med bolnikom in zdravnikom, Pravo in medicina* [Aspects under the Law of Obligations concerning the Relationship Between Patient and Doctor; in: *The Law and Medicine*], Cankarjeva založba, Ljubljana 1998, p. 106).
- 31 Z. Krušič Matè, *op. cit.*, p. 55.
- 32 B. Novak, D. Korošec, B. Ivanc, and J. Balažic, *op. cit.*, p. 42.
- 33 Cf. Decision of the Constitutional Court No. U-I-346/02, dated 10 July 2003 (Official Gazette RS, No. 73/03, and OdlUS XII, 70). See also the Judgments of the ECtHR in *Kędzior v. Poland*, *Stanev v. Bulgaria*, and *Shtukaturov v. Russia*.
- 34 In accordance with the PRA, a person has the capacity to adopt decisions regarding him- or herself if, with respect to his or her age, maturity, health condition, and other personal circumstances, the person is capable of comprehending the meaning and consequences of the invocation of rights determined by that Act, in particular of consent, refusal, or withdrawal of the refusal to accept a medical procedure or health care (point 19 of Article 2 of the PRA).

legal representative or guardian for his or her ward in accordance with the express statutory definition (Article 207 of the MFRA) cannot be interpreted as meaning that it also includes decision-making on the deprivation of the person's liberty for the purpose of his or her treatment or placement in a social care institution. The deprivation of liberty concerns a value so important that it must be a consequence of a decision adopted in a fair trial. In such context, it must be underlined that when persons with mental disorders and thus possibly also with difficulties with the exercise of their (free) will are at issue, a fair and proper procedure must, despite this fact, ensure such persons as comprehensive and complete participation in the procedure as possible and thereby also the exercise of their human rights and fundamental freedoms. Also the first paragraph of Article 52 of the Constitution, which guarantees persons with disabilities special protection in accordance with the law, obliges the legislature to adopt such (adapted) regulation of the procedure.<sup>35</sup> In such a procedure also a legal representative (a guardian of a person deprived of legal capacity) can be included in an appropriate manner, as care for his or her ward is his or her fundamental task. He or she must thereby also observe the CRPD, by signing of which the Republic of Slovenia committed itself to ensuring and promoting the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability and to adopting all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the [mentioned] Convention (Article 4 of the CRPD).<sup>36</sup> In such context, also the positions of the UN Committee on the Rights of Persons with Disabilities with regard to the general obligations of the Member States under the CRPD must be underlined.<sup>37</sup> The Committee draws attention to the fact that the CRPD requires signatory states to abolish guardianship systems (including the deprivation of legal capacity) and their replacement with systems of support during the decision-making.<sup>38</sup>

20. The challenged regulation of the commitment of persons deprived of legal capacity to a secure ward of a social care institution does not fulfil the requirements that follow, with regard to the procedure in accordance with which such persons can be deprived of their liberty, from the second paragraph of Article 19 of the Constitution (and which are defined in more detail by other constitutional provisions). Due

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35 Cf. the Judgments of the ECtHR in *Zagidulina v. Russia* and *Stanev v. Bulgaria*.

36 Also the European Union ratified the CRPD. It has applied therein since 25 January 2011.

37 United Nations, Convention on the Rights of Persons with Disabilities, Committee on the Rights of Persons with Disabilities, Eleventh Session, 31 March–11 April 2014, General Comment No. 1 (2014), Article 12: Equal recognition before the law, adopted on 11 April 2014. The text is accessible in several languages on the following website: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en).

38 The Committee also draws attention to the fact that depriving persons with disabilities (or *personnes handicapées*) of legal capacity and their commitment to institutions against their will, i.e. without their consent or on the basis of the consent of their guardian, entails an arbitrary deprivation of liberty and violates Articles 12 (equal recognition before the law) and 14 (liberty and security of the person) of the CRPD.

to their inconsistency with the second paragraph of Article 19 of the Constitution (Point 1 of the operative provisions), the Constitutional Court abrogated the third sentence of the second paragraph of Article 74 of the MHA, which reads as follows: “Consent for a person deprived of legal capacity shall be given by his or her legal representative,” and the third sentence of the third paragraph of Article 74 of the MHA, which reads as follows: “In the event the person’s legal representative withdraws his or her consent, the social care institution shall proceed in the same manner.”

21. The Constitutional Court decided that the abrogation shall take effect one year following the publication of the present Decision in the Official Gazette of the Republic of Slovenia (Article 161 of the Constitution and Article 43 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA)). The reason why it opted for such a solution is that the complexity of the regulated content renders an immediate abrogation impossible. In order to provide the legislature with enough time to regulate the procedure for the commitment of persons deprived of legal capacity to secure wards of social care institutions in a constitutionally consistent manner, and taking into account the reasons stated in this Decision, the Constitutional Court decided to suspend the effect of the abrogation for the longest period possible, i.e. for one year (Point 2 of the operative provisions).
22. In order to ensure, during the period of suspended effect of abrogation, at least the essential procedural safeguards when limiting the personal freedom of persons deprived of legal capacity, the Constitutional Court determined, on the basis of its authorisation determined by the second paragraph of Article 40 of the CCA, the manner of the implementation of its Decision. It determined that, during this period, an *ex post* judicial review regarding the commitment of persons deprived of legal capacity to secure wards of social care institutions shall be ensured. To this end, social care institutions must submit to a court, within eight days of the commitment of a person deprived of legal capacity to a secure ward, a proposal to carry out the procedure determined by Article 75 of the MHA (Point 3 of the operative provisions). In order to ensure persons deprived of legal capacity who on the day of the publication of this Decision are [still] committed to secure wards of social care institutions equal fundamental constitutional procedural safeguards, the Constitutional Court determined, also as regards these persons, the manner of the implementation of this Decision. It determined that social care institutions must submit to a court, within 30 days of the publication of this Decision in the Official Gazette of the Republic of Slovenia, a proposal to initiate a procedure in accordance with Article 75 of the MHA (Point 4 of the operative provisions). In such manner, *ex post* judicial control as determined by Article 75 of the MHA will be ensured to both persons deprived of legal capacity who are placed in secure wards, and to persons who have yet to be committed to secure wards during the time period until a constitutionally consistent statutory regulation is adopted or until the expiry of the period of suspended effect of abrogation referred to in Point 2 of the operative provisions of this Decision.

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23. The Constitutional Court adopted this Decision on the basis of Article 43 and the second paragraph of Article 40 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, and Dr Jadranka Sovdat. The decision was reached unanimously.

*Mag. Miroslav Mozetič*

*President*

Decision No. **Up-333/96**, dated 1 July 1999

### DECISION

At a session held on 1 July 1999 in proceedings to decide upon the constitutional complaint of R. M. from L., the Constitutional Court

*decided as follows:*

1. Supreme Court Judgment No. U 1195/94, dated 11 September 1996, Decision of the Ministry of the Interior No. 0013/7-226/179-94, dated 18 July 1994, and Decision of the Secretariat for Internal Affairs of the City of Ljubljana No. P-226/4-2190/94, dated 8 June 1994, are annulled.
2. Supreme Court Judgment No. I Uv 14/95, dated 16 October 1997, is annulled.
3. Until a law regulating the status of citizens of other successor states to the former Socialist Federal Republic of Yugoslavia in the Republic of Slovenia is adopted or until the expiration of the deadlines set out therein, the Administrative Unit must register the complainant in the register of permanent residents of the Republic of Slovenia and issue the complainant a driving licence for this period.

*Reasoning*

### A

1. The complainant has had a registered permanent residence in Slovenia and lived here since 1965. Since he, as a citizen of another republic of the former Socialist Federal Republic of Yugoslavia (hereinafter referred to as the SFRY), failed to apply for Slovene citizenship in accordance with Article 40 of the Citizenship of the Republic of Slovenia Act (Official Gazette RS, Nos. 1/91-I, 30/91-I, 38/92, 61/92 – OdlUS, and 13/94 – hereinafter referred to as the CRSA) following Slovenia's independence, the Ljubljana Administrative Unit removed him *ex officio* from the register of permanent residents on 26 February 1992 and transferred his details to the register of aliens. The complainant's application for the renewal of his driving licence was also dismissed on the grounds that he, as an alien, did not reside lawfully in the Republic of Slovenia and therefore did not fulfil the criteria for the issuing of a Slovene driv-

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ing licence determined by Article 112 of the Road Traffic Safety Act (Official Gazette SRS [Socialist Republic of Slovenia], Nos. 5/82, 40/48, 29/86, and Official Gazette RS No. 1/91-I). Therefore, the complainant lodged an “application for protection due to an unlawful act on the part of the respondent that infringes the already acquired constitutional right to choose his place of residence determined by Article 32 of the Constitution” before the Supreme Court. He also initiated proceedings for judicial review of administrative acts with regard to the refusal to renew his driving licence.

2. The Supreme Court dismissed the lawsuits in both cases. It took the view that the citizens of other republics of the former SFRY who did not apply for Slovene citizenship in accordance with Article 40 of the CRSA had, in accordance with Article 13 of the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (Official Gazette RS, No. 1/91-I – hereinafter referred to as the CAIBCC), equal rights and obligations as the citizens of the Republic of Slovenia only until 26 February 1992 when the provisions of the Aliens Act (Official Gazette RS, Nos. 1/91- I, 44/97, and 50/98 – OdlUS – hereinafter referred to as the AA) began to apply to them in accordance with Article 81 of the AA. In the Supreme Court’s opinion, in cases such as the complainant’s case, the legal status of persons who were not citizens of the Republic of Slovenia was changed *ex lege*, without any administrative act having been issued; therefore, the conduct of the Administrative Unit cannot be deemed an unlawful interference with a constitutional right. Since the complainant, as an alien, failed to initiate proceedings in order to legalise his residence according to the provisions of the AA (he had neither temporary nor permanent residence), the Administrative Unit was correct to also dismiss his application for the renewal of the driving licence.
3. In the constitutional complaint, the complainant emphasises that the position taken by the Supreme Court in the challenged decisions is erroneous. He argues that such an interpretation of the second paragraph of Article 81 of the AA violates the third paragraph of Article 32 of the Constitution and the right to judicial protection determined by Article 23 of the Constitution. He states that he did not deregister his permanent residence in Ljubljana, which he had registered on 30 March 1965, that he did not vacate the property without deregistering, and that he was unlawfully removed from the register of permanent residents by the Administrative Unit. He believes that the change in the legal status of the Republic of Slovenia as a state that the Supreme Court referred to cannot result in the termination of permanent residence as the newly established state is obliged to assume permanent residents in accordance with the generally applicable principles of international law (Article 8 of the Constitution). As no decision regarding his erasure had been issued, he was also deprived of the right to a legal remedy determined by Article 25 of the Constitution. He further asserts that he expressly proposed that the Supreme Court decide on the existence of the already acquired right to permanent residence in the proceedings concerning the renewal of his driving licence as a preliminary question. He also alleges that his right to enjoy private property under the conditions determined by law was violated when his valid driving licence was not renewed. He proposes that the

Constitutional Court not only annul the challenged decisions, but also establish that the complainant has had a permanent residence in Ljubljana since 30 March 1965, and order that the Administrative Unit renew his driving licence.

4. By the Order dated 26 May 1999, the Constitutional Court accepted the constitutional complaint for consideration. The Supreme Court did not reply to the constitutional complaint.

## B

5. During the proceedings to decide on the constitutional complaint, by way of Decision No. U-I-284/94, dated 4 February 1999 (Official Gazette RS, No. 14/99), the Constitutional Court decided that the AA was inconsistent with the Constitution as it failed to specify the conditions to be met in order for the persons referred to in the second paragraph of Article 81 to obtain a permanent residence permit after the expiration of the time-limit for applying for Slovene citizenship if they did not apply for it, or after the day on which the decision rejecting Slovene citizenship became final; the Constitutional Court further decided that the legislature must remedy the established inconsistency no later than six months following the day of the publication of that Decision in the Official Gazette, and that, until the established inconsistency is remedied, no deportations may be ordered against citizens of another republic of the former Socialist Federal Republic of Yugoslavia according to Article 28 of the AA, provided that on the day of the plebiscite, i.e. 23 December 1990, they had a registered permanent residence in the territory of the Republic of Slovenia and they also actually live in the Republic of Slovenia.
6. In the aforementioned decision, the Constitutional Court found that the AA regulates the acquisition of temporary and permanent residence permits for aliens; however, due to its content, this regulation was not appropriate for the status of the relevant group of citizens of other republics of the former SFRY, and it also could not be applied to these persons by means of statutory and legal analogy. These persons had permanent residence status in the territory of Slovenia in accordance with the regulation in force at the time and they also actually resided in the territory of Slovenia. Permanent residence and actual residence in the territory of the Republic of Slovenia are essential circumstances that place the persons concerned in a special legal position, and therefore the provisions of the AA that regulate the acquisition of permanent and temporary residence are not relevant in their case. The legislature should have regulated the position of the persons concerned or their transition to the status of alien in a special manner in the transitional provisions of the AA or in a special statute. The provisions regulating the different legal positions of aliens are based on the assumption that an alien enters the Republic of Slovenia with the intention of staying there for a certain period of time and gradually begins to arrange his or her legal status as an alien in accordance with the AA (from a temporary residence permit to a permanent residence permit). In its reasoning, the Constitutional Court expressly stated that the provisions of the second paragraph of Article 13 and the first paragraph of Article 16 of the AA should not have been applied to citizens of other republics of the former

SFRY who have not obtained Slovene citizenship and that the competent authorities should not have transferred those persons from the existing register of permanent residents into the register of aliens *ex officio*, without issuing any decision or informing the person concerned thereof. They had no legal basis for such conduct. The Inhabitants' Residence Records and Population Registry Act does not provide for an *ex lege* deletion of permanent residence. It was on these grounds that the Constitutional Court concluded that the AA – which does not regulate in its transitional provisions the legal status of citizens of other republics of the former SFRY who had permanent residence in the Republic of Slovenia and also actually lived there as aliens in the Republic of Slovenia – violated the principles of a state governed by the rule of law determined by Article 2 of the Constitution. Upon the expiration of the time-limits set out in the second paragraph of Article 81, the citizens of the other republics of the former SFRY found themselves in an uncertain legal position. From the transitional provision that refers to the provisions of the AA these persons could not grasp what kind of status is applicable to them as aliens and which provisions of the Act should apply to them and thus, due to the undetermined legal status of the citizens of other republics as aliens in the Republic of Slovenia, the principle of the protection of trust in the law, which is one of the principles of a state governed by the rule of law, was violated. Apart from this violation, the Constitutional Court also found a violation of Article 14 of the Constitution. In the reasoning of its decision, it stated that at the time when Slovenia gained independence persons resided in the territory of the Republic of Slovenia who had the status of an alien in accordance with the Federal Movement and Residence of Aliens Act (Official Gazette SFRY, Nos. 56//80, 53/85, 30/90, and 26/90) that applied to the territory of the Republic of Slovenia either until independence was gained or until the AA entered into force, as appropriate. The legal status of those persons, who were already deemed aliens before Slovenia gained independence, was regulated in the third paragraph of Article 82 of the AA. It determined that permanent residence permits issued on the basis of the law previously in force shall continue to apply to all aliens who had permanent residence in the territory of the Republic of Slovenia when the AA entered into force. Based on this provision all aliens who had a permanent residence permit were allowed to continue to reside in Slovenia without any new conditions. The Act, however, failed to regulate the transitional legal status of the citizens of other republics of the former SFRY who also legally resided in the territory of Slovenia and had permanent residence there, and as a result they found themselves in a worse legal position than those aliens who already had the status of alien before the Republic of Slovenia gained independence. As there are no objectively justified reasons for the described differentiation that would dictate that the transitional legal status of the citizens of other republics of the former SFRY who had permanent residence in the Republic of Slovenia and legally resided there would have to be substantially different from the legal status of those persons that had already had the status of an alien with permanent residence before Slovenia's independence, the failure to regulate the legal status of those persons entails a violation of the principle of equality determined by the second paragraph of Article 14 of the Constitution.

7. The Supreme Court adopted the challenged decisions already before the unconstitutionality of the AA was established. It took the view that the provisions of the AA that regulate the status of aliens who enter the Republic of Slovenia with the objective of staying there for a certain period of time and gradually begin to arrange their legal status as aliens in accordance with the provisions of the AA (from a temporary residence permit to a permanent residence permit) also apply to the complainant – the citizen of another republic of the former SFRY who had registered permanent residence in the Republic of Slovenia and legally resided in its territory – and that the Administrative Unit lawfully removed the complainant from the register of permanent residents. On the grounds that the Constitutional Court stated in the above-mentioned decision, an interpretation of the AA such as the Supreme Court applied in the challenged decisions is unconstitutional.
8. Equality before the law determined by the second paragraph of Article 14 of the Constitution entails that regulations shall apply to each individual in a non-arbitrary manner. In proceedings before the courts, other state authorities, local community authorities, and bearers of public authority, this implies that these authorities are required, when applying the law to specific cases, to treat equal situations equally without taking into consideration personal circumstances that are not determined as decisive by the legal norm. This entails that the same rules must be applied to the same factual situations or that the same rules must not be applied to fundamentally different factual situations. Article 22 of the Constitution entails the application of the general principle of equality before the law (the second paragraph of Article 14 of the Constitution) to the protection of rights. It is a special case of the principle of legal equality that guarantees to everyone equal protection of rights in proceedings before the courts, other state authorities, local community authorities, and bearers of public authority. An interference with this constitutional right would exist if the individual act was adopted in proceedings wherein the complainant was unable to enforce this right or could enforce it only in a limited way, which could consequently also interfere with another of his rights. Such could also occur if the complainant fulfilled the conditions determined by law for the enforcement or recognition of the right, but was unable to enforce this right due to an unconstitutional or unlawful procedure.
9. The Supreme Court based its decision on Article 81 of the AA, in relation to which the Constitutional Court established in Decision No. U-I-284/94 that the AA is inconsistent with the Constitution due to an unconstitutional legal gap. The interpretation of Article 81 of the AA in the challenged Supreme Court Judgments put the complainant in an unequal position in comparison to aliens that were not citizens of other republics of the former SFRY, but had permanent residence in the Republic of Slovenia when the AA entered into force. Thus the right of the complainant to equality before the law determined by the second paragraph of Article 14 of the Constitution was violated, which, in the proceedings to decide on rights, duties, or legal interests, is expressed as a violation of Article 22 of the Constitution (the equal protection of rights). The Constitutional Court thus granted the constitutional complaint and annulled the challenged decisions.

10. In Decision No. U-I-284/94, wherein the Constitutional Court established that the AA was unconstitutional, it required the legislature to remedy the established unconstitutionality within six months from the day of the publication of the Decision. It follows from the legislative materials (Gazette of the National Assembly, No. 35/99) that the draft of the Act Regulating the Status of Citizens of Other Successor States of the Former SFRY in Slovenia (hereinafter referred to as the ARSCOSS) that will specifically regulate the acquisition of permanent residence permits for citizens of other republics of the former SFRY who did not apply for Slovene citizenship in accordance with the provisions of Article 40 of the CRSA or were issued a negative decision (or the persons referred to in the second paragraph of Article 81 of the AA, which includes the complainant) is in the process of being adopted. Only after the adoption of this law or its entry into force will it be possible to decide on the permanent residence of the complainant. Therefore, until such time, the complainant must be granted the same legal status as he would have had in accordance with Article 13 of the CAIBCC before the deadline determined by the second paragraph of Article 81 of the AA expired. This entails that the address where the complainant had been registered before he was unlawfully removed from the register of permanent residents has to be recognised as his permanent residence until the ARSCOSS is adopted or until the deadlines set out by this Act for resolving his status expire, and that the Administrative Unit must renew the complainant's driving licence for this period. When the ARSCOSS is adopted and enters into force, the complainant will be required to regularise his status in accordance with the provisions of this Act. Therefore, in accordance with the second paragraph of Article 40 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), in Point 3 of the operative provisions, the Constitutional Court determined the authority that is to implement the Decision and the manner of its implementation.
11. As the Constitutional Court already granted the constitutional complaint because the challenged decisions violated the right determined by Article 22 of the Constitution, it was not necessary to consider the violation of the rights determined by Articles 23, 25, 32, and 33 of the Constitution.

### C

12. The Constitutional Court adopted this Decision on the basis of the second paragraph of Article 40 in conjunction with Article 49 and the first paragraph of Article 59 of the CCA, composed of Franc Testen, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Dr Miroslava Geč-Korošec, Lojze Janko, Dr Lojze Ude, Dr Mirjam Škrk, and Dr Dragica Wedam-Lukić. The decision was reached unanimously.

*Franc Testen*  
*President*

Decision No. **U-I-145/03**, dated 23 June 2005

### DECISION

At a session held on 23 June 2005 in proceedings to review constitutionality initiated upon the petition of Alenka Reisner, Domžale, and Andrej Lužar, Kamnik, represented by Dr Andrej Berden, Ljubljana, the Constitutional Court

*decided as follows:*

1. In the provision of the third paragraph of Article 11 of the Civil Procedure Act (Official Gazette RS, Nos. 26/99, 96/02, 12/03 – official consolidated text, 2/04, and 36/04 – official consolidated text), the words “a natural person” and “and a legal entity, sole proprietor, or attorney with a maximum fine of 1,000,000 Slovene tolar” are abrogated.
2. The provisions of the fifth to seventh paragraphs of Article 11 of the Civil Procedure Act are abrogated.
3. The provision of Article 109 of the Civil Procedure Act is not inconsistent with the Constitution.

*Reasoning*

#### A

1. The petitioners challenge the provisions of the Civil Procedure Act (hereinafter referred to as the CPA) regulating fines for the abuse of procedural rights and the provisions on written submissions insulting the court, a party, or other participant in proceedings. Article 109 of the CPA provides that a civil court shall punish a person who by a written submission insults the court, a party, or other participant in proceedings. The court may fine the offending person on the basis of the provisions of the third to seventh paragraphs of Article 11 of the CPA, and such penalty does not bar additional criminal sanctions in the criminal proceedings. The first paragraph of Article 11 of the CPA contains the principle that proceedings be expeditious and economical and the principle of the prohibition of the abuse of rights. The second paragraph provides the possibility of issuing a fine for the abuse of procedural rights.

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The challenged third to seventh paragraphs of Article 11 (which are applied also for fines under Article 109 of the CPA) determine that in the event rights are abused, the court may impose on a natural person a maximum fine of 300,000 Slovene tolar, and a legal entity, sole proprietor, or attorney a maximum fine of 1,000,000 Slovene tolar. The court issues a fine by a court order that determines the deadline for paying the fine, which cannot be shorter than 15 days or longer than three months. If a natural person, sole proprietor, or attorney does not pay the fine within the deadline set by the court, the fine is enforced in the following manner: for every 10,000 Slovene tolar of the fine, a maximum of one day imprisonment is determined, whereas the imprisonment of a natural person cannot exceed 30 days, while for a sole proprietor or attorney the maximum is 100 days. The penalty of imprisonment is enforced pursuant to the act on serving the criminal penalty of imprisonment. The conversion of the fine into imprisonment is decided by a special court order, in accordance with the preceding paragraph [of the Article]. The seventh paragraph of Article 11 of the CPA determines that if a legal entity does not pay the fine within the deadline set by the court, the court shall enforce *ex officio* this fine increased by 50%. The order on the fine so determined constitutes an execution title.

2. The petitioners argue that the above-mentioned provisions of the CPA are contrary to the principle of a state governed by the rule of law (Article 2 of the Constitution), the right to equality before the law (Article 14 of the Constitution), the right to judicial protection and to an impartial court (Article 23 of the Constitution), the principle of legality in criminal law (Article 28 of the Constitution), and to freedom of expression (Article 39 of the Constitution). They state that the essential aim of Article 11 of the CPA is to ensure that proceedings are carried out without delay and at the minimum cost possible, and that Article 109 of the CPA extends the fines to instances that do not concern procedural rights and the abuse thereof, but entail a penalty for insults outside the scope of the rules and procedures otherwise determined by penal law. This institution allegedly does not contribute to the speeding up and economy of proceedings, and does not have any relation to the prohibition of the abuse of rights. They opine that it is an institution that is comparable with the sanctioning of verbal offences in the former Yugoslavia, and is as such allegedly intended to protect the structure and system of power against the freedom of speech. Contrary to Article 169 of the Penal Code (Official Gazette RS, No. 64/94 – hereinafter referred to as the PC), the challenged provision allegedly does not take into account the principle of proportionality as the grounds for excluding illegality are not foreseen – if other constitutional rights are at stake, a statement should be illegal only if an insulting intention is proven. They opine that such applies in particular to attorneys, as was confirmed by the European Court of Human Rights (hereinafter ECtHR) in the Judgment in *Nikula v. Finland*. The threat of a penalty thus allegedly prevents the expression of justified criticism. The concept of the abuse of rights determined by Article 11 of the CPA is allegedly not defined precisely enough, and the concept of insults in Article 109 of the CPA does not contain exculpatory grounds for excluding the illegality of such statements. The petitioners deem such to be contrary

to the principle of legality in criminal law, determined by Article 28 of the Constitution. Furthermore, due to the lack of appropriate procedural provisions, they deem that a judge can act completely arbitrarily. They also assert that it is contrary to the right to an impartial judge that the same judge who was or is alleged to have been insulted decides on the penalty for such insults. The judge would thus decide on his or her own case. They opine that when a judge's personality, honour, or good reputation are offended, it should also apply that the judge him- or herself or, if statute so determines, the state prosecutor's office, can institute criminal proceedings due to such insults. As the statutory regulation is different, the right to equality before the law is allegedly violated. This triggers the initiation of criminal proceedings that allegedly take place without any rules of criminal substantive or procedural law within the sphere of civil law judicial decision-making. Moreover, they assert that the statutory regulation makes criminally sanctioning the same act twice possible. It can also happen that the civil court punishes a perpetrator, while the criminal court acquits him or her. Without respect for the requirements of holding a main hearing, adversarial, and oral proceedings, the direct taking of evidence, and publicity, anything could allegedly happen in the civil proceedings, as the judge would not be bound by the safeguards of criminal law. The petitioners perceive such to be a violation of the principles of a state governed by the rule of law determined by Article 2 of the Constitution. The same principles are allegedly also violated due to the fact that the sanctions determined by the provisions of Article 109 and Article 11 of the CPA are not proportionate to those determined for the criminal offences in the PC; the possible sentence of imprisonment is allegedly not proportionately determined. The petitioners also do not see any grounds why substantially higher fines are determined by Article 11 of the CPA for attorneys, particularly in view of the fact that the Criminal Procedure Act (Official Gazette RS, No. 63/94, etc.) in its comparable provisions does not determine such different fines; furthermore, the fines prescribed therein for insulting the court are essentially lower.

3. The National Assembly did not reply to the petition. The Government opines that the challenged provisions are not contrary to the Constitution. It states that the provisions of the third to seventh paragraphs of Article 11 of the CPA ensure the effectiveness of the provisions on the prohibition of the abuse of procedural rights and on the prohibition of insults in written submissions. The penalty for insults within civil procedure allegedly does not entail criminal law protection, as Article 109 of the CPA especially emphasises by stating that a penalty pronounced for an insulting written submission is not an obstacle to a penalty for a criminal offense. The purpose of prohibiting insults, combined with an effective penalty, lies namely in restricting the expression of negative value judgments. This should allegedly not preclude the effective use of rights in court proceedings. Furthermore, the Government argues that it is acceptable to determine prohibited conduct using an open legal term. Moreover, the Government states that the purpose of the challenged provisions is not the protection of a judge as an individual. By a negative value judgment, by which the dignity of a judge is offended in relation to his or her work, it is the reputation of the

judicial branch of power in the State that is affected. The Government asserts that freedom of expression is not unlimited, and that limitations thereof can be sanctioned by both criminal as well as civil law. It pointed out the case law of the ECtHR, according to which the legitimate interest of a state in protecting the reputation of judges is not contrary to an applicant's interest in being ensured participation in a discussion on the issue of the structural impartiality of the court. Furthermore, the Government alleges that the challenged provisions are not contrary to the right to an impartial court. It opines that the difference in the amounts of the prescribed fines between (other) natural persons, on the one hand, and attorneys, on the other, is not unfounded. It is allegedly legitimately expected from an attorney as a legal expert bound by the Attorneys Act (Official Gazette RS, No. 18/93, etc.) and the autonomous professional rules of attorneys that they demonstrate greater care, and that violations of their obligations are to be more severely punished.

#### **B – I**

4. A petition to initiate proceedings for the review of constitutionality can be lodged by any person provided that he or she demonstrates legal interest (the first paragraph of Article 24 of the Constitutional Court Act, Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA). Pursuant to the second paragraph of the mentioned article of the CCA, legal interest is demonstrated if the regulation whose review is proposed by the petitioner directly interferes with his or her rights, legal interests, or legal position. The first petitioner demonstrated her legal interest as she was punished in the civil proceedings as an attorney representing her client on the basis of the challenged CPA provisions (she lodged a constitutional complaint against the order on the fine). As the petitioner undoubtedly demonstrated her legal interest to lodge a petition, the Constitutional Court did not need to establish whether legal interest was also demonstrated by petitioner Andrej Lužar. The Constitutional Court accepted the petition for consideration and, given the fulfilled conditions under the fourth paragraph of Article 26 of the CPA, immediately proceeded to decide on the merits of the case. As the provision of the seventh paragraph of Article 11 of the CPA is related to the provisions of the third to sixth paragraphs of Article 11, the Constitutional Court also commenced *sua sponte* proceedings for a review of the constitutionality of this provision (Article 30 of the CCA).

#### **B – II**

5. The Constitutional Court first reviewed whether the mere possibility of a penalty on the basis of Article 109 of the CPA, irrespective of the system of penalties determined by Article 11 of the CPA, is inconsistent with any human right. Concerning such, the petitioner referred to the freedom of expression determined by the first paragraph of Article 39 of the Constitution. However, it is necessary to consider that the purpose of the words (both concerning oral statements as well as in written submissions) delivered before the court by a party (or his or her representative or attorney) is to effectively exercise constitutional procedural safeguards. Thus, the Constitutional

Court did not review the allegation that the challenged statutory provisions were inconsistent with the freedom of speech determined by the first paragraph of Article 39 of the Constitution independently. It reviewed such in the framework of a review of the conformity of this statutory regulation with the right to make statements before the court determined by Article 22 of the Constitution.

6. Concerning the statements of attorneys made when representing a client in a particular case before the court (the same would apply to sanctioning the statements of a party participating in proceedings without an attorney), the prohibition of insulting statements in proceedings before the court is thus related to the right to make statements before the court, which is part of the right to the equal protection of rights determined by Article 22 of the Constitution. However, this does not entail that such constitutes an interference with the mentioned constitutional right, whose admissibility should therefore necessarily be reviewed on the basis of the strict test of proportionality. In the view of the Constitutional Court, such only concerns the determination of a manner of exercise of this right, in conformity with the second paragraph of Article 15 of the Constitution. As regards statements made to exercise the right to make statements before the court on the basis of Article 22 of the Constitution (only statements that in terms of their content are such that they can contribute to the effective protection of rights in proceedings before the court are relevant for the review of this issue), the law namely does not restrict the party as regards what he or she may or may not state in proceedings before the court. The challenged statutory provisions only prohibit a party from making statements that could benefit the party in protecting his or her rights in proceedings in an offensive or defamatory manner. Therefore, the human right at issue is not limited, it is the manner of its exercise that is determined. Furthermore, it is necessary to emphasise in relation to such that the crucial circumstance of the case at issue is that it concerns statements before the court and not, for example, instances of artistic expression. For the latter area, the Constitution (in the framework of guaranteeing freedom of speech determined by the first paragraph of Article 39) ensures the protection of both the content and the form of making statements, and a limitation imposed on a person that determines the form of expression can be considered a limitation of this constitutional right. Making statements before the courts entails a different and specific position; for court proceedings, it is naturally necessary that the manner or form of carrying out procedural activities, including making statements before the court, be regulated and subject to certain formal requirements (*inter alia*) concerning the manner of making statements. It is also necessary to consider that the delimitation between the determination of the manner of the exercise of human rights and the limitation of constitutional rights is not always simple. The fact that the constitution framers were aware of the possibility that in determining the manner of the exercise of human rights a law would often be on the verge of interfering with such is clear from the wording of the second paragraph of Article 15 of the Constitution: without an explicit constitutional basis with regard to an individual right, such a regulation is admissible only if it is necessary due to the particular nature of the right itself.

“Necessity” already points to one of the elements of proportionality, which must be considered in interferences with or limitations of constitutional rights.<sup>1</sup> In considering the case at issue, the Constitutional Court took into account this starting point, in particular due to the fact that the case concerns a statutory regulation in which the determination of the manner of the exercise of a human right approaches the line where it could already entail its limitation.<sup>2</sup>

7. First of all, it is necessary to note that human rights relating to the conduct of parties to proceedings before the court, particularly including the right to make statements, are already by their nature such that they require detailed regulation by law. Court proceedings can namely be effective only if a certain level of formality and order is ensured in such.
8. It evidently follows directly from the meaning of the right to make statements before the court that it cannot entail the right of a party (or his or her representative or authorised person) to make any kind of statement before the court. The right to make statements before the court is guaranteed in connection with the right to effective judicial protection determined by the first paragraph of Article 23 of the Constitution, and logically refers to statements that are important for the court’s decision on a case at issue. In so far as the statements prohibited by Article 109 of the CPA only generally and indiscriminately express contempt for the judiciary or entail a personal attack on a judge and have no relation to the decision at issue, it is evident that such statements have no connection with the protection of the rights of a party to proceedings, or can in no manner contribute to such protection. Thus, the prohibition of such statements does not in any way limit the right to make statements before the court concerning issues due to which this right is guaranteed, i.e. to ensure the protection of one’s rights before the court and to be able to effectively influence the court’s decision. With regard to statements whose content could be essential for a decision, the requirement that in a particular case any criticism stated by a party (or his or her representative or authorised person) with regard to a judicial decision or the conduct

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1 Testen, in: Šturm et al., *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana (2002), p. 196.

2 It is necessary to mention that comparison with the ECtHR, which in the framework of freedom of speech determined by Article 10 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) uses the wording (admissible) “restrictions”, cannot be decisive. Also, concerning the comparison with the case law of the ECtHR, Jaklič establishes that the adjective “necessary” does not always correspond to the strictest constitutional test, which requires that the means (legal restrictions) are “indispensable” to attaining a legitimate aim, and neither does it correspond to the less demanding constitutional test of the “reasonable” connection between the means and the legitimate aim. The necessity test simply requires that for a restriction of the freedom of expression the state demonstrates the existence of a “pressing social need”, whereby the restriction must be proportionate to the legitimate aim pursued, which includes a review of whether the grounds why the state limited the freedom of expression are relevant and sufficient in accordance with the second paragraph of Article 10 of the ECHR. Jaklič, in: Šturm et al., *Komentar Ustave Republike Slovenije*, p. 425 (and the Judgment in *The Sunday Times v. the United Kingdom*, dated 26 April 1979, No. 65338/74, Para. 59).

of the court be formulated in a respectable manner so that it preserves the dignity and authority of the court is also neither exaggerated nor too restrictive. The prohibition of insulting the court determined by Article 109 does not prevent a party from harshly, openly, and critically presenting arguments, e.g. in a legal remedy against the challenged judicial decision, which in his or her opinion point to the illegality of the judicial decision; Article 109 of the CPA only determines the limits of the manner of stating such criticism. Criticism of a given judicial decision or the conduct of the court in a particular case can always be stated in such a manner that it does not damage the reputation of the court or the entire judiciary, or does not personally attack, e.g., the judge's capacity to perform judicial office.<sup>3</sup> The Constitutional Court cannot agree with the arguments of the petitioner, who in connection with the aim of ensuring an effective defence would like to make the freedom of speech of an attorney in representing a party before the court absolute. In the case of *Nikula v. Finland*, the ECtHR also explicitly dismissed the argument of the applicant in that case that the freedom of speech of an attorney in representing a client should not be limited by any measure.<sup>4</sup>

9. Regarding the prohibition of insulting written submissions determined by Article 109 of the CPA, the purpose of the legislature is to protect the trust in the judiciary and the reputation and authority of the judiciary; not that of a particular judge or a court, but the judicial branch of power in its entirety. This thus only concerns the protection of the reputation of the judicial branch of power, not the protection of the reputation of the state in its entirety, as was erroneously claimed by the Government in its response. There are namely special reasons why it is legitimate for the judiciary to enjoy special protection, different than other branches of state power. Undoubtedly, it is true for the work of the judiciary – for a particular judge as well as for the courts in general – that building respect and trust in the judiciary is primarily a task for the courts themselves, and they can most easily accomplish this by conducting proceedings lawfully and appropriately, by deciding disputes (without undue delay) on the merits correctly and lawfully, and by providing well-substantiated reasons for judicial decisions. The system of penalties for insulting written submissions thus cannot be a fundamental manner of ensuring the reputation and authority of the courts. This is, however, an additional (and subordinate) measure enabling the protection of the existing reputation and authority of the courts when an atmosphere of distrust in the work of the courts is created by demeaning value judgments and by general attacks on the work of a court or the personality of a particular judge that are unnecessary for the protection of rights in a particular case. As established by the ECtHR, it is necessary to take into account the special role the judiciary plays in society. As the guardian of justice, a fundamental value in a state governed by the rule of law, it must enjoy the trust of the public in order to be successful in performing its role. Therefore, it may appear to be necessary to protect this trust against destructive attacks that are evidently

<sup>3</sup> Cf. the ECtHR's reasoning in the Judgment in *Barfod v. Denmark*, dated 22 February 1989, No. 11508/85 (Paras. 33 and 35).

<sup>4</sup> *Nikula v. Finland*, Judgment dated 21 March 2002, No. 31611/96 (Para. 49).

unfounded, in particular considering the fact that judges who have been criticised are bound by certain principles that make it impossible for them to respond to an attack.<sup>5</sup> The purpose of such limitations is to protect the authority of the judiciary, more precisely the aim that the public must respect the courts and trust that the latter are able to perform their function.<sup>6</sup> The protection of the authority of the courts relates to the awareness that it is precisely the courts that are the forums intended for dispute resolution or deciding on guilt or innocence, whereby it is important that the public trust to a great extent that the judiciary is able to accomplish its tasks.<sup>7</sup>

10. The petitioner indeed argued that there is no need (i.e. necessity) for the special penalty for insulting the court determined by Article 109 of the CPA, as appropriate protection is already afforded by the provisions in the PC determining criminal offenses against honour and good reputation (e.g. the criminal offense of an insult determined by Article 169 of the PC), and that it is always possible to prosecute these criminal offenses in a separate criminal procedure. However, these arguments of the petitioner are not substantiated. The possibility of independent protection under criminal law is not an appropriate (at least not always) substitute and cannot ensure the above-mentioned effects. The petitioner's arguments are already erroneous in claiming that when a judge's personality, honour, or good reputation is insulted, the judge him- or herself can institute proceedings. As established above, the purpose of the sanctioning provision of Article 109 of the CPA is not the protection of a particular judge and does not concern the protection of his or her honour and good reputation; it is the values of the respectability and authority of the entire judiciary that are protected. The PC does not even contain a special criminal offense that would incriminate insults against the entire judiciary as a branch of state power (and not perhaps only a particular court as a state body). Additionally, it is necessary to consider that it is of great and symbolic significance that behaviour undermining the authority of the courts may trigger an immediate reaction such that it is evident for all participants in proceedings (in particular, the opposing party, and when a penalty on an attorney is concerned, also for the party this attorney represents) that the court will not tolerate such behaviour. When the matter concerns statements by an attorney, it is especially important that the parties are able to realise that the offensive sharpness of the attorney's representation before the court is not proof of the quality of his representation and that it will not contribute to success in the litigation. By such, the attorney is also directed away from acting on the wish he or she might have to make a good impression on the client not by means of the quality of his or her legal arguments (which a lay party is frequently unable to assess), but by the sharpness and offensiveness of his or her performance. However, it is generally true that additional court proceedings intended to ensure the effectiveness of court proceedings cannot be a proper approach. It is necessary to mention that also the ECtHR,

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5 *Prager and Oberschlick v. Austria*, Judgment dated 26 April 1995, No. 15974/00 (Para. 34).

6 *The Judgment in The Sunday Times v. the United Kingdom* (Para. 55).

7 *Worm v. Austria*, Judgment dated 29 August 1997, No. 83/1996 (Para. 41).

in the Judgment in *Nikula v. Finland* (which is also cited by the petitioner), explicitly adopted the position that the duty of the courts and the presiding judge is to direct proceedings in such a manner so as to ensure the proper conduct of the parties and the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party's statements in the prior proceedings.<sup>8</sup> Moreover, the ECtHR has also determined that courts may respond to such conduct when it is neither necessary nor practicable to bring a criminal charge against the perpetrator thereof.<sup>9</sup>

11. The petitioner otherwise opines that the prohibition of insulting written submissions is in no way connected with the prohibition of the abuse of rights and the aim of ensuring the principle of economy and the speeding up of proceedings. However, her claims must be rejected. In addition to the reasons already mentioned in Paragraphs 8 and 9 of the reasoning of this Decision, it must be noted that, understood in the broadest sense, the prohibition determined by Article 109 of the CPA can also contribute to the effectiveness of court proceedings by ensuring respect and cooperation between the subjects of the procedure, as well as the focus of the statements in submissions on the elements essential for the decision. Insulting written submissions (as well as submissions that digress from the relevant issues or are overloaded with emotion) burden court proceedings and make it difficult to carry out such proceedings, thus causing the risk that the parties' statements will depart from what is essential for the decision in a dispute, and particularly make the pursuit of a peaceful resolution of the dispute or the conclusion of a court settlement difficult (which is especially emphasised in Article 305 of the CPA).
12. As the petitioner is an attorney, it is necessary to note that her attempt at arguing that the limitation on an attorney's speech makes it impossible for him or her to fulfil his or her task defending a party before the court is manifestly contrary to the rules and ethical standards that have developed in the autonomous professional rules of attorneys' themselves. As one of the violations of the attorney's duty, Article 77a of the Statute of the Bar Association (Official Gazette RS, No. 15/94, etc.) cites inappropriate or insulting conduct or statements in the performance of the attorney's profession. From among the Attorneys' Code of Ethics, certain rules, e.g. the second paragraph of Article 9, should be mentioned, according to which in the performance of their tasks attorneys must enjoy the trust of their clients and, at the same time, of the judicial authorities before which they represent such. Therefore, they should try to win that trust, sustain it, and not undermine it by any act. An attorney's legal and general culture must be evident from his or her professional work, appearance, submissions, speech, and in contacts with clients, colleagues, and judicial and other authorities (Article 15). Attorneys must not make their personal and professional ethics dependant on their loyalty to a client. In their work, they should never lose their independence and objectivity. They must always remain dignified, polite, and objective in relation to the opposing party, their representative, and judicial and other

<sup>8</sup> The Judgment in *Nikula v. Finland* (Para. 53).

<sup>9</sup> E.g. *Putz v. Austria*, Judgment dated 22 February 1996, No. 18892/91 (Para. 33).

state authorities (Article 43). Regarding the mentioned issue, Article 18 of the Code is of particular importance: “In their professional capacity, attorneys must protect the reputation of courts and other authorities. Their duty is to strengthen the trust of the public in their work. Therefore, they must not make insulting or disdainful statements regarding the work of these bodies and their decisions. They should also advise their clients to adopt a respectful approach.” In view of the above, it follows that it is undoubtedly accepted in the independent rules of the attorney’s profession that the “freedom of speech” of an attorney in appearances by such before the court is not without limits, and that an attorney as part of the system of the administration of justice has a special role and responsibility in establishing trust in and respect for the judiciary. The cited rules also prove that attorneys themselves are becoming aware of the fact that not only does the prohibition of insulting and disdainful statements not prevent the effective performance of attorneys’ duties, but enhances their performance. Making appropriate and respectful statements is of great importance for an attorney to be able to fulfil his or her duties in respect of the client that he or she represents, as well as for the responsibility that he or she has as a part of the system of the administration of justice for the legal order as a whole. Furthermore, due to the mentioned rules adopted by the independent organisation of attorneys itself, the petitioner’s arguments that the prohibition of insulting written submissions prevents her from performing the profession of an attorney loses its persuasiveness.

13. Thus, the prohibition of insulting written submissions determined by Article 109 of the CPA does not limit a party’s right to make statements before the court with regard to those issues due to which the right to make statements is guaranteed as a human right – as a part of the right to the equal protection of rights in proceedings in accordance with Article 22 of the Constitution. Therefore, Article 109 of the CPA does not limit this right, but only determines the manner of its exercise. When applying the mentioned statutory provision, a court must of course give due consideration to the above-mentioned aspects in every particular case. A court deciding on applying Article 109 of the CPA must carefully weigh whether critical and perhaps sharp statements (e.g. in a legal remedy against a challenged court decision) entail an admissible manner of exercise of the right to make statements in proceedings determined by Article 22 of the Constitution, which is necessary for the effectiveness of the right to judicial protection (as well as the right to appeal determined by Article 25 of the Constitution). If in a particular case the court does not consider these aspects to a sufficient extent, it could entail a limitation, a kind that is inadmissible, of the right to make statements. As also held by the ECtHR<sup>10</sup>, this concerns the need to strike the right balance and to determine certain bounds that must not be overstepped. At the statutory level, this cannot be precisely defined; it is for the court in each particular case to give due consideration thereto; thus, in every particular case the court must consider the principle of proportionality. Consequently, it is necessary, on the one hand, to consider that the circumstance that these statements are made in defence of rights before the court speaks in favour

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10 *Schöpfer v. Switzerland*, Judgment dated 20 May 1998, No. 25405/94 (Para. 33).

of greater tolerance. On the other hand, it is necessary to take into account the special significance that trust in the judiciary and respect for the authority of the courts holds for the judicial branch of power in the performance of its duties.

14. The above also addresses the petitioner's allegation as to the inconsistency with the second paragraph of Article 14 of the Constitution, which refers to the fact that only judges – in the event their personality, honour, or good reputation is harmed – do not need to request that separate criminal proceedings be initiated. The Constitutional Court emphasised regarding such the particularly well-founded reasons for such regulation, as well as the circumstance that the object of protection when penalising insulting written submissions is different than in the instance of the criminal offense of insult determined by Article 169 of the PC, making the petitioner's allegation unfounded.
15. In light of the above-mentioned reasons, the Constitutional Court established that the provision of Article 109 of the CPA is not inconsistent with the Constitution.

### B – III

16. The petitioner alleges that it is inconsistent with the right to an impartial judge (the first paragraph of Article 23 of the Constitution) that the judge to whom such insults are directed decides in his or her own case. Irrespective of the fact whether the penalty on the basis of Article 109 in conjunction with Article 11 of the CPA entails a matter in which all of the procedural guarantees pursuant to Article 23 of the Constitution should be fulfilled, it is evident that the statutory regulation is not inconsistent with the right to an impartial trial determined by Article 23 of the Constitution. The petitioner erroneously understands the function and purpose of the penalty according to Article 109 of the CPA. From the law, the national case law, the case law of the ECtHR<sup>11</sup>, and comparative law (e.g. the institution of contempt of court in Anglo-Saxon legal orders<sup>12</sup>), it follows that as regards institutions of this type, the protected value is not the honour and good reputation of the particular judge, but the protection of trust in the judiciary and the protection of the authority of the judicial branch of power. When the matter concerns imposing a fine on the basis of Article 109 of the CPA, a particular judge is not the “victim” and does not protect his or her own honour and good reputation when deciding on the basis of Articles 109 and 11 of the CPA. If his or her honour and good reputation are harmed, the judge can certainly request protection through the institutions of penal and tort law. Considering this aim and the purpose of imposing a fine on the basis of Article 109 of the CPA (in conjunction with Article 11 of the CPA), it follows that the allegation that judges decide on a case wherein they themselves have been the victim or the injured party is not substantiated (if, of course, they properly interpret Article 109 of the CPA and include appropriate reasoning in the order issuing the fine). Therefore, the challenged regulation is not inconsistent with the right to an impartial judge determined by the first paragraph of Article 23 of the Constitution.

11 E.g. the Judgment in *Putz v. Austria*; *Ravnsborg v. Sweden*, Judgment dated 23 March 1994, No. 14220/88.

12 See, e.g., Barrie & Cowe, *The Law of Contempt*, 3<sup>rd</sup> Ed., Butterworths, London, 1996, p. 522.

#### B – IV

17. Having found that the prohibition of and penalties for insulting written submissions in civil proceedings are not inconsistent with the right to make statements before the court determined by Article 22 of the Constitution, the Constitutional Court proceeded with the review of the system of fines determined by the third to seventh paragraphs of Article 11 of the CPA. It is only with regard to such that Article 109 of the CPA refers to Article 11 of the CPA, namely in relation to the prohibition of insulting written submissions. The petitioner's allegations referring to the definition of the abuse of rights determined by the first and second paragraphs of Article 11 of the CPA are not relevant for the decision in this case (the petitioner also did not challenge them and in the case on which her legal interest for this petition is based, the ordinary court did not apply such), therefore it was not necessary for the Constitutional Court to respond to these allegations.
18. The third to sixth paragraphs of Article 11 of the CPA determine penalties in the event of insulting written submissions determined by Article 109 of the CPA. The issue is raised whether such a system of penalties and imposing such fines is at all admissible within the framework of civil proceedings. With regard to such, the Constitutional Court had to review whether such penalties entail deciding on charges that would necessitate all the procedural guarantees of criminal proceedings and all substantive constitutional guarantees regarding decisions on criminal offenses (*inter alia*, also the principle of legality in the criminal law determined by the second paragraph of Article 28 of the Constitution, as was expressly asserted by the petitioner).
19. The Constitutional Court cannot agree with the argument that every penalty entails a consideration of criminal "charges", even if the law defines such as a "punishment", as this would at the same time exclude the possibility that such issues be decided on in the framework of another, e.g. civil, procedure. The Constitutional Court has already adopted the position that not every definition of prohibited conduct (and sanctions for the violation of such prohibition) must be considered a definition of a criminal offense, in the event of which the substantive guarantees determined by the Constitution for criminal offenses must be fulfilled. Likewise, deciding on penalties for the violation of these prohibitions cannot always be considered a criminal procedure, in which all the constitutional procedural guarantees particularly referring to a criminal procedure should therefore be fulfilled (Decision No. U-I-220/03, dated 13 October 2004; Official Gazette RS, No. 123/04, and OdlUS XIII, 61). However, even if the prohibited conduct is not to be considered a criminal offense, and the penalties for such conduct do not need to be considered in criminal proceedings, the general principles of a state governed by the rule of law determined by Article 2 of the Constitution still apply; in addition, the general guarantees of a fair trial determined by Article 22 of the Constitution must be ensured in all court proceedings. The above-mentioned starting points must be taken into account when reviewing the regulation of penalties determined by Article 109 of the CPA. Firstly, it is necessary to emphasise (such, however, is not decisive in itself) that the legislature did not regulate this matter in the sphere of criminal law. This is even more evident as in the challenged provision the CPA explicitly determines that

issuing a penalty on the basis of Article 109 does not prevent a punishment for a criminal offense. Such does not entail a determination of a criminal offense (in either the formal or substantive sense) in particular with regard to the purpose of the prohibition determined by Article 109 of the CPA and also its character. This is more a measure of the conduct of proceedings, whose purpose is to ensure the orderly conduct of civil proceedings and necessary procedural discipline. The possibility of pronouncing such a measure is based on the premise that the court has the right and the duty to ensure the proper conduct of proceedings. Therefore, the provision of Article 109 of the CPA in itself cannot concern the determination of such conduct that would require that the substantive guarantees of criminal law (e.g. according to Article 28 of the Constitution) be fulfilled, necessitating also that penalties be issued within a separate procedure in which all the constitutional criminal procedural guarantees are safeguarded. However, with regard to this issue it is necessary to also consider the system of penalties on the basis of Article 11 of the CPA. The reasoning that the prohibition of insulting written submissions in civil proceedings and the possibility of imposing penalties within civil proceedings for the violation of this prohibition entails a matter that is closer to a disciplinary sanction and not to the determination of a criminal offense, can only be substantiated if the penalties that can be pronounced for such activities are not overly severe. Namely, the very nature and the amount of a penalty prescribed can reach such a degree that it can only be pronounced within proceedings that fully satisfy all the constitutional guarantees of a criminal procedure. In Decision No. U-I-117/93, dated 2 February 1995 (Official Gazette RS, No. 13/95, and OdlUS IV, 10), the Constitutional Court already adopted the position that deciding on a sentence of imprisonment entails such a severe interference with the rights of the affected person that this entails a “criminal charge”. The Constitutional Court adopted this position when it used the possibility of pronouncing a sentence of imprisonment as the argument that such must be decided within appropriate court proceedings.<sup>13</sup>

20. Furthermore, in the case law of the ECtHR (in cases concerning the issue of whether Article 6 of the ECHR is applicable) criteria have been established whether deciding on “penalties” entails a decision on “criminal charges”, and whether, therefore, all criminal procedural guarantees must be satisfied. The answer whether the matter concerns “deciding on criminal charges” depends on the domestic classification of the charge, the nature of the offence, and the nature and severity of the penalty. Concerning the first criterion, it is decisive whether the legislation classifies a certain violation within the system of criminal law and criminal procedure. In this regard, the ECtHR reviews which law determines the prohibited conduct, which law determines the procedure in which such conduct is decided on, the issue of whether the pronounced penalty is entered into the criminal records, and whether there are oth-

13 “Minor offense judges can also pronounce, for certain minor offenses, a sentence of imprisonment. By issuing security measures, they can also interfere with constitutionally protected rights. Thus, minor offense judges should be considered a constituent part of the judicial power, both on the basis of Article 23 of the Constitution as well as with regard to the type of penalties they can issue.”

er consequences usually resulting from a criminal conviction.<sup>14</sup> The use of the word “punishment” itself is not decisive.<sup>15</sup> With regard to the second criterion (the nature of the offence), the ECtHR has established that such penalties as the one in the case at issue are more akin to the exercise of disciplinary powers than to the imposition of a penalty for the criminal offense committed.<sup>16</sup> Moreover, the ECtHR has found that powers of such type vested in the court are a common feature of the legal orders of the Contracting States. Such rules and sanctions derive from the inherent power of a court to ensure the proper and orderly conduct of its own proceedings. Concerning the statutory regulation in the Slovene law, as was explained above, neither the first nor the second criterion, which would entail that the penalty determined by Article 109 of the CPA concerns a criminal charge, is fulfilled. Only the third criterion remains: the nature and severity of the prescribed penalty. Even if the case does not meet either of the first two criteria for a “criminal charge”, the ECtHR will establish that it concerns such if the prescribed penalties (i.e. those that are at stake for the party) are sufficiently severe. With regard to the Austrian regulation of penalties for insulting written submissions, which is very similar to the statutory regulation in the CPA, the ECtHR held that the prescribed fine of approximately 1500 EUR (which can be converted into a sentence of imprisonment not exceeding ten days) was not so severe that what was at stake was sufficiently important to warrant the fulfilment of the third criterion.<sup>17</sup> However, the ECtHR adopted the opposite conclusion when a sentence of imprisonment of up to 16 days was at stake.<sup>18</sup>

21. In light of the already established positions of the Constitutional Court and the case law of the ECtHR, it follows that the regulation of penalties determined by Article 11 of the CPA, particularly regarding the sentence of imprisonment, which for a natural person may reach 30 days, while for an attorney (*inter alia*) it may reach even up to 100 days, evidently attains such a degree of severity that it warrants classifying such as entailing a decision on criminal charges (warranting, therefore, that all the procedural and substantive guarantees of criminal procedure and regarding criminal offenses must be ensured).<sup>19</sup> It is evident that the statutory regulation of penalties – not in itself, but due to the severity of the penalties prescribed – determined by Article 11 of the CPA (thus in the framework of civil procedure) is not consistent with the requirements of the first paragraph of Article 23 of the Constitution and Article 6 of the ECHR, as well as the guarantees in criminal procedure. The CPA could determine such penalties only if such punishment would be decided on within a procedure that fully satisfies the guarantees of not only Article 23 of the Constitution, but also of Article 29 of the Constitution (the guarantees in criminal procedure; e.g. the right to have adequate time to prepare one’s defence). The statutory regulation of penalties

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14 E.g. the Judgment in *Putz v. Austria* (Para. 37).

15 E.g. *Weber v. Switzerland*, Judgment dated 22 September 1990, No. 11034/84 (Para. 31).

16 E.g. the Judgments in *Putz v. Austria* (Para. 33) and *Ravnsborg v. Sweden* (Para. 34).

17 The Judgment in *Putz v. Austria*.

18 *Weber v. Switzerland*, the Judgment dated 22 September 1990, No. 11034/84.

19 E.g. the Judgment in *T. v. Austria*, dated 14 November 2000, No. 27783/95.

in Article 11 of the CPA (in conjunction with Article 109 of the CPA) is, in view of the above-mentioned reasons, inconsistent with the Constitution. It is inconsistent with the Constitution not because it would not be possible to issue penalties in the framework of the civil procedure, but due to determining such severe penalties that they warrant classifying such as entailing a decision on criminal charges and that, therefore, all the procedural guarantees concerning criminal procedure, also those referred to in Article 29 of the Constitution, must be satisfied. The statutory regulation in Article 11 of the CPA would be consistent with the Constitution if the penalties prescribed were not so severe. This in particular concerns the prescribed sentence of imprisonment. Consequently, the Constitutional Court abrogated the possibility of pronouncing the sentence of imprisonment in the procedure and manner determined by Article 11 of the CPA in conjunction with Article 109 of the CPA (the fifth and sixth paragraphs of Article 11 of the CPA).

22. The issue of the severity of the prescribed penalties arises also with regard to the fines. The additional issue of whether the difference between the prescribed fines for natural persons, on the one hand, and those for attorneys (as well as legal persons and sole proprietors), on the other, is justified also underlies this review. The Constitutional Court deems that the severity of the prescribed fine for natural persons (300,000 Slovene tolar) does not reach such a degree to warrant that it could only be issued in a procedure fulfilling all the criteria of a criminal procedure, and not in the framework of a civil procedure. The prescribed fine for attorneys (one million Slovene tolar) is, however, so severe that it would be in conformity with the requirements of the Constitution only if it is decided on in a procedure that fulfils all the criteria of a criminal procedure. The Constitutional Court does not consider that, regarding insulting written submissions, it is inadmissible in itself that the law is stricter on an attorney than on a party to proceedings. The reasons for the stricter punishment of attorneys can be found in the fact they are legal experts, whose task is (*inter alia*) to represent parties before courts as a part of their profession, and who are a constituent part of the system of the administration of justice and responsible for contributing to the maintenance of the reputation of the courts and trust in their work. This circumstance (emphasised also by the ECtHR<sup>20</sup>) is undoubtedly important and justifies the possibility of a stricter approach to inadmissible statements of attorneys than in the event such are made by other participants in proceedings. However, the court can take this aspect into account already when pronouncing the fine in a range of up to the prescribed 300,000 Slovene tolar. However, the prescribed fine in the amount of up to one million Slovene tolar is too high to be decided on within civil proceedings without satisfying all the procedural guarantees of a criminal procedure. In addition, such a severe fine is also not necessary to achieve the purpose of the penalty on the basis of Article 109 of the CPA. Furthermore, it is necessary to emphasise, also with regard to the penalties for insulting written submissions, that the symbolic signifi-

20 The Judgment in *Schöpfer v. Switzerland* (Paras. 29 and 31).

cance of such penalties is in the forefront, by ensuring an immediate response of the court to conduct that could jeopardise the course of court proceedings and the authority of the judiciary. As the punishment for insulting written submissions on the basis of Article 109 of the CPA also does not exclude criminal responsibility, which can be decided on within criminal proceedings, there are no objective grounds for the penalties prescribed by Article 11 of the CPA to be so severe (as well as unacceptably severe in relation to the penalties that can be issued by a court for the criminal offense of insult pursuant to Article 169 of the PC while ensuring all the guarantees of criminal procedure and taking into account the different purpose of the penalty). Therefore, the Constitutional Court abrogated the third paragraph of Article 11 of the CPA in the part that enables the issuance of a fine in an amount exceeding 300,000 Slovene tolar.

23. The Constitutional Court emphasises that both with regard to its positions on issuing a sentence of imprisonment outside of criminal proceedings as well as regarding the severity of the fines, these positions refer to instances where participants in proceedings are penalised for written submissions in civil proceedings that are insulting. It is not necessary for the positions of the Constitutional Court to be the same when punishing participants in proceedings also pursues the aim of ensuring the enforcement of decisions in the narrower or broader sense, in particular in those instances where penalties are used as a means to influence the willingness of a certain person to perform a certain activity (as is, e.g., the case when punishing a witness who refuses to answer questions without justification; the second paragraph of Article 241 of the CPA). In this Decision, the Constitutional Court has not adopted a position with regard to such issues.
24. The petitioner's arguments that, concerning the definition of the prohibited conduct determined by Article 109 of the CPA, the requirements of the principle of legality in criminal law (Article 28 of the Constitution) should be fulfilled are not substantiated. As was explained above, due to the abrogation of the excessively severe fines prescribed, it can be justifiably considered that the penalties on the basis of Article 109 of the CPA in conjunction with Article 11 of the CPA do not entail criminal law protection. Thus, it is logical that also substantive constitutional guarantees relating to criminal offenses do not apply. Therefore, there is no need for the special determination of grounds that could exclude illegality, such as those determined by Article 169 of the PC. Such grounds are also not specifically determined by Article 179 of the Code of Obligations (Official Gazette RS, No. 82/01) with regard to damages for emotional distress due to insults to honour and good reputation. When deciding on the penalty determined by Article 109 of the CPA, the court must in each case apply the principle of proportionality with regard to freedom of speech and in particular to the right to make statements as a part of the right to the equal protection of rights determined by Article 22 of the Constitution in the manner that follows from this Decision. The Constitutional Court does not need to answer the question of whether the fact that the intent of insult is not demonstrated can constitute grounds for excluding illegality. It is necessary to underline again that the purpose of the prohibi-

tion of insulting written submissions determined by Article 109 of the CPA is different than that of the relevant criminal offenses against honour and good reputation (and also different than for the civil law protection of honour and good reputation).

25. As mentioned above, the principle of the precision of legal norms is also important when the matter does not concern criminal cases. A limitation of a right (as applies *mutatis mutandis* also to the determination of the manner of its exercise) may only be prescribed by a law that is precise and clear. The requirement that legal norms must be precise and clear ensures, on the one hand, that individuals can foresee from the norm their rights and duties and the consequences in the event of conduct contrary to the norm. On the other hand, individuals are thereby protected from instances of unjustified interferences with their rights and legal interests (Constitutional Court Decision No. U-I-220/03). The petitioner did refer to violations of the principles of a state governed by the rule of law in this regard, however, it is necessary to explain that the concept of “insulting the court” (in the broad sense) is an open legal term, for which it is typical that it is not completely linguistically and technically defined in a legal act.<sup>21</sup> Legal terms are a model of a typical legal feeling;<sup>22</sup> it is for the bodies deciding in a particular case to fill them with substance. The definition of prohibited conduct by a legal term is not of itself inadmissible; a court applying a legal term by establishing its substance and giving appropriate reasons it took into account does not apply law arbitrarily, but in accordance with the will of the legislature. Furthermore, it follows from constitutional case law that the use of indefinite legal terms is not in itself inconsistent with the principles of a state governed by the rule of law according to Article 2 of the Constitution.<sup>23</sup> In the academic literature and case law, the concept of an “insult” has been concretised well enough, not only as regards criminal cases, but also in connection with claims for damages for emotional distress due to insults to honour and good reputation, providing another reason why this term is not undetermined. The same also applies for the definition of possible grounds for excluding illegality – see in this regard the reasoning provided in the previous paragraph. With regard to other allegations of inconsistency with the principles of a state governed by the rule of law (concerning the severity and comparability of the penalty), the Constitutional Court does not need to review them as it abrogated the challenged provisions as regards the amount of the fine. The petitioner’s assertions that the determination of the prohibition of insulting written submissions was in-

21 M. Pavčnik, *Teorija prava* [Theory of Law], Cankarjeva založba, Ljubljana (1997), pp. 52–53.

22 M. Pavčnik, *Argumentacija v pravu* [Argumentation in Law], Pravna fakulteta and Cankarjeva založba, Ljubljana (2004), p. 194.

23 Constitutional Court Decision No. U-I-220/03: “However, the use of indefinite legal terms is not in itself inconsistent with the Constitution. The task of competent bodies (in particular, the Agency and courts) is to give to an indefinite legal term, by using methods of interpretation, a substance that is consistent with the Constitution and law. Thereby, they must not act arbitrarily. It is not possible, however, to foresee in advance that the competent bodies will interpret indefinite legal terms in a manner such that is not consistent with the Constitution, and that thereby they will act arbitrarily. Such also does not suffice for substantiating a violation of Article 2 of the Constitution.”

consistent with the principles of a state governed by the rule of law, as determined by Article 2 of the Constitution, are thus not substantiated. Moreover, the petitioner did not allege that the procedure in which the court decides on the penalty violates any guarantees of a fair trial (except the right to an impartial judge determined by the first paragraph of Article 23 of the Constitution – which has already been reviewed) that must be taken into consideration even if the matter does not concern a criminal case; therefore, the Constitutional Court did not need to address this issue.

26. For the reasons stated in paragraphs 19 to 22 of the reasoning of this Decision, the Constitutional Court abrogated the provisions of Article 11 of the CPA on the possibility of pronouncing a sentence of imprisonment or a fine in the amount of more than 300,000 tolar. Due to the abrogation of these provisions, it is no longer possible to pronounce such penalties also for legal entities and sole proprietors. As the provisions that prescribed the sentence of imprisonment, which the court could pronounce in the event that a fine was not paid, are abrogated, henceforth if a fine is not paid, a regular enforcement procedure applies. Furthermore, the abrogated provisions of Article 11 of the CPA cannot be applied in instances of punishment due to the abuse of rights determined by the first and second paragraphs of Article 11 of the CPA, and for obstructing a main hearing as determined by Article 304 of the CPA. In view of the abrogation of the provisions on the sentence of imprisonment, also the provision on the substitute penalty for legal entities, which could not be issued a sentence of imprisonment, loses its significance (the seventh paragraph of Article 11 of the CPA). Therefore, the Constitutional Court also abrogated this provision.
27. In view of the fact that the Constitutional Court decided that the institution of punishment by a fine (up to the limited amount) in a civil procedure is not inconsistent with the Constitution, it follows that also the provision of the fourth paragraph of Article 11 of the CPA, which merely determines the manner in which a fine is pronounced and the time limit in which such a fine must be paid, is not inconsistent with the Constitution.

### C

28. The Constitutional Court adopted this Decision on the basis of Articles 21 and 43 of the CCA, composed of: Dr Janez Čebulj, President, and Judges Dr Zvonko Fišer, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrija, Dr Ciril Ribičič, Dr Mirjam Šrk, and Dr Dragica Wedam Lukić. Points 1 and 2 of the operative provisions were adopted unanimously. Point 3 of the operative provisions was adopted by five votes against three. Judges Ribičič, Šrk, and Wedam Lukić voted against. Judges Ribičič and Wedam Lukić submitted dissenting opinions.

*Dr Mirjam Šrk*  
*Vice-President*

*on behalf of*  
*Dr Janez Čebulj*  
*President*

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**DISSENTING OPINION OF JUDGE DR DRAGICA WEDAM LUKIĆ,  
JOINED BY JUDGE DR CIRIL RIBIČIČ  
AND JUDGE DR MIRJAM ŠKRK**

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1. I voted against Point 3 of the operative provisions, in which the Constitutional Court decided that the provision of Article 109 of the CPA, which authorises the court to punish a person who in his or her written submissions insults the court, a party, or another participant in the proceedings, is not inconsistent with the Constitution. This does not mean that I am of the opinion that such punishment is in itself inconsistent with the Constitution. I voted against this decision as I had serious doubts concerning the criteria on the basis of which the Constitutional Court reviewed the challenged provision.
2. The petitioners explicitly asserted (*inter alia*) that the challenged provision is inconsistent with the right to freedom of expression determined by Article 39 of the Constitution, which is why I argued that the Constitutional Court should apply the proportionality test to review whether the matter concerned a constitutionally (in) admissible interference with the mentioned right. However, the majority decision avoided such a review and reviewed the allegations as to the inconsistency with Article 39 of the Constitution from the viewpoint of the consistency of the challenged provision with the right to make statements before the court determined by Article 22 of the Constitution. According to the majority, the prohibition of insulting statements does not entail an interference with this constitutional right that would need to be reviewed on the basis of the strict test of proportionality, but “only concerns the determination of a manner of exercise of this right, in conformity with the second paragraph of Article 15 of the Constitution” (Paragraph 6 of the reasoning).
3. Article 15 of the Constitution (the exercise and limitation of rights) provides, at the outset in the first paragraph, that human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution. In accordance with the second paragraph of this Article, the manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. In the case at issue, the possibility of prescribing the manner of the exercise of the right to freedom of speech in court proceedings is not explicitly prescribed by the Constitution. As follows from Paragraph 6 of the reasoning, the majority decision is based on the standpoint that for court proceedings, “it is naturally necessary that the manner or form of carrying out procedural activities, including making statements before the court, be regulated and subject to certain formal requirements (*inter alia*) concerning the manner of making statements.” In the text that follows, the majority established that the “delimitation between the determination of the manner of the exercise of human rights and the limitation of constitutional rights is not always simple,” and that is why they considered that a review of the “necessity” of such regulation was required. This in particular was allegedly essential as “the case concerns a statutory regulation in which the determination of the manner of the exercise of a human right approaches the line where it could already entail its limitation.”

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4. The nature of the right to judicial protection (Article 23 of the Constitution) and the right to the equal protection of rights (Article 22 of the Constitution) is undoubtedly such that the legislature must regulate the manner of the exercise thereof for them to be exercisable. This entails that the legislature must establish a judicial system and prescribe rules of procedure for their exercise. However, in the case at issue the matter does not concern a situation in which the determination of a penalty for insulting statements would be necessary for the exercise of the mentioned two rights. From Paragraph 9 of the reasoning of the Decision it namely follows that such determination of the manner of the exercise of the mentioned rights is necessary to protect “the trust in the judiciary and the reputation and authority of the judiciary.” This can represent a constitutionally admissible aim for the limitation of a human right, however, such does not constitute a justification for the necessity of regulating the manner of the exercise of the mentioned rights. It would be an exaggeration to state that without any punishment for insulting written submissions, as provided by Article 109 of the CPA, the mentioned constitutional rights cannot be exercised. This is also clear from a comparison with other legal systems that do not regulate such punishment or do not regulate it to such an extent.<sup>1</sup>
5. The starting point entailing that the matter only concerns the determination of the manner of the exercise of a right seems to me even more questionable with regard to freedom of speech as determined by Article 39 of the Constitution. The idea that it is possible to determine the manner of the exercise of this right without such also entailing its limitation seems to me constitutionally questionable already in and of itself. The matter namely concerns a fundamental constitutional freedom that can be exercised directly on the basis of the Constitution itself. The Constitutional Court has often emphasised that the right determined by Article 39 of the Constitution is of particular importance. The Constitutional Court defined the content of this right in Decision No. U-I-226/95, dated 8 July 1999 (Official Gazette RS, No. 60/99, and OdlUS VIII, 174), in which it decided that exceptions from the imposition of penalties for damaging someone’s honour and good reputation are not inconsistent with the Constitution. In that decision the Constitutional Court quoted a former Justice of the US Supreme Court, Justice Cardozo, who stated that freedom of expression is “the matrix, the indispensable condition, of nearly every other form of freedom.” Furthermore, the Constitutional Court emphasised that the right of an individual to express his or her opinions must be protected irrespective of whether a statement is harsh or neutral, rational or emotionally loaded, mild or aggressive, beneficial or damaging, correct or erroneous. A similar position also follows from the case law of the ECtHR, which in the Judgement in *Handyside v. The United Kingdom* held that freedom of expression refers “not only to [ideas] that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”<sup>2</sup> However, this does not entail that in such cases the expressed

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1 In France and Germany, e.g., there are no penalties for insults made in written submissions.

2 See L. Šturm, *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slove-

statements will be effectively protected. Limitations are admissible if they pursue a constitutionally admissible goal, and if they are in accordance with the second paragraph of Article 15 of the Constitution. One of the constitutionally admissible aims is the protection of the honour and good reputation of others and, on the basis of the second paragraph of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR), explicitly also maintaining the authority of the judiciary. The European Court has held that a limitation of the freedom of expression is admissible if a state takes disciplinary measures against a lawyer who has broken his professional duty to refrain from aggressive and insulting conduct (*X. v. Germany*)<sup>3</sup>. In the second paragraph of Article 10 of the ECHR, the exceptions with regard to which the exercise of the freedom of expression may be restricted are defined somewhat differently than in the third paragraph of Article 15 of the Constitution, however, this does not entail that in these instances the application of the test of proportionality is excluded. Nevertheless, it is necessary to emphasise that in the event that the standards determined by the Constitution are higher than those in the ECHR, the Constitutional Court must apply those determined by the Constitution.

6. The majority was evidently aware of these issues and thus argued for its approach by pointing out that the case at issue concerned “statements before the court and not, for example, instances of artistic expression.” According to the majority, as regards artistic expression, “protection of both the content and the form of making statements [is ensured], and a limitation imposed on a person that determines the form of expression can be considered a limitation of this constitutional right,” whereas making statements in proceedings before the courts entails a different and specific position. For court proceedings, it is allegedly “naturally necessary that the manner or form of carrying out procedural activities, including making statements before the court, be regulated and subject to certain formal requirements (*inter alia*) concerning the manner of making statements.” However, this comparison is not the most appropriate. The case at issue namely does not concern only the form or manner of making certain statements. The fact is that the court punishes a party (or another person) for statements that are insulting **in terms of their content**, and not because of their form (written or oral)<sup>4</sup> and the manner how they are made.
7. It is also necessary to consider that the right to make statements in proceedings, guaranteed by Article 22 of the Constitution, does not cover all the aspects of the punishment determined by Article 109 of the CPA. From the majority decision it follows that the right to make statements before the court “logically refers to statements that are important for the court’s decision on a case at issue.” The prohibition

nia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 429; and Macdonald, Matscher, Petzold, *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, 1993, p. 470.

3 See *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], p. 424; and Macdonald, Matscher, Petzold, p. 488.

4 According to Article 16 of the CPA, parties perform their procedural activities in writing outside a hearing and orally at a hearing, if the law does not determine otherwise for individual procedural activities.

of statements that only “generally and indiscriminately express contempt for the judiciary or entail a personal attack on a judge,” in the majority’s opinion, “does not in any way limit the right to make statements before the court concerning issues due to which this right is guaranteed,” as such statements have no connection with the protection of the rights of a party to the proceedings. I can agree with this, although it is often difficult to differentiate between statements that still function so as to protect a party’s right and those that “have no relation to the decision at issue.” However, the Decision gives no answer to the question of whether all such statements are prohibited and whether their prohibition entails a limitation of freedom of expression as determined by Article 39 of the Constitution.<sup>5</sup> Furthermore, the majority decision failed to establish that the right to make statements determined by Article 22 of the Constitution is the right of a party to proceedings (the person whose rights and duties are decided on), however, pursuant to Article 109 of the CPA, the court may also punish others.<sup>6</sup> This is important because the majority decision explicitly emphasises (Paragraph 13 of the reasoning) that the court must in every case weigh whether critical and perhaps sharp statements entail an admissible manner of exercise of the right to make statements in proceedings determined by Article 22 of the Constitution, since failure to perform this weighing could cause an inadmissible limitation of this right. A person who is not a party to proceedings cannot argue in constitutional complaint proceedings that due to his or her punishment the defence of the rights of a party to proceedings was curtailed. This applies even if the court punishes the party’s attorney, as in proceedings the latter does not exercise his or her own rights, his or her statements are made only for the protection of the rights of the party.<sup>7</sup>

8. Whether and to what extent the penalty imposed on the basis of Article 109 of the CPA entails a violation of the right of a party to make statements in proceedings, as determined by Article 22 of the Constitution, is a matter of individual proceedings. The effect of the prohibition of insulting written submissions on this right of a party is only indirect: when due to the threat of a penalty the party does not dare to efficiently defend his or her positions. I agree that given a correct understanding and application of the challenged provision such consequences cannot occur. Furthermore, it is necessary to emphasise that Article 109 of the CPA only determines that a person who insults the court shall be punished, however, the law does not

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5 I hope that the sentence that the right of a party to make statements in proceedings “cannot entail the right of a party (or his or her representative or authorised person) to make any kind of statement before the court” (Paragraph 8 of the reasoning), cannot be understood as proclaiming that any statements not “made to” protect the party’s rights in the proceedings are prohibited.

6 The first paragraph of Article 109 contains the wording “a person who in his or her submissions insults the court, a party, or another participant in proceedings,” while Article 304, which determines the penalty for insulting statements made at a hearing, contains the wording “if someone who takes part in the proceedings [...] insults the court [...]”

7 The Constitutional Court rejected the constitutional complaint of an attorney lodged against a decision by which the court had dismissed a motion for the reinstatement of a case after the attorney missed the time limit for filing an appeal (Order No. Up-216/99, dated 19 December 2000, OdlUS IX, 315).

determine that individual statements that are relevant for the decision should not be considered although they have been expressed in an insulting manner. Therefore, I am of the opinion that the Constitutional Court could establish only exceptionally in constitutional complaint proceedings that a party's right determined by Article 22 of the Constitution was violated due to an (unjustified) penalty.

9. What is essential for the review of this case is, in my opinion, the issue of whether the case concerns a limitation of the freedom of expression determined by Article 39 of the Constitution. As the Constitutional Court excluded the provision of Article 39 of the Constitution from its review, and did not provide convincing reasons for such, I could not vote in favour of the majority decision.

*Dr Dragica Wedam Lukić*

*Dr Mirjam Škrk*

I join the dissenting opinion of Judge Dr Dragica Wedam Lukić. In addition, I would like to add that it is particularly important for trust in the law, legal certainty, and the foreseeability of Constitutional Court decisions that it is foreseeable in which cases the Constitutional Court must apply the strict test of proportionality due to an interference with constitutional rights, in the case at issue, due to an interference with the freedom of expression determined by Article 39 of the Constitution, and when it has no such obligation. This should not be dependent on the circumstances of a particular case.

An especially interesting case in which the Constitutional Court applied the strict test of proportionality is Decision No. U-I-141/97, which concerned the advertising of tobacco products. Although the case was not brought forward by an individual, but by producers of tobacco products, and did not concern the freedom of expression in general, but its exercise in the economic framework of advertising (i.e. commercial speech), regarding which the limitations due to concerns for public health are well justified on the basis of the detrimental effects of tobacco products, the Constitutional Court decided to apply the strict test of proportionality and provided the following reasons: "When the Constitution does not foresee a limitation of a human right or fundamental freedom, it is necessary to review whether an interference is admissible for the protection of the constitutional rights of others or due to the public benefit. As follows from the case law of the Constitutional Court [...], it is admissible to limit constitutional rights in order to protect the constitutional rights of others only if such limitations are in accordance with the principle of proportionality. For a limitation to be admissible, there must be a constitutionally admissible aim (the protection of the rights of others or even of a public benefit – the protection of the public benefit constitutes a constitutionally admissible aim either directly or indirectly – when through such the rights of others are protected). In addition, three conditions must be fulfilled:

- (1) the interference must be necessary – this entails that the aim cannot be achieved by a milder interference with the constitutional right or even without such (it cannot be replaced by other possible measures that would achieve the same aim);
- (2) the interference must be appropriate for achieving the pursued constitutionally admissible aim; and
- (3) so-called proportionality in the narrower sense must also be considered.

This entails that in the review of the necessity of the interference, the importance of the interference with the constitutional right must be weighed against the importance of the constitutionally admissible aim protecting or ensuring other constitutionally guaranteed values, and evaluated as regards whether the interference is justifiable in relation to the gravity of its consequences.” In the light of the cited case<sup>1</sup>, in a matter concerning an attorney who must suffer limitations of his or her freedom of expression appearing before the court to the benefit of his or her party in civil proceedings, the decision of the Constitutional Court to not apply the strict test of proportionality is unconvincing. However, my position that in this case it was necessary to apply the strict test of proportionality certainly does not entail that such test would not be passed successfully.

*Dr Ciril Ribičič*

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1 Andraž Teršek, *Primer Tobačna, d.o.o.* [The Case of Tobačna Ltd.], *Pravna praksa*, No. 4/2002, p. 15. The author was of the opinion that the Constitutional Court would have to develop a doctrine on the application of the strict test of proportionality when the matter concerns interferences with the freedom of expression (and in general, the freedom of conduct) in the area of commercial expression (and he mentions, in addition to tobacco products, the prohibition of advertising alcohol), adding that: “Perhaps the Constitutional Court decided to apply the strict test of constitutionality on the basis of an advance evaluation that in the case at issue, the strict test of constitutionality would be passed.”

Decision No. **U-I-164/09**, dated 4 February 2010

## DECISION

At a session held on 4 February 2010 in proceedings to review constitutionality initiated upon the request of the Ljubljana District Court, the Constitutional Court

*decided as follows:*

The second paragraph of Article 282 of the Civil Procedure Act (Official Gazette RS, Nos. 26/99, 96/02, 12/03 – official consolidated text, 2/04, 36/04 – official consolidated text, 52/07, 73/07 – official consolidated text, and 45/08) is abrogated.

## *Reasoning*

### **A**

1. The applicant proposes a review of the constitutionality of the second paragraph of Article 282 of the Civil Procedure Act (hereinafter referred to as the CPA), which, in the event a defendant is unjustifiably absent from the settlement hearing or (if the settlement hearing was not scheduled) the first session of the main hearing, determines that, if the statutory conditions are fulfilled, a default judgment is to be issued against the defendant, even if he or she had filed a defence. In its opinion, the challenged regulation represents an irrebuttable presumption that the defendant withdrew the defence or a statutory fiction that such procedural action did not happen. In any event, when issuing a default judgment, courts should allegedly disregard the allegations of the defendant in the defence, because this type of judgment is based on the prerequisite of an express recognition of the factual basis stated in the action. The applicant interprets the challenged provision in such a manner that courts must only issue a default judgment when the defendant does not appear at the first hearing, regardless of the fact that also a settlement hearing was scheduled. It is also of the opinion that it follows from this provision that when issuing a default judgment, courts must also disregard [those] objections of substantive law submitted on time until the moment of [the defendant's] non-appearance at the hearing that [by law] may only be taken into account if the defendant refers thereto (e.g. a dispropor-

tionate contractual penalty, a limitation period), and also must disregard generally known facts that benefit the defendant if he or she refers thereto.

2. The applicant is of the opinion that from Article 23 of the Constitution, which refers to the guarantee of effective judicial protection without undue delay, there follows the duty of the state to appropriately organise the judicial system and to adopt appropriate procedural regulations that will ensure, by procedural duties and limitations of parties to the procedure, that those invoking judicial protection will obtain the judicial decision in a reasonable time. Therefore, there are allegedly no obstacles of principle to enacting the duty of cooperation of parties to the procedure, which in a lawsuit is invoked in [the form of] prescribed sanctions in the sense of preclusions with regard to making allegations and presenting evidence, as well as in the limitation of legal remedies available for challenging judicial decisions. The applicant nonetheless draws attention to the fact that the sanction for the failure of a party to proceedings to perform the duty of cooperation must be proportionate to the consequence that would arise if such sanction were not prescribed. Allegedly, the function of procedural law is also to ensure that judicial decisions are substantively correct. Therefore, when pursuing the aim that proceedings are expeditious and focused, the legislature is allegedly bound by the duty to enact such sanctions for failures to act of parties to proceedings that interfere less with the parties' legal position. In the assessment of the applicant, disproportionate procedural sanctions entail an interference with the human right to judicial protection (the first paragraph of Article 23 of the Constitution).
3. The applicant alleges that the challenged second paragraph of Article 282 of the CPA includes a sanction that is entirely disproportional to the aim of the legislature, i.e. [ensuring] that the civil procedure is focused and expeditious. In its opinion, this disproportionality is especially evident in the event substantive objections of the defendant are disregarded of which the factual basis is undisputable, which has no correlation with the length of the main hearing. The legislature allegedly has the possibility to prevent unnecessary postponement of the main hearing by enacting different sanctions, namely by limiting the taking of individual pieces of evidence, as it did in the fifth paragraph of Article 282 of the CPA. The applicant is of the opinion that, alternatively, the system that was in force before the entry into force of the Act Amending the Civil Procedure Act (Official Gazette RS, No. 45/08 – hereinafter referred to as the CPA-D) could remain in force; it was then possible for the first hearing to be carried out in the absence of the defendant, who in such manner deprived him- or herself of the possibility to actively participate in the taking of evidence. The applicant is of the opinion that the limited possibility to challenge the default judgment will eventually mean that courts will not ensure protection to true holders of substantive rights; not because of the parties' admissible revision or withdrawal of claims and objections, but due to the statutory fiction, which due to the failure to perform a procedural action nullifies another procedural action performed on time. For the above-stated reasons, the challenged regulation is allegedly also inconsistent with the right to make a statement "as one expression of the right to judicial protection". The applicant also alleges an inconsistency of the challenged provision with the

right to equality before the law (the second paragraph of Article 14 of the Constitution). In its view, the mentioned inconsistency lies in the alleged privileged position of a plaintiff who does not appear at the first hearing, compared with a defendant in the same situation. The plaintiff has allegedly the possibility to avoid the issuance of a default judgment by revoking his or her fictive statement waiving the claim without substantiating the justification for his or her non-appearance at the hearing.

4. In its reply to the request, the National Assembly of the Republic of Slovenia explains that the general purpose of the new regulation of the system of sanctioning [a party's] non-appearance at the main hearing (Article 282 of the CPA) was to remedy the systemic deficiencies of the CPA, which did not enable the judicial protection of rights to be effectively ensured. Allegedly, it became evident in practice that the principle that the main hearing must be focused was not being implemented consistently, because even if the main hearing ended following its second session, that was an exception. The National Assembly explains that the CPA prior to the CPA-D did not institute instruments for ensuring [the implementation of] this principle and at the same time it did not contain sanctions for [punishing] the inactivity of the parties to judicial proceedings, especially in the event one of the parties did not appear at the hearing. This allegedly enabled the postponement of hearings and the delay of proceedings. For such reason, the amended Article 282 of the CPA allegedly pursues the aim of ensuring the greater activity and responsibility of both parties to a civil procedure and the aim of expediting the procedure, which should be concluded in the event both parties are unjustifiably absent. Allegedly, the challenged obligation to issue a default judgment thus, on the one hand, punishes the inactivity of the defendant in the procedure, and on the other hand, has an influence on whether the party does appear at the hearing and thus enables the procedure to be concluded. The National Assembly adds that already the Labour and Social Courts Act (Official Gazette RS, Nos. 2/04, *etc.* – hereinafter referred to as the LSCA-1) introduced, in 2004, exactly the same sanction – in terms of substance and effect – in the event the defendant does not appear at the hearing. The National Assembly warns that a party is not obliged to make a statement in the procedure and that a party cannot be forced to actively participate in the procedure; however, his or her inactivity may have, if the party is warned thereof in advance, certain negative consequences. In the opinion of the National Assembly, it allegedly follows from the statutory context of the challenged provision that in the procedure the defendant is given the possibility to make a statement, because a default judgment may only be issued – provided that the other conditions determined by Article 318 of the CPA are fulfilled – if the defendant was duly summoned to the hearing, warned of the consequences of his or her non-appearance, and if the defendant has given no justified reasons for non-appearance or if no generally known circumstances existed that would justify the defendant's non-appearance. The National Assembly also deems important the fact that the consequences of a [party's] non-appearance can be remedied by using the legal institute of the reinstatement of the case.
5. The National Assembly alleges that the aim of an efficient judicial procedure, which is pursued by the legislature, is constitutionally important within the framework of

the right to judicial protection determined by Article 23 of the Constitution. Allegedly, the legislature limited, to a certain extent, the right to make a statement in order to ensure to a greater extent the right to judicial protection. By the challenged limitation, legal certainty and trust in the law are allegedly also ensured in the public interest. In the opinion of the National Assembly, completely the same effect on the procedure being focused and the possibility of its conclusion at the first hearing could not be achieved by other means. Insofar as the legislature could apply, within the framework of the assessment of the appropriateness of [different] means, other possibilities to achieve the same aim, it would allegedly have, with regard to this issue, certain discretion. The National Assembly is of the opinion that the challenged regulation is proportionate in the narrower sense, as such a strict sanction is proportionate to the importance of the main hearing, and in addition, the defendant allegedly had considerable possibilities to prevent the consequences of non-appearance from arising. The National Assembly rejects the allegations regarding the inconsistency with the principle of equality before the law, in particular due to the fact that the position of the defendant is not completely the same as that of the plaintiff. It also did not concur with the interpretation of the first paragraph of Article 282 of the CPA in relation to the fifth paragraph of Article 317 of the CPA, as proposed by the applicant.

6. Also the Government of the Republic of Slovenia does not concur with the constitutional allegations of the applicant. It underlines that the challenged regulation is a consequence of the findings in theory and practice that before the entry into force of the CPA-D courts did not have appropriate possibilities to ensure that the main hearing, which is the most important phase of a civil procedure, is focused. Allegedly, the principle that also the parties themselves have an obligation to contribute to expediting the procedure and make it more economical by acting diligently and responsibly in the procedure was not implemented to a sufficient degree in the past. The Government underlines the significant importance of the right to a trial without undue delay determined by Article 23 of the Constitution, with which the principle that the procedure must be economical and expeditious is connected, as is the principle that the main hearing must be focused. Allegedly, the state has an obligation to ensure such regulation of the civil procedure in which the inactivity of one party will not deprive the opposing party of an effective right to judicial protection. The Government (similarly as the National Assembly) warns of the entirety of the statutory provisions that determine, together with the second paragraph of Article 282 of the CPA, the conditions for issuing a default judgment or for the abrogation thereof. It explains that the legislature decided on such a severe sanction due to the fact that it was demonstrated in practice that the solutions in force before the CPA-D were ineffective from the viewpoint of the main hearing. In the opinion of the Government, the filing of a possible defence does not entail that courts will not even take into consideration the allegations from the defence they received [upon the filing of such]. The Government is of the opinion that the challenged regulation is not inconsistent with the Constitution.
7. The reply of the National Assembly and the opinion of the Government were sent to the applicant, who did not reply thereto.

**B – I**

8. The challenged second paragraph of Article 282 of the CPA took effect, as a part of the new and completely modified Article 282 of the CPA, on the day the CPA-D entered into force (i.e. on 1 October 2008). It brought to the Slovene regulation of civil procedure a second (an additional) possibility for issuing a default judgment, which before the mentioned statutory amendment [entered into force] could only be issued by the procedure envisaged in Article 318 of the CPA.<sup>1</sup> Article 282 of the CPA reads, in its entirety, as follows:

- “If the plaintiff fails to appear at the settlement hearing, or the first hearing if the settlement hearing has not been scheduled, the judgment may nevertheless be rendered on the basis of relinquishment, provided the conditions set forth in Article 317 hereof have been fulfilled.
- If the defendant fails to appear at the settlement hearing, or the first hearing if the settlement hearing has not been scheduled, the court shall, on the basis of the conditions set forth herein, render a default judgment even though a defence has been filed by the defendant. If the plaintiff’s statements do not prove that the claim is justified and if at the hearing the plaintiff does not correct the statements accordingly, the claim shall be rejected.
- If neither of the parties appears at the settlement hearing, or at the first hearing if the settlement hearing has not been scheduled, the action shall be deemed to have been withdrawn by the plaintiff.
- If the plaintiff fails to appear at a subsequent hearing and the court fails to render a judgment on the basis of the file (the fifth paragraph of this Article), the plaintiff shall be deemed to have withdrawn the action unless the defendant disagrees with the assumption of the withdrawal of the action.
- If both parties fail to appear at a subsequent hearing, the court shall decide on the basis of the file provided the hearing at which evidence is taken has been conducted and the facts sufficiently clarified (judgment on the basis of the file). The court shall decide in the same manner if one of the parties fails to appear at the hearing and the opposing party makes a motion for a decision on the basis of the file. No appeal shall be allowed against the order by which the court denies a motion for a decision based on the facts in the file.
- The provisions of the preceding paragraphs shall be applied provided the party has been duly summoned and has given no justified reasons for non-appearance, or there are no known circumstances indicating that the party was unable to appear at the hearing for justified reasons.
- The party shall be informed of the consequences of non-appearance at a hearing in the writ of summons.”

1 Before the CPA-D, Article 282 of the CPA then in force determined that if the plaintiff or defendant does not appear at the first hearing, or at any subsequent hearing, the main hearing shall nevertheless be held. The first paragraph of Article 209 of the CPA then in force determined that the procedure shall be stayed if one of the parties does not appear at the hearing after being duly summoned and if the opposing party proposes that the procedure be stayed, except when the absent party had proposed beforehand that the hearing be held in its absence.

9. The challenged provision imposes on the court of first instance<sup>2</sup> the duty to issue a default judgment (a judgment by which it finds for the plaintiff in the entirety or in a part of the claim) against the defendant if the prescribed statutory conditions therefor are fulfilled. The conditions for issuing a default judgment due to an unjustified non-appearance at a hearing are only partly directly included in the challenged provision, namely in its first sentence. From this provision it follows that the unjustified non-appearance of the defendant<sup>3</sup> at the settlement hearing, or the first hearing if the settlement hearing has not been scheduled, is sufficient for issuing a default judgment. The issuance of a default judgment is not hindered by the fact that the defendant filed a defence.<sup>4</sup> In addition to the second paragraph of Article 282 of the CPA, also the sixth paragraph of Article 282 of the CPA must be taken into consideration when assessing the conditions for issuing a default judgment, in conformity with which a default judgment may only be issued if the defendant has been duly summoned<sup>5</sup> and has given no justified reasons for non-appearance, or there are no known circumstances indicating that the party was unable to appear at the hearing for justified reasons. If a court is informed in due time of the existence of justified reasons for a party's non-appearance at the hearing, it adjourns the hearing (Article 115 of the CPA). Failure to appear at a hearing due to a justified reason also entails a basis for abrogating a default judgment and for the reinstatement of the situation in the lawsuit prior to the non-appearance at the hearing (Article 116 of the CPA). With regard to further conditions for issuing a default judgment, the challenged provision contains ("under the conditions determined by this Act") a reference to the first paragraph of Article 318 of the CPA, which determines that such judgment may be issued if: (1) the action has been duly served upon the defendant in order for such to file a defence, but the latter did not file the defence within the statutorily prescribed period of time; (2) the action does not contain a claim that the parties may not revise or withdraw; (3) it follows from the facts stated in the action that the claim is well founded;<sup>6</sup> and (4) the facts upon which the claim is based are not in con-

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2 From Article 349 of the CPA in relation to the second paragraph of Article 348 of the CPA it follows that, in the appeal procedure, the challenged provision of the second paragraph of Article 282 of the CPA cannot even be applied *mutatis mutandis*.

3 A situation wherein neither of the parties to the civil dispute attends the first hearing is regulated by the third paragraph of Article 282 of the CPA.

4 The defence had to be manifestly filed on time (the first paragraph of Article 277 of the CPA) and substantiated (Article 278 of the CPA), otherwise a default judgment as referred to in the second paragraph of Article 282 of the CPA would in any case not be possible, because a default judgment against the defendant would have already been issued in conformity with the first paragraph of Article 318 of the CPA, or a so-called quasi-default judgment, in conformity with the second or third paragraph of Article 318 of the CPA.

5 The concept of duly summoning someone to a hearing is defined by the second and third paragraphs of Article 113 of the CPA, the seventh paragraph of Article 282 of the CPA, the second paragraph of Article 280 of the CPA (for a hearing), and the third paragraph of Article 305c of the CPA (for a settlement hearing).

6 The claim in the action thus must follow from the stated facts. When assessing if it does, courts take into consideration all of the plaintiff's allegations in the action and in the possible subsequent preliminary submissions before the hearing (see A. Galič, *Zakon o pravnem postopku z uvodnimi pojasnili k spremembam zakona in stvarnim kazalom* [The Civil Procedure Act with Introductory Explanations regarding the Amendments of

tradition with the evidence adduced by the plaintiff or with generally known facts. In certain special civil procedures, the challenged provision cannot be applied,<sup>7</sup> whereas in others the parties can *de facto* “exclude” its application by their conduct if they renounce in writing a main hearing,<sup>8</sup> or the [mentioned] provision cannot be applied because in a commercial dispute a court issues a judicial decision without scheduling a hearing.<sup>9</sup>

10. In proceedings to decide on requests for a review of the constitutionality of laws that are filed by courts in conformity with Article 23 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court can be in a significantly different position than when deciding on petitions for a review of the constitutionality of regulations that do not have direct effect. Petitioners must have a legal interest to challenge [regulations], meaning that in conformity with the second paragraph of Article 24 of the CCA, they must provide evidence that they have exhausted all legal remedies. By that time, there often already exists established case law that interprets the regulation in conformity with the established methods of interpretation of legal rules. The judicial interpretation of the concrete constitutionally disputable provision contributes to high-quality and reasoned constitutional case law, as it dispels doubts regarding the meaning of the regulation.<sup>10</sup> When deciding on a request, which might be filed very soon after the entry into force of the regulation, interpretative doubts or unclariities arise more often. If such unclariities are irrelevant for the review of constitutionality, the Constitutional Court does not have to adopt a position thereon.<sup>11</sup> With regard to the other interpretative dilemmas, however, it must explain which interpretation of the challenged provision is the most sound and convincing one and it must use such as the basis for its assessment.<sup>12</sup>
11. From the Act [at issue] it follows that the purpose of the sanction for not attending a hearing is to increase the activity and responsibility of parties, and to thereby prevent delays in the procedure, i.e. to enable the procedure to also conclude in the event the

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the Act, with Index], Uradni list RS, Ljubljana 2008, p. 40).

- 7 A default judgment does not exist in matrimonial disputes and in disputes relating to the relations between parents and children (the first paragraph of Article 412 of the CPA), whereas in small claims disputes, in certain instances of the non-appearance of a duly summoned defendant at a hearing, a judgment by consent is issued (the third paragraph of Article 454 of the CPA), and in others a legal fiction is created as to the withdrawal of all of the defendant's motions for evidence, except documentary evidence that the party has already submitted to the court beforehand (the first paragraph of Article 455 of the CPA).
- 8 Article 279a of the CPA.
- 9 Article 488 of the CPA.
- 10 Cf. Order of the Constitutional Court No. U-I-330/05, U-I-331/05, U-I-337/05, dated 18 October 2007 (Official Gazette RS, No. 101/07, and OdUS XVI, 79).
- 11 With regard to the challenged provision, the situation such [as described] is, e.g., in relation to the question of how courts act in the event the plaintiff rectifies, at the hearing, a claim that does not follow from the stated facts, which is a situation that is not resolved by the linguistic frame of the provision (see, e.g., A. Galič, *Prve izkušnje z novelo ZPP-D* [The First Experiences with the CPA-D Amendment], in: *VII. dnevi civilnega prava* [7<sup>th</sup> Civil Law Days]: 22 – 23 April 2009, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljana 2009, p. 38).
- 12 If, subsequently, a different interpretation becomes common in the case law, this entails a factor that the Constitutional Court must take into consideration in a possible repeated constitutional review of the provision at issue.

parties are unjustifiably not present.<sup>13</sup> The sanction for non-appearance applies to any first hearing to which a party was summoned. It also applies to a settlement hearing, the purpose of which is to conclude a court settlement and thus to conclude the procedure in the most efficient manner. The Constitutional Court does not concur with the reasoning of the applicant that a default judgment cannot be issued if the defendant was only absent from the settlement hearing that was scheduled independently or at the same time as the first hearing. Absence from a settlement hearing is namely an independent condition for the consequences of non-appearance to arise. Also in line with this position is the case law that has developed in relation to the first paragraph of Article 28 of the LSCA-1, which is substantively similar to the second paragraph of Article 282 of the CPA.<sup>14</sup> With regard to the issuance of a default judgment as a consequence of the unjustified non-appearance of the defendant determined by the second paragraph of Article 282 of the CPA, it must be underlined that from Article 318 of the CPA, to which the challenged provision refers, it follows that when issuing a default judgment, the court of first instance only verifies that the facts upon which the claim is based are not in contradiction with the evidence adduced by the plaintiff (and not by the defendant) or with facts that are generally known (with regard to which the principle of party presentation determined by Article 7 of the CPA applies fully and which courts must not, as a general rule, determine *ex officio*).<sup>15</sup> The court at issue decides on the basis of the set of documents provided only by the plaintiff. Legal experts interpret the challenged provision in such manner as well.<sup>16</sup> The Constitutional Court cannot concur with the differing position of the Government regarding the consequences of the challenged provision in the event of the unjustified non-appearance of the defendant.

## B – II

12. The applicant alleges that the challenged regulation interferes with the right of the defendant to make a statement in the procedure. The applicant considers this entitlement to be a part of the right to judicial protection determined by the first paragraph of Article 23 of the Constitution. Nonetheless, the Constitutional Court considered this allegation, in conformity with the established constitutional case law, within the framework of the right to the equal protection of rights determined by Article 22 of the Constitution, i.e. within the framework of the right to an adversarial procedure

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13 Gazette of the National Assembly, No. 21/08, p. 135.

14 In Judgment and Order No. Pdp 517/2005, dated 23 September 2005, the Higher Labour and Social Court stated that the court of first instance should have issued, on the basis of the first paragraph of Article 28 of the Labour and Social Courts Act (the LSCA-1), a default judgment already due to the defendant's absence from the settlement hearing and that it was not necessary that, after having established that the attempt at a settlement did not succeed due to the non-appearance of the defendant at the settlement hearing, the court of first instance proceeded by holding the first hearing, on which it issued the challenged default judgment.

15 The second paragraph of Article 318 of the CPA, which refers to "circumstances regarding which inquiries must be made", does not entail a basis for determining substantively relevant facts *ex officio*.

16 A. Galič, 2009, *op. cit.*, p. 37.

13. The right to an adversarial procedure is one of the most significant expressions of the right to the equal protection of rights. Courts must give each party the possibility to make a statement with regard to the allegations and claims of the opposing party. It follows from the Constitution that the procedure must be conducted by observing the fundamental requirement of the equality and procedural balance of the parties, and by observing their right to defend against all the procedural actions that could affect their rights or interests. In such manner, it is based on respect for human personality, as it ensures everyone the possibility to make a statement in a procedure that concerns his or her rights and interests and thus prevents persons from becoming nothing but an object of the procedure. Therefore, a party and everyone having a position equal to a party must thus be enabled to present arguments supporting his or her positions and to make a statement both with regard to factual and legal questions. The party must be ensured the right to state facts and present evidence, and to make a statement on the allegations of the opposing party and on the results of the taking of evidence, as well as the right to be present during the taking of evidence. The corollary to the right of a party to make a statement in the procedure is, on the opposing side, the obligation of courts to take note of all the (legal and factual) allegations of the party, to weigh their admissibility and relevance, and to adopt a position in the reasoning of the judgment on those allegations that are admissible and significant for the decision.<sup>17</sup> On the basis of Article 22 of the Constitution, parties to a lawsuit have a right entailing that courts must consider, evaluate, and in a substantiated manner accept or dismiss their allegations and positions if they are presented in conformity with the provisions of the civil procedure and if they are not manifestly legally irrelevant.<sup>18</sup>
14. Thus, the courts must, in particular, become acquainted with all the preliminary submissions and applications, statements, allegations, motions for evidence, and objections of parties; however, they only must substantively study and (if they are legally relevant) take into consideration when deciding [on the case] those that are in conformity with the procedural rules.<sup>19</sup> If a certain procedural provision must be interpreted in such a manner that (regardless of their legal significance) the allegations of the parties are, in a certain manner or after certain time limits have expired, inadmissible, or even in such a manner, as in the case at issue, that the allegations that are initially correctly presented subsequently become inadmissible due to a party's failure to participate in another procedural action without good cause, courts disregard such allegations when deciding and do not adopt a position thereon. Nonetheless, the law that prescribes such legal consequences must fulfil the

17 See, e.g., Decisions of the Constitutional Court No. U-I-60/03, dated 4 December 2003 (Official Gazette RS, No. 131/03, and OdlUS XII, 93), and No. Up-373/97, dated 22 February 2001 (Official Gazette RS, No. 19/01, and OdlUS X, 108).

18 This was stated by the Constitutional Court in Order No. Up-118/95, dated 11 June 1998 (OdlUS VII, 227).

19 Cf. A. Galič, *Ustavno civilno procesno pravo* [Constitutional Civil Procedural Law], GV Založba, Ljubljana 2004, pp. 239–240.

requirements determined by Article 22 of the Constitution.<sup>20</sup>

15. In Slovene legal theory and practice, it is commonly accepted that a default judgment is based on the system of the so-called affirmative *litiscontestatio*, which considers that the defendant's inaction entails the recognition of the plaintiff's allegations of facts.<sup>21</sup> In a procedure for issuing a default judgment courts do not have to determine the state of the facts, but they must take the state of the facts as stated in the action as the basis for the default judgment.<sup>22</sup> That is why a default judgment cannot be challenged on grounds of an erroneous or incomplete determination of the state of the facts (the second paragraph of Article 338 of the CPA). The challenged second paragraph of Article 282 of the CPA only introduces the fiction of the recognition of the facts stated in the action as a sanction due to the subsequent inaction of the defendant. As the Constitutional Court explained in the ninth paragraph of the reasoning of the present Decision, it is not even possible for a default judgment to be issued due to non-appearance at the first hearing if prior to that the defendant has not submitted a defence in a timely and substantiated manner.<sup>23</sup> By such a defence, the defendant clearly demonstrated that he or she actively opposes the claim (the first paragraph of Article 278 of the CPA). Therefore, the challenged provision requires that a correctly expressed, timely procedural activity of the defendant be disregarded. This entails an interference with the right to the equal protection of rights determined by Article 22 of the Constitution. The challenged provision also limits the right determined by Article 22 of the Constitution due to the fact that it entails a deviation from the principle of a fair judicial procedure, which also entails the requirement that, within the framework of the principle of party disposition and the principle of party presentation, the composition and structure of the civil procedure allow the courts, as much as possible, [to arrive at], and facilitate for them, the correct and complete determination of the legally relevant facts of a concrete case, as well as the correct application of substantive

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20 The German constitutional doctrine accepts the standpoint that the duty to adopt a position with regard to a party's allegations only refers to the allegations that were submitted in a substantively and procedurally correct (legal) manner, unless what is at issue is, exceptionally, a law that entails an inadmissible formation of a protected area of the first paragraph of Article 103 of the German *Grundgesetz* [Basic Law] (K.-G. Zierlein in: D. Umbach and T. Clemens (Ed.), *Grundgesetz, Mitwirkungskommentar und Handbuch*, Vol. 2, C. F. Müller Verlag, Heidelberg 2002, pp. 1210–1211).

21 This is stated, for instance, by L. Ude in *Civilno procesno pravo* [Civil Procedural Law], Uradni list RS, Ljubljana 2002, p. 307, and in the Supreme Court Judgment No. II Ips 840/2007, dated 6 December 2007.

22 Decision of the Constitutional Court No. Up-201/01, dated 6 November 2003 (Official Gazette RS, No. 117/03, and OdlUS XII, 110).

23 A [filed] defence is substantiated if the defendant states facts that substantiate the [filed] defence and also proposes evidence (A. Galič, *Sankcije za neaktivnost strank v pravnem postopku* [Sanctions for the Inactivity of Parties in a Civil Procedure], *Zbornik znanstvenih razprav LXIII* [Collection of Scientific Papers LXIII], Pravna fakulteta v Ljubljani, Ljubljana 2003, p. 161). In fact, with regard to the requirement that the defendant submit evidence, the distribution of the burden of proof in the concrete case must be taken into consideration; therefore, a defence often cannot be deemed to be formally deficient only due to the fact that evidence is not proposed therein. Furthermore, the defendant may only submit objections of a legal nature in its [filed] defence.

law, and thereby the issuance of a correct and legal judicial decision.<sup>24</sup> The principle that the procedure must be expeditious and economical should not be hypertrophied on account of this (final) aim of the civil procedure.<sup>25</sup>

16. Human rights may only be limited in cases explicitly determined by the Constitution and due to the protection of the rights of others (the third paragraph of Article 15 of the Constitution). In conformity with the established constitutional case law, a human right may be limited if the legislature thereby pursued a constitutionally admissible aim and if the limitation is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), namely with that of these principles that prohibits excessive interferences by the state (the general principle of proportionality).
17. It follows from the legislative file that the principal aim of the CPA-D is to ensure that the procedure is expeditious and that the main hearing is focused, while protecting, at the same time, the guarantees of a fair trial guaranteed by the Constitution and conventions.<sup>26</sup> In such context, the proposer of the amendment deemed it necessary, *inter alia*, to realise and implement in practice the principle that also parties and their authorised representatives are responsible for contributing to expediting and focusing the procedure, and to determine the sanctions – or to increase the severity thereof – for the non-appearance of parties at hearings, thereby promoting the greater procedural discipline of the parties to the procedure and enabling the procedure at the first instance to conclude also in the event of the non-appearance of parties.<sup>27</sup> Allegedly, the second paragraph of Article 282 of the CPA plays an important role in achieving the mentioned aims, as it allegedly has a significant effect on the procedure being focused, expeditious, and economical.<sup>28</sup> An essentially equally defined aim of the challenged provision also follows from the reply of the National Assembly and from the opinion of the Government. In the assessment of the Constitutional Court, this undoubtedly entails a constitutionally admissible aim due to which the legislature was authorised to limit the right of the defendant determined by Article 22 of the Constitution. Ensuring that the civil procedure is focused, expeditious, and economical is namely not only an important statutory principle of the CPA (see Article 11 and the second paragraph of Article 298 of the CPA), but it is also of key importance for effectively ensuring the right to judicial protection without undue delay determined by the first paragraph of Article 23 of the Constitution. The inaction of the party must not cause the opposing party to be unable to invoke

24 By Order No. 2 BvR 701/80, dated 9 July 1980, the German Federal Constitutional Court underlined that the constitutional right to make a statement in a procedure determined by Article 103 of the German *Grundgesetz* [Basic Law] is (*inter alia* also) intended to clarify the factual basis of the judicial decision. As stated by K.-G. Zierlein, *op. cit.*, p. 1192, this right contributes to the optimisation of seeking the truth in judicial procedures and to ensuring maximal protection of the substantive rights of citizens.

25 J. Zobec in: L. Ude, A. Galič (Ed.), *Pravdni postopek* [Civil Procedure], *Zakon s komentarjem* [The Act with Commentary], Vol. 1, Uradni list RS and GV založba, Ljubljana 2005, p. 110.

26 Gazette of the National Assembly, No. 21/08, p. 15.

27 *Ibidem*, pp. 15–16.

28 *Ibidem*, p. 136.

his or her right to judicial protection. The state even has the duty to ensure that the inactivity of parties to a civil procedure is penalised.<sup>29</sup> From the established case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), it follows that the right to a trial in a reasonable time is of exceptional importance for the right itself to judicial protection and that 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) obliges the contracting states to organise their legal systems in such a manner that courts are able to fulfil the requirements determined by first paragraph of Article 6 of the ECHR, including [the requirement to] ensure a reasonable length of procedures. In the assessment of the ECtHR, it follows from the positive obligation of the state with regard to the protection of human rights that the state must organise the judiciary in such a manner that the actual implementation of the right to a trial in a reasonable time is ensured.<sup>30</sup>

**18.** With regard to the fact that an interference with the right of defendants in civil procedures to the equal protection of rights determined by Article 22 of the Constitution pursues a constitutionally admissible aim and that from such perspective it is thus not inadmissible, it must also be assessed whether the challenged regulation is in conformity with the general principle of proportionality. The assessment of whether what is at issue is perhaps an excessive interference is carried out by the Constitutional Court on the basis of the so-called strict test of proportionality. This test includes an assessment of three aspects of the interference:

- (1) whether the reviewed interference is appropriate for achieving the pursued aim in the sense that this aim can indeed be achieved by the interference at issue;
- (2) whether the interference is truly necessary (needed) in order to achieve the pursued aim; and
- (3) whether the weight of the consequences of the reviewed interference with the affected human right is proportionate to the value of the pursued aim and to the benefits that will result from the interference (the principle of proportionality in the narrower sense).

Only if the interference at issue passes all three aspects of the test is it constitutionally admissible (see Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03, and OdlUS XII, 86, Paragraph 25 of the reasoning).

**19.** When assessing the appropriateness of an interference with human rights, the Constitutional Court assesses whether the interference is actually appropriate for achieving the constitutionally admissible aim of a limitation of a human right. In doing so, it must consider the assessed provision in its context and ascertain what its combined effects are in practice in conjunction with the other provisions of the same regulation, as well as of other regulations. The legislature assessed that the systemic deficiency of the regulation of the civil procedure [that existed] before

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<sup>29</sup> A. Galič, 2003, *op. cit.*, pp. 158 and 160.

<sup>30</sup> The Constitutional Court went into more detail with regard to these positions of the ECtHR in Decision No. U-I-65/05, dated 22 September 2005 (Official Gazette RS, No. 92/05, and OdlUS XIV, 72).

the CPA-D amendment was that the CPA did not give courts sufficient possibilities to ensure that the main hearing is focused, which entails one of the fundamental instruments for ensuring that the procedure is expeditious and economical.<sup>31</sup> Undoubtedly, the legislature had multiple possibilities available to achieve this aim that were known both in theory and comparative law. It is important that when pursuing the aim that the civil procedure is expeditious, economical, and focused, the legislature did not limit itself only to [adopting] a new regulation of sanctions for non-appearance at a hearing. In general, the CPA-D accentuates, more than was the case hitherto, the principle that the responsibility or burden to contribute to ensuring that the procedure is focused and expeditious, as well as to the substantive quality of judicial protection, also lies with the parties.<sup>32</sup> There are several such novelties in the CPA – those relevant to the case at issue include, e.g., the expressly written requirement of a substantiated disputation of the facts (the second paragraph of Article 214 of the CPA); the possibility that courts direct the party to submit a written summary of extensive documentation (the fourth paragraph of Article 226 of the CPA); the possibility to acquire statements of witnesses in writing (Article 236a of the CPA); the authorisation given to courts to apply measures of organisation of procedure in the phase of preparations for the main hearing in conjunction with the setting of time limits to carry out procedural actions and the rescheduling of preclusions with regard to the stating of facts and the submission of evidence to a time before the first main hearing (the first three paragraphs of Article 286a of the CPA), and the obligation to file preliminary submissions in due time so that it is not necessary to postpone a hearing (the fourth paragraph of Article 286a of the CPA). The purpose of these changes is, above all, to ensure that the materials for the procedure are collected as soon as possible, so that the procedure can be concluded already at the first hearing, as well as to increase the possibility of the courts to adapt the framework and the manner of how the procedure is conducted to the circumstances and characteristics of each individual case.<sup>33</sup>

20. Therefore, the new regulation of the civil procedure significantly increased the possibilities as to what measures of organisation of procedure can be applied, both from the time perspective and with regard to the set of statutory authorisations. The measures of organisation of procedure (i.e. the “open trial”) at a main hearing can contribute to the more complete and correct establishment of the disputed state of the facts and to the procedure being more focused and expeditious if the judge then already has a clearly elaborated legal diagnosis of the dispute.<sup>34</sup> If this method of conducting the civil procedure is extended into its written phase (before the main hearing) – together with the preclusions, the requirement of a substantiated disputation of the allegations of the opposing party within the time limit

31 Gazette of the National Assembly, No. 21/08, p. 2.

32 A. Galič, 2008, *op. cit.*, p. 16.

33 Gazette of the National Assembly, No. 21/08, p. 16.

34 Cf. N. Betetto in: L. Ude, A. Galič (Ed.), *Pravdni postopek* [Civil Procedure], *Zakon s komentarjem* [The Act with Commentary], Vol. 2, Uradni list RS and GV založba, Ljubljana 2006, p. 584.

imposed by the court, the timely sending of preliminary submissions, and other changes – the significance of the main hearing and of the oral part of the procedure in general is thereby undoubtedly reduced to a certain extent. The latter is namely no longer necessarily the phase in which the two parties would exchange their written applications at the hearings, submit allegations, motions for evidence, and dispute each other's alleged facts. This finding cannot be changed by the circumstance that, in concrete cases, judges are given wide discretion with regard to the application of individual novelties introduced by the CPA-D, because the decision of courts will depend on the characteristics and circumstances of the concrete case.<sup>35</sup> When preparing the main hearing, courts must namely always choose the method that in the individual case is the most appropriate. In doing so, they must always respect the principle that the procedure must be focused, economical, and expeditious. When the measures of organisation of procedure are moved into the phase of preparations for the main hearing, their objective is to collect the necessary materials for the procedure already before the first hearing. Only the taking of evidence is then left for the oral part of the procedure, as well as the participation of the parties in the procedure for taking evidence, who can then orally complete their legal viewpoints, positions, and substantiations.

21. Even before the entry into force of the challenged second paragraph of Article 282 of the CPA and the other changes introduced by the CPA-D, it could have been disputed whether the non-appearance of a duly summoned defendant at the main hearing indeed always obstructs the speedy and efficient conclusion of the procedure.<sup>36</sup> The legislature's aim of ensuring the greater activity and responsibility of the parties in the procedure is namely only sensible and weighty if the [pursued] activity is reasonable and effective, and not an end in itself. The presence of the defendant at the main hearing (to which the latter is in fact always entitled) is in certain situations even unnecessary and, from a certain perspective, contrary to the legislature's tendency [to ensure] that the procedure is efficient. This, for instance, holds true in instances where the state of the facts is undisputed by the parties or where the defence is manifestly well-founded, i.e. the defendant's allegations and the evidence submitted in writing therein substantiate in themselves the dismissal of the claim (e.g. due to the objection that the [monetary] claim has been repaid, which is confirmed by a notarised creditor's receipt or by a bank certificate). The applicant also correctly draws attention to those substantive objections of the defendant that are only taken into consideration if the party refers thereto and which, in conformity with the challenged provision, must be deemed, if a default judgment is issued, to not have been submitted.<sup>37</sup>

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35 A. Galič, 2008, *op. cit.*, p. 36.

36 The fact that the courts rescheduled hearings despite the unjustified non-appearances of one party or another was not a systemic flaw in the procedure, but an incorrect practice when conducting the concrete procedures at issue.

37 E.g. the objection that the claim is barred by the lapsing of the time period in accordance with Article 335 and the objection of a disproportionate contractual penalty in accordance with Article 252 of the Code of Obligations (Official Gazette RS, Nos. 83/01, etc.). In practice, situations are possible where such an objection is also successful if only the facts stated by the defendant are taken into consideration, as well as situations

22. With the new authorisations given to courts and the new procedural burdens on the parties, the CPA-D has only strengthened all the reservations relating to the actual effect of forcing the defendant to participate in the main hearing (as the Constitutional Court has already indicated in Paragraph 20 of the reasoning of the present Decision). The structure of the CPA now enables courts to collect the materials for the procedure already before the main hearing and to acquire the necessary explanations from both of the parties in the procedure; by taking into consideration the greater procedural activity of the plaintiff, which will often have an effect on the outcome of the procedure, it also enables them to appropriately punish a defendant who, despite having been duly summoned, does not appear at the first main hearing. Likewise, also with regard to “compulsory” participation in the settlement hearing (which the defendant attends not out of a genuine readiness for a court settlement, but only out of fear of a default judgment being issued), it cannot be concluded that it can increase the number of court settlements by a non-negligible degree. Consequently, the Constitutional Court concluded that the challenged provision has no additional beneficial effect on achieving the aim that the civil procedure is efficient, expeditious, economical, and focused.
23. In the assessment of the Constitutional Court, all the stated reasons indicate that the assessed limitation of the defendant’s human right to an adversarial procedure is not appropriate for achieving the aims stated in Paragraph 17 of the reasoning of the present Decision. The challenged statutory regulation entails a disproportionate interference with the defendant’s right to the equal protection of rights determined by Article 22 of the Constitution. Since the Constitutional Court already established the inconsistency of the challenged regulation with the Constitution for such reason, it did not assess the other allegations of the applicant. Therefore, it abrogated the second paragraph of Article 282 [of the CPA].

### C

24. The Constitutional Court adopted this Decision on the basis of Article 43 of the CCA and the second indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of: Jože Tratnik, President, and Judges Dr Mitja Deisinger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. The decision was reached by five votes against two. Judges Mozetič and Tratnik voted against.

*Mag. Miroslav Mozetič*  
*Vice President*

*on behalf of*  
*Jože Tratnik*  
*President*

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where such legally relevant facts as stated by the defendant are very obvious and easy to establish.

**DECISION**

At a session held on 12 March 1998, in proceedings to review constitutionality initiated upon the request of the State Prosecutor General of the Republic of Slovenia and the petitions of Marija Bitenc Samec, Celje, and Jožica Ilenič, Ljubljana, following a public hearing held on 5 February 1998, the Constitutional Court

*decided as follows:*

The provision of Article 28 of the Asset Confiscation and Confiscation Enforcement Act (Official Gazette DFY, No. 40/45), to the extent that it enabled individual persons to be proclaimed war criminals or national enemies on its basis without a final criminal court judgment, was not in accordance with the general principles of law recognised by civilised nations at the time of its entry into force nor with the constitutional principles in force at the time. Its application in court proceedings in the present day would be inconsistent with the Constitution.

*Reasoning***A**

1. By a request submitted on 5 April 1994 and supplemented on 22 February 1995, the State Prosecutor General challenged the provision of Article 28 of the Asset Confiscation and Confiscation Enforcement Act (Official Gazette DFY [Democratic Federal Yugoslavia], No. 40/45 – hereinafter referred to as the ACCEA) and the provision of Article 31 of the Seizure of Assets and Seizure Enforcement Act (Official Gazette FPRY [Federal People's Republic of Yugoslavia], No. 61/46 – hereinafter referred to as the SASEA), insofar as it was still possible on the basis thereof to apply the provision of Article 28 of the ACCEA. He opines that this Act is consistent with neither the past nor the present constitutional order. The Act was allegedly not adopted by a constitutionally determined legislature, therefore it is not a legally valid law, but a revolutionary decree. The provision of Article 28 of the ACCEA allegedly entails a collective criminal conviction without a trial since all persons shot,

killed, or expelled during the war were proclaimed to be war criminals or national enemies and punished by the seizure of their assets.

2. The seizure of assets was pronounced by a court on the basis of a proclamation by a District People's Council. Regarding such, the court had no power to review whether the conditions for such seizure were fulfilled. Therefore, the proclamation represented a declaratory decision on the issue of whether someone was a war criminal or national traitor. The applicant refers to the scholarly literature of the period (Dr Marjan Cigoj, *Ljudski pravnik [People's Lawyer]*, No. 2/49) that interpreted such declaratory decisions as follows: "It was necessary to deem that, for example, an enforceable judgement had been issued against a person who had been shot, to which the court does not have access, as it was not possible to keep regular archives during the exceptional conditions of war." The erroneous nature of the statements in a proclamation could only be established in reopened proceedings. The applicant opines that the provision of Article 28 of the ACCEA thus allowed the legal fiction that an individual person was a national traitor because they had been shot. Due to the nature of the matter, this decision was allegedly equal to a criminal court judgment and therefore it should also be possible to lodge a request for the protection of legality against such. The provision allegedly incriminates merely the status of a person punishable as it contains the terms "national enemy" and "war criminal" instead of acts determined in a definite manner, and allegedly also presupposes this incrimination in certain cases. Therefore, it is allegedly contrary to the general principles of law recognised by civilised nations and also contrary to Articles 27 and 28 of the Constitution.
3. The applicant states that he has not lodged any legal remedy in relation to the application of Article 28 of the ACCEA. The issue of its constitutionality, however, had been raised in a case in which the assets of an individual who had been "executed as a national enemy" had been seized on the basis of this provision, without there having been a final criminal court judgment. The applicant states that he did not decide to lodge a request for the protection of legality due to the unconstitutionality of the challenged provision, which the Supreme Court should not apply when deciding. He opines that it should be possible to annul a proclamation by amending a final court decision through the legal remedy determined by Article 416 of the Criminal Procedure Act, if the Constitutional Court were to decide that the provision of Article 28 of the ACCEA should no longer be applied. On this basis, it would also be possible to return assets to the heirs of the disposed person in accordance with the provisions of the Enforcement of Criminal Sanctions Act.
4. At the public hearing the applicant put forward further arguments, stating that the provision of Article 28 of the ACCEA is a special provision of a criminal law nature. It allegedly contains elements of substantive law by proclaiming *ex lege* an individual person a war criminal and by determining a criminal sentence (the seizure of assets). In addition to this, it allegedly also contained elements with regard to the regulation of the proceedings by regulating the proclamation issued by the District People's Council. Courts allegedly only enforced the sentence of the seizure of assets by registering such in the land register. With regard to its substance, [such proclamation]

allegedly constituted a repressive measure carried out by an administrative body. The proclamations of the District People's Councils allegedly were not served on the convicted person or their relatives. The majority of such proclamations also cannot be found in the court records and their content is evident only from the decisions of the courts by which the seizure of assets was enforced. The State Prosecutor General believes that there are no available legal remedies by which he could challenge decisions issued under Article 28 of the ACCEA, not even in cases in which an evident and very serious injustice was committed against individuals. Allegedly, such is not very problematic from the point of view of property law, due to the possibility of denationalisation proceedings, but conviction as a war criminal is allegedly the most problematic aspect, as it cannot be annulled in denationalisation proceedings. The State Prosecutor General believes that on the basis of a finding that the challenged provision is a provision of criminal law, the affected persons could achieve a retrial in criminal proceedings and thereby moral redress on the basis of Article 416 of the Criminal Procedure Act. In the opinion of the State Prosecutor General, the criminal proceedings would need to restart at the phase prior to the indictment being issued, but as there was no such indictment, at the investigation phase instead. In answer to the question of a judge at the public hearing, the State Prosecutor General explained that individuals had only very rarely decided to lodge exceptional legal remedies in administrative proceedings, in particular motioning for a declaration of the nullity of the proclamation of the District People's Council. There allegedly exists only one decision of a competent administrative body entailing a declaration of nullity; proceedings are allegedly still pending in all other cases.

5. The petitioners Marija Bitenc Samec and Jožica Ilenič lodged petitions on 6 January 1997 and 7 March 1997, respectively, for a review of the constitutionality of the ACCEA. They stated that they wish to join their petition to the request of the State Prosecutor General. The petitioner Marija Bitenc Samec bases her legal interest for challenging the ACCEA on the fact that by a decision of the District Court in Ljubljana the assets of her father were seized as the assets of a person who was alleged to "have fled as a collaborator with the occupier." In reality, the petitioner's father had returned from forced labour in Vienna even before the decision on seizure was issued. The petitioner Jožica Ilenič bases her legal interest on the fact that her grandfather was executed in 1943, and in 1945, on the basis of Article 28 of the ACCEA, his assets were seized.
6. Andrej Doles, attorney in Domžale, was also invited to the public hearing as the representative of the complainant Josipina Petrocokino. A procedure for consideration of the constitutional complaint (No. Up-133/96) that the complainant lodged against the judgement of the Supreme Court is pending before the Constitutional Court. By that judgement her request for the protection of legality against the criminal conviction and execution of her brother, which was carried out by the security intelligence service on 6 January 1944, was rejected as inadmissible. The assets of her brother were confiscated in accordance with Article 28 of the ACCEA by a decision of the District Court in Kranj on the basis of a proclamation of the District People's Council in Kranj. The representative of the complainant Josipina Petrocokino drew attention

to the Protection of the Slovene Nation and Its Movement for Liberation and Unification Decree (Slovenski poročevalec [The Slovene Gazette], Year II, No. 19, dated 1 October 1941). This regulation also determined the procedure used against persons who offended the national honour of Slovenia: The procedure was supposed to be prompt, speedy, and secret. The judgement was allegedly issued orally, an appeal was excluded according to the provisions of the cited decree, and the judgment was enforceable immediately. Therefore, it is allegedly very difficult to obtain evidence of the trials of that period today. The only evidence that the complainant has is the proclamation of the District People's Council in which it is stated that her brother was condemned to death and executed as a national traitor. The complainant's fundamental interest is to achieve moral redress for her brother, and due to such she should at least be able to demonstrate his innocence.

7. The request was sent to the National Assembly, who did not respond to it and also did not take part in the public hearing.

#### **B – I**

8. The Constitutional Court joined the petitions and the request of the State Prosecutor General for joint consideration and deciding.
9. In reaching a decision on the matter, the Constitutional Court first had to decide whether the procedural preconditions for reviewing the constitutionality of the act were fulfilled. The provision of Article 28 of the ACCEA was already annulled by the provisions of the SASEA, and the SASEA ceased to apply with the entry into force of the Enforcement of Punishment, Security Measures and Measures for Juvenile Delinquents Act (Official Gazette FPRY, No. 47/51). The challenged statutory provisions could therefore not become a constituent part of the legal order of the Republic of Slovenia in accordance with the first paragraph of Article 4 of the Constitutional Act Implementing the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, since they were not in force at the time of independence. The Constitutional Court generally cannot decide on the constitutionality of laws, other regulations, and general acts which have ceased to have effect. Exceptions to this rule are only possible in specific cases. The Constitutional Court has thus already reviewed the constitutionality of certain regulations that were already not in force at the time the proceedings were initiated. In Decision No. U-I-6/93, dated 1 April 1994 (OdlUS III, 33), when reviewing the Military Courts Decree, the Constitutional Court based its decision on the provision of the second paragraph of Article 28 of the Constitution. According to this provision, acts that are criminal offences will be established and the resulting penalties pronounced according to the law that was in force at the time the act was performed, except where a more recent law adopted is more lenient towards the offender. Due to this special characteristic applicable to substantive criminal regulations, according to the standpoint of the Constitutional Court, a review of the constitutionality of laws that have been formally annulled must also be admissible. This standpoint was confirmed in Decision No. U-I-67/94, dated 21 March 1996 (OdlUS V, 31), in which the Constitu-

tional Court reviewed the Suppression of Illicit Trade, Illicit Speculation, and Economic Sabotage Act. In addition, the constitutional review of the regulation in that decision was also based on the provision of Article 416 of the Criminal Procedure Act (Official Gazette RS, No. 63/94 – hereinafter referred to as the CrPA). According to this provision, a person convicted on the basis of regulations that are found to be inconsistent with the Constitution by a decision of the Constitutional Court has the right to request the amendment of a final judgement in reopened proceedings. After his or her death, on the basis of the provision of the first paragraph of Article 411 and the second paragraph of Article 367 of the CrPA, this right can be exercised by the convicted person's spouse or common-law spouse, their direct descendants, adoptive parent, adoptee, brother, sister, or foster parent.

10. In view of the above, the issue of whether the procedural preconditions in this case are fulfilled regarding the request of the applicant, as well as regarding the petitioners, depends on the review of the legal nature of the provision of Article 28 of the ACCEA and the legal nature of individual acts issued on its basis. For the reasons cited hereunder, the Constitutional Court found that the provision of Article 28 had in particular cases a criminal law meaning (also in the substantive sense). The Constitutional Court thus has jurisdiction to review the constitutionality of the regulation. The State Prosecutor General may, under the provision of the fifth indent of the first paragraph of Article 23 of the CCA, lodge a request initiating proceedings before the Constitutional Court if a question of constitutionality arises in connection with a case he is conducting. A state prosecutor of the Republic of Slovenia may, under the provisions of the second paragraph of Article 421 of the CrPA, lodge a request for the protection of legality, both to the detriment and to the advantage of the accused, against a final court decision issued in criminal proceedings. With regard to such, in contrast to the accused and contrary to other proceedings in which he is similarly entitled to lodge a request for the protection of legality, [the state prosecutor] is not restricted by any time limit. The Constitutional Court must agree with the applicant that due to the fact that the ordinary courts would have to apply the challenged provision of Article 28 of the ACCEA in proceedings initiated by submitted requests for the protection of legality, such entails that a request for the protection of legality could only be lodged to the detriment of the petitioners or their requests would be rejected as unfounded, since the actions of the then post-war authorities had their basis precisely in this provision of the law, or they would even be rejected as inadmissible on the basis of the decision that acts issued on the basis of the challenged provision are not criminal court judgments. Therefore, the procedural preconditions determined by the fifth indent of the first paragraph of Article 23 of the CCA are fulfilled.
11. Since [the provision at issue] is a substantive criminal law regulation, on the basis of Article 416 of the CrPA the procedural preconditions are also met for consideration and review of the petitions by which the petitioners have joined the proceedings initiated upon the request of the applicant. The petitioners challenge the ACCEA as a whole, but it is evident from their statements that their legal interest is demonstrated

only with regard to the review of Article 28 of the ACCEA, which was the legal basis for the enforcement of the confiscation of the assets of their forebears, therefore it was only possible to accept their petition to that extent. Since the State Prosecutor General's request was submitted to the National Assembly for a reply thereto, and the petitioners joined their petitions to the substance of the request, the condition for deciding on the petitions is also met in conformity with the provision of the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA).

12. In the cited decision on the Military Courts Decree, the Constitutional Court already answered the question of what criteria are to be used for a review of the constitutionality of pre-constitutional regulations. It is necessary to review them from the standpoint of consistency with the constitutional and general principles of law recognised by civilised nations at the time, and, with regard to their application in new proceedings, also from the standpoint of consistency with the Constitution.
13. The standpoint of the applicant that the Act was not issued by a competent body and that, even at that period, it was already not a valid law but a revolutionary decree, is not substantiated. In the cited decision on the constitutionality of the Military Courts Decree, the Constitutional Court already found that legislative power had been vested in AVNOJ [*Antifašistični svet narodne osvoboditve Jugoslavije* – the Anti-Fascist Council for the National Liberation of Yugoslavia] itself from the second session of AVNOJ onward, and in the period between the two sessions to the Presidency of AVNOJ. The Presidency issued the ACCEA on the basis of the authorisation of AVNOJ in the Supreme Legislative and Representative Body of Yugoslavia Decree, and it was confirmed on 1 December 1945 by its Constituent Assembly. As the SA-SEA, it was adopted in accordance with the procedure prescribed specifically by the Constitution of the FPRY. It is therefore necessary to deem that the challenged Act was adopted by a body competent to exercise legislative power at the time.

## B – II

14. The provision of Article 28 of the ACCEA reads:

“(1) At the latest within 90 days after the adoption of this law, the District People's Councils must deliver to the District People's Courts an exact inventory of the real property of those war criminals or national enemies who were shot, killed, or who died or fled during the war period, whose assets were either not confiscated at all because the assets could not be accessed, or only the movable property was confiscated or only a part of these assets was. In all such cases, the District People's Court, irrespective of whether it has at its disposal the judgement by which such a person was convicted, shall deem this conviction to be enforceable in its entirety also with regard to the operative part on such confiscation and form a decision on the confiscation of the entire assets, both movable and real property, in conformity with this law and shall fully enforce this decision and implement the transfer of the confiscated assets and the registration of the rights of the state with regard to the confiscated real property.

- (2) The District People's Councils must also report such cases in which the confiscation of real property has already been carried out, in order for the court to implement the prescribed transfer of these assets into the ownership of the state.
  - (3) Similarly, military courts and military commands must deliver to the District People's Courts from their archives a transcription of the judgements in the above cases, in order to enable the courts to fully enforce such confiscation and adopt a decision on confiscation insofar as such was not issued by the judgement."
- 15.** On 3 August 1945 (Official Gazette DFY, No. 56/45), the Presidency of AVNOJ adopted an authentic interpretation of some of the ACCEA provisions, including the provision of Article 28 of the ACCEA. This reads as follows:
- "It is necessary to deem that the first paragraph, which refers to persons who were shot, killed or who died, also applies to those who died before they were sentenced.
  - It is not necessary for the courts to establish whether an individual was actually shot, killed, fled, or died, since such is in the exclusive jurisdiction of the People's Councils.
  - If the District People's Councils are in possession of the judgements in the meaning of the first paragraph of Article 28, they must deliver them together with the inventory of the assets."
- 16.** By the Confirmation, Amendment, and Supplement of the ACCEA Act, dated 9 June 1945 (Official Gazette FLRJ, No. 61/46), the ACCEA was amended so that it no longer contained the provision of Article 28 of the ACCEA; however, the SASEA determined in Article 31 that the courts must conclude all those proceedings for which the District People's Councils, military courts, and commands had sent them the data under Article 28 of the ACCEA by the date this act came into force (i.e. by 6 August 1946). Under the provisions of the SASEA, new proceedings on the basis of Article 28 of the ACCEA could no longer be initiated by new proclamations of the District People's Councils. Therefore, in terms of substance, it is only the provision of Article 28 of the ACCEA that is at issue and reviewed in this matter.
- 17.** The terms "war criminal" and "national enemy" used in the text of the first paragraph of Article 28 of the ACCEA are terms that can be found in that period in the Military Courts Rules [hereinafter referred to as the MCR] (Articles 13 and 14<sup>1</sup>),

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1 These provisions read: Article 13: "The following shall be considered war criminals, irrespective of the fact that they are citizens of Yugoslavia, or occupied or other provinces: initiators, organisers, inciters, abettors, and direct perpetrators of mass killings, torture, forced expulsion of the population, or their forcible removal to concentration camps or to forced labour; of arson, destruction and looting of national and state property; as well as all individual estate owners and companies in Yugoslavia, in the occupied or other provinces, who inhumanely exploit the labour force by the forced labour of abducted people; officials of the terrorist apparatus and terrorist armed formations of the occupier and locals in the occupier's service; and those who have carried out the mobilisation of our people for the enemy army." Article 14: "The following shall be considered national enemies: all active Ustashi, Chetniks, and members of other armed formations in the enemy's service in any kind of capacity – as spies, informers, couriers, agitators and similar; those who have forced the people to hand over weapons to the occupier; those who have betrayed the national battle and have collaborated with the occupier; those who defected from the national authority and work against it; those who undermine the national army or in other

the constitutionality of which the Constitutional Court already decided on in case No. U-I-6/93, cited above. At that time, the Constitutional Court determined that all those elements of the provisions of the Rules that were, and to the extent that they were, used in particular criminal proceedings to incriminate merely the status of a person and did not refer to the acts of the accused determined in a definite manner (Paragraph 11 of the reasoning of the cited Decision) and that were, and to the extent that they were, the basis for arbitrary decision-making by the courts of the time in particular criminal proceedings due to these provisions not being specific enough (Paragraph 13 of the reasoning of the cited Decision), were contrary to the general principles of law recognised by civilised nations, and are contrary to the Constitution in the present day. This definition does not refer to those provisions of the Rules that determine clearly and specifically enough the criminal offences or incriminate participation in such acts (for example, perpetrators or participants in mass killings, torture, forced displacement of populations, arson, destruction and looting of state and national property, etc. – Paragraph 19 of the reasoning of the cited Decision). It can undoubtedly be concluded that the post-war legislature, by using the cited terms in the challenged provision, referred to the very terminology of Articles 13 and 14 of the MCR. The proclamation allegedly referred to all those “war criminals” or “national enemies” who during the war were “shot, killed, or who died or fled [...], whose assets were either not confiscated at all [...], or only the movable property was confiscated or only a part of this assets was.” If at the time of the proclamation of the District People’s Council the property of these persons had already been seized, the seizures could only be issued by judgements of military courts that at the time were adjudicating cases on the basis of the MCR. It is therefore clear that a proclamation of the District People’s Council could be based on a military court judgment. The seizure of assets was determined as an ancillary penalty under the MCR (the second paragraph of Article 16). As such, the court pronounced it together with the main penalty in the criminal proceedings in which a decision was reached regarding the criminal responsibility of the accused.

18. Even at the time the ACCEA was in force, it emerged that on the basis of Article 28 of the ACCEA the assets of persons who were not “war criminals” were seized. The issue of the restitution of such seized assets or payment of compensation for such had already arisen at the time.<sup>2</sup> The fact that a particular person was not a “war criminal” or “national enemy”, could, according to the standpoints accepted at the period of time, be established by a statement of the competent public prosecutor that the person at issue had not been punished and that no criminal proceedings against this person had been instituted. If the prosecutor gave such a statement, the District Executive

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ways aid and assist the occupier; those who have carried out grave cases of murder, robbery, or similar.”

- 2 It was considered at that time (source: Opinion of the Ministry of Justice of the People’s Republic of Slovenia, No. 69/45-245, dated 2 November 1946) that all proclamations are “a decision (finding) that someone was a war criminal or national traitor. The courts could thus only annul their decision on the seizure of assets on the basis of some other decision of the same District Executive Council that, namely, the original report (decision) is annulled because it was subsequently shown that the relevant person was not a war criminal or national enemy.”

Council allegedly issued a decision that its proclamation was annulled, and on this basis the court allegedly also annulled its confiscation decision. Such proceedings were allegedly initiated only upon a motion of the affected person.

19. The representative of the complainant in constitutional complaint proceedings No. Up-133/96 emphasised the provision of Article 7 of the Protection of the Slovene Nation and Its Movement for Liberation and Unification Decree adopted by the SNOO [*Slovenski narodnoosvobodilni odbor* – Slovene National Liberation Committee]. For certain criminal offences, this provision prescribed a trial by special courts and a prompt, oral, and secret procedure without hearing the perpetrator or the possibility of appeal, whereas the punishment was enforceable immediately. Such regulation was in force until 15 August 1943, when the Establishment of the Brigade and Detachment Military Courts Decree (*Slovenski poročevalec* [The Slovene Gazette], Year IV, No. 15) entered into force. This Decree already determined that the detailed organisation, operation, and procedure of these courts would be regulated by special rules that were issued on 5 August 1943 and that were already replaced on 16 October 1943 by the Organisation and Operation of Brigade and Detachment Military Courts Rules. With regard to the substantive definition of criminal offences, these Rules referred to the cited Protection of the Slovene Nation Decree. The procedure under these Rules was comprised of the investigation carried out by the prosecutor and the public hearing, of which minutes had to be kept; a written judgement had to be issued and the convicted person had no right of appeal against such, however, a procedure for confirming the judgment was introduced. Judgements had to be sent to the Higher Military Court, which was established by decree of the Headquarters of the NOV and POS [*Narodnoosvobodilna vojska in partizanski odredi Slovenije* – the National Liberation Army and Partisan Detachments of Slovenia]. The Instructions No. 13<sup>3</sup> that the Judicial Department of the Headquarters of the NOV and POS sent to all the Brigade and Detachment Courts on 30 August 1943 read as follows: “A written judgement with regard to each conviction must be made. The latter must contain a statement as to when and where the judgement was issued; in addition, the offence for which the accused was convicted must be characterised briefly and clearly. Each judgement must also give reasons.” In Instructions No. 5, issued on 17 February 1944 by the Judicial Department, the military courts were notified anew that asset seizure is a measure of criminal law that can be issued only by the courts, and namely by a judgement against a person who had committed a criminal offence. The cited Rules were replaced by the Military Criminal Judiciary Rules issued by the Headquarters of NOV and POS on 20 April 1944, and slightly more than a month later the latter were replaced by the MCR issued by the High Command of NOV and POJ [*Narodnoosvobodilna vojska in partizanski odredi Jugoslavije* – the National Liberation Army and Partisan Detachments of Yugoslavia].
20. It is therefore evident that a proclamation based on Article 28 of the ACCEA could be based on a criminal court judgment. It is also possible that criminal proceedings

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3 Source: M. Šnuderl: *Dokumenti o razvoju ljudske oblasti v Sloveniji* [Documents on the Development of People's Power in Slovenia], Official Gazette SRS, Ljubljana 1949.

took place in some cases, but the court files were not preserved.<sup>4</sup> It is, however, also clear that in certain cases executions were carried out without any court proceedings.<sup>5</sup> When reviewing the MCR in the already cited decision, the Constitutional Court pointed out the results of the recent historical research according to which in certain cases criminal proceedings on the basis of the MCR were abused in order to seize assets, although there was neither a factual nor legal basis for issuing such a measure. The same research also reveals that the majority of the abuses did not occur on the basis of the MCR, but outside of it (arbitrary revenge, extrajudicial executions or liquidations – Paragraph 17 of the cited decision) and, as is evident from the above mentioned, also despite the regulations applicable on Slovene territory before the MCR entered into force. If it were not for the provision of Article 28 of the ACCEA, it would be possible to conclude the discussion at this point and draw a clear distinction between the cases in which persons were convicted in criminal proceedings and cases in which persons were put to death outside of court proceedings. The latter were abuses, but abuses that the provision of Article 28 of the ACCEA, in particular its authentic interpretation (the first paragraph), considered admissible. Not only the seizure of the assets of persons against whom no court proceedings had ever taken place was allowed on its basis, but these persons, merely by the proclamations of the District People's Councils, were proclaimed "war criminals" or "national enemies", which in the criminal law terminology of the time (Paragraph 17 of the reasoning of this Decision) signified persons who had been convicted of war crimes. In addition to the above stated, the legal fiction of a criminal conviction also included persons who had "fled". The legislature thus gave the District People's Councils – i.e. administrative bodies – the authority to find a certain person guilty of a criminal offence on the basis of Article 13 or 14 of the MCR in cases in which there were no criminal judgements nor evidence of criminal proceedings having been carried out. And this was done in proceedings that did not provide even the most minimal guarantees of a fair trial. It is therefore necessary to agree with the applicant that the challenged provision also contains elements of substantive criminal law,

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- 4 Tominšek (*Sodstvo v Istrskem odredu* [The Judiciary in the Istria Detachment], *Revija za zgodovino, literaturo in antropologijo*, note 6) refers to the prosecutor, Jože Markučič, and to the commissar of the defence battalion, Milan Cirek. The first states that there were a number of cases of trials held by the detachment court where the court records were not preserved. The other person, who participated often in the court proceedings, states that from February to May 1944, in addition to the registered court processes, there were at least 25-26 unregistered ones of which 15 or 16 ended with a conviction and some ten with an acquittal. Minutes were kept on all these trials, but were probably lost during the German attack on Preloža.
- 5 The circular issued by the Department of Justice of the Headquarters of NOV and POS to the courts stated under point III: "If due to the special exceptional circumstances cited in the circular, a punishment was carried out without prior court discussion, the courts must carry out the court proceedings subsequently on the basis of the charge of the competent public prosecutor [...]". The Headquarters of NOV and POJ responded to this circular, and in their letter to the Headquarters of NOV and POS No. SA 102/44, dated 19 December 1944, explicitly stated that this entailed that dead persons were to be put on trial, which was not envisaged by the MCR and was not supposed to be carried out in other parts of Yugoslavia.

and that its legal quality entailed a retrogression from the criminal law protection already achieved at the time (criminal proceedings could not be conducted against a deceased person, the penalty of the seizure of assets was issued as a sentence by a court against a person who was found guilty of a criminal offence). Even the MCR, despite the fact that it also contained specific elements opposing the basic principles recognised by civilised nations already at the time, was from this point of view a legally more developed regulation than the subsequently adopted ACCEA.

21. The legal nature of the first paragraph of Article 28 of the ACCEA and the legal nature of the proclamation issued by the District People's Councils is therefore of crucial importance for the review of this case. An essential part of its content is the finding that a given person who was shot, killed, or who died or fled during the war period was a war criminal or national enemy. When issuing the sentence of confiscation, the court was not allowed to review the issue of whether the individual person had really been shot, killed, or had died or fled, since establishing this, under the second paragraph of the authentic interpretation of Article 28 of the ACCEA, was within the exclusive jurisdiction of the District People's Councils. Similarly, the courts could not review the issue of whether the individual person had really committed any kind of criminal offence entailing a war crime under the valid legislation of the period and whether this person had been convicted in criminal proceedings in which the basic guarantees of a fair trial were ensured, as already then recognised by civilised nations. The courts therefore issued sentences and carried out confiscations of real property even if a criminal judgement had not been submitted to them, but only on the basis of the proclamation of the District People's Council.
22. From a formal legal point of view, the proclamation was undoubtedly an administrative decision; it was an administrative decision also from the substantive law point of view in all those cases in which and insofar as the finding that an individual person had committed a criminal offence, i.e. was a war criminal, was based on a criminal court judgment. In all other cases it was actually possible to declare an individual person a war criminal by this administrative decision. Undoubtedly, the definition of a "war criminal" and "national enemy" in the circumstances of the period entailed a person who was supposed to have committed a certain criminal offence (Paras. 11 and 12 of the reasoning of Decision No. U-I-6/93). Also in these cases, seizure as such was namely considered to be an ancillary penalty. It was also treated as such in the scholarly literature quoted by the applicant. Thus, Dr Marjan Cigoj (*O zaplembi [On Seizure]*, *Ljudski pravnik [People's Lawyer]*, Nos. 2/49 and 6-7/49) states that there were different types of legally recognised decisions by which seizure was imposed<sup>6</sup>. Thus, the courts sometimes acted as the bodies merely executing the penalty of seizure, and sometimes issued this penalty themselves. According to this author, when issuing the penalty of seizure under Article 28 of the ACCEA, it was necessary to deem that there was an enforceable judgement issued against the persons determined in this

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6 Among these, only the post-war seizure of assets of German nationals was not considered to be a measure of criminal law but a measure legally based in reparations for war damages.

Article, but the court did not have access to such, since it was not possible to keep archives in the exceptional wartime conditions. The concept of seizure under the provision of Article 28 of the ACCEA thus constituted a concept of criminal law. This entails that the applicant's claim that the administrative decision – the proclamation of a District People's Council in all those cases where it was not based on a criminal court judgment – replaced the criminal court judgment in terms of its substance is well-founded. With regard to this, the District People's Council did not seize this competence on its own, but had explicit statutory authority for such. It was thus the statutory regulation that allowed for a criminal conviction without requiring that prior criminal proceedings be carried out that would guarantee the individual at least the basic principles of a fair trial recognised by civilised nations already at that time. On the basis of this provision it was therefore permissible to take a person's life and then confiscate assets outside of criminal proceedings and irrespective of the military activities of this person. The application of such a provision, which gravely violated human rights and fundamental freedoms, was not in conformity with the basic legal principles recognised by civilised nations even at that time; the possibility of its application in proceedings today would be even more unacceptable. Were such a provision to be used in proceedings today, its application would be contrary to at least Article 23 of the Constitution, according to which everyone has the right to have any criminal charges brought against him decided by an independent, impartial court constituted by law. This right can be violated in the most basic manner precisely by convicting an individual "as a war crime or national enemy" without a criminal court judgment and even without a criminal charge.

23. If an individual legal act, and the proclamation was such an act, is of such nature that it represents a criminal court judgment in terms of its substance, the same rules must apply for such as for criminal court judgments. On the basis of the requirement that the Constitutional Court explicitly addressed to the legislature in the already cited decision on the MCR,<sup>7</sup> a special legal remedy was introduced by the provision of Article 559 of the CrPA for challenging final court decisions. The deadline for exercising such remedies has already expired. The CrPA also contains the provision of Article 416, which introduced particular grounds for a retrial if a final criminal conviction was issued on the basis of a regulation abrogated by a Constitutional Court decision. This legal remedy is undoubtedly also a reflection of the provision of Article 28 of the Constitution, and as such is directed above all at cases of annulled substantive provisions of criminal law determining criminal offences. In the case at issue, the Constitutional Court cannot abrogate the challenged provision as it is no longer

<sup>7</sup> Point 3 of the operative provisions of the cited Decision states the following: "The statutory regulation of criminal proceedings in force is contrary to the Constitution as it does not allow all the decisions that were unjust from a procedural and substantive point of view and that were issued on the basis of the regulations of the revolutionary war-time and post-war authorities to be remedied, or allow redress of the consequences of such decisions with exceptional legal remedies. The Constitutional Court calls upon the National Assembly to remedy the established unconstitutionality as soon as possible."

in force, but decided that due to its unconstitutionality it can no longer be applied in proceedings before the state authorities in the Republic of Slovenia in the same manner and for the same reasons as the Constitutional Court decided with regard to the MCR. From the point of view of Article 416 of the CrPA, such decision has the same effects in terms of its substance as the abrogation of a regulation determining a criminal offence would. It is therefore necessary to allow persons who were declared war criminals or national enemies by a proclamation without a criminal court judgment, or their legal heirs entitled to such in accordance with the law, to request that a final court decision (i.e. the proclamation of a District People's Council not based on a criminal court judgment) be reversed in a retrial in accordance with Article 416 of the CrPA on the basis of this decision of the Constitutional Court.

24. Persons who were unjustly convicted in this manner have the right to moral redress, which they can achieve in a retrial under Article 416 of the CrPA. In addition, they also have the right that seized assets be returned to them or their legal heirs. In these cases, the assets were seized by a decision of the competent district court in the formal legal sense on the basis of Article 28 of the ACCEA, which in essence entailed the enforcement of the proclamation. From this point of view, such a decision that can no longer be challenged by any legal remedy would in the above-mentioned cases, despite the possibility of the annulment of the proclamation, represent an obstacle to the return of assets to unjustly convicted persons outside of denationalisation proceedings. However, it is necessary to take into account that in both these cases and in the cases in which the seizure was based on a criminal court judgment, the decision of the district court only entailed a continuation of the criminal court judgment and from that point of view it in fact entailed that a criminal sentence was issued against the individual. Therefore, in cases in which the individual achieves the annulment of the proclamation on which the seizure by a decision of a district court under Article 28 of the ACCEA was based, it is necessary to deem that such also creates a legal basis for the restitution of assets under the provisions of the Enforcement of Criminal Sanctions Act (Official Gazette SRS, No. 17/78, and Official Gazette RS, No. 8/90, 12/92, 58/93, and 10/98).

## C

25. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 40 of the CCA, composed of: Dr Lovro Šturm, President, and Judges Dr Peter Jambreč, Dr Tone Jerovšek, Mag. Matevž Krivic, Mag. Janez Snoj, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. The Decision was reached by six votes against two. Judges Ude and Zupančič, who submitted a dissenting opinion, voted against. Judges Jerovšek, Šturm, and Testen submitted a concurring opinion.

*Dr Lovro Šturm*  
*President*

In this case I voted against the majority decision, as it is based on the legal fiction that there exist substantive “grounds for issuing a final criminal conviction” (Article 416 of the CrPA), which is a prerequisite for a retrial in accordance with the current Criminal Procedure Act. As it is impossible to have a retrial of criminal proceedings that never took place, the legal fiction with regard to the interpretation of Article 28 of the Asset Confiscation and Confiscation Enforcement Act (AFIPA) from 1945 only upgrades the first (unjust) legal fiction with a modern “interpretation”, arguing that this provision contains both the substantive and procedural criteria of criminal decision-making and that, as such, it was “the basis for a criminal conviction.” The extreme legal formalism that led to such an interpretation went astray when creating a legal fiction only to meet the formal-legal requirements of the current wording of Article 416 of the Criminal Procedure Act. This stretching of the current wording on a Procrustean bed in order to neutralise the injustices from fifty years ago, however, is not appropriate to the role that the Constitutional Court should assume in such instances.

As of course there can be no doubt that redress for the past injustices must be given, the legislature, which is free to create such a procedural path, is responsible for enabling such redress. If the Constitutional Court intended to achieve such in this manner, it would have to abrogate *sua sponte* also the legal gap in Article 416 of the Criminal Procedure Act and require the legislature to open up this path using a specific, adapted procedure also for those cases in which the injustice constituted by the confiscation of property was suffered as a secondary “legal consequence” of a *not legal* execution, etc. The AFIPA could not fictitiously regularise criminal proceedings that never existed. Likewise, the Constitutional Court today cannot infer from a *mutatis mutandis* interpretation of Article 416 that the procedure that led to the confiscation ever existed.

One must namely ask oneself what the practical procedural consequences of this decision will be. There can *de facto* be no retrial in these proceedings.

The clear intention of Article 416 of the Criminal Procedure Act was to allow for this type of retrial where the substantive (or even procedural) legal basis for the criminal conviction was amended. In this case, however, the Constitutional Court neither amended nor newly created the substantive legal basis. The other fiction created by the Constitutional Court by this decision will therefore be followed by a whole avalanche of fictitious retrials (rehabilitations and restitutions). Even the actualisation of the State Prosecutor General’s statements made at the public hearing, i.e. that in such cases he will request that the case be remanded to the investigation phase, is very doubtful after fifty years.

I think that at least in this case it is very clear that the Constitutional Court should have required the legislature to enact that which the Constitutional Court now attempted to do in a legally very questionable manner.

*Dr Boštjan M. Zupančič*

*Dr Lojze Ude*

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**CONCURRING OPINION OF JUDGE DR JEROVŠEK,  
JOINED BY JUDGES DR ŠTURM AND TESTEN**

This decision enables those persons who were declared “war criminals” or “national enemies” by a proclamation without a criminal court judgment or their legal heirs who are entitled to such in accordance with the law, to request on the basis of this decision of the Constitutional Court that a final court decision (i.e. the proclamation of a District People’s Council not based on a criminal court judgment) be reversed in a retrial in accordance with Article 416 of the CrPA.

It is a known fact that in numerous situations the law uses the instrument of legal presumptions, rarely legal fictions, precisely in order to overcome occurrences in life that seem unresolvable. In the field of criminal law, a legal fiction to the detriment of the defendant or suspect, or even a person known to be innocent, is not admissible. The idea that a certain proclamation is deemed to be the legal fiction of a criminal conviction so that those who were shot, killed, or who died or fled “must be considered” [...] “war criminals” or “national enemies” without a court judgment, is abhorrent, with regard to the most basic principles of justice. The effect of this legal fiction was the confiscation of assets, not to mention the suffering of the innocent who for fifty years on the basis of these legal fictions carried in the eyes of the people the burden of perceived depravity. In a situation where the legislature has not (or not yet) regulated the manner of the redress of injustices caused by the application of Article 28 of the AFIPA, it is the duty of the Constitutional Court to immediately enable the possibility to use legally admissible means of redress for consequences contrary to the principles of law recognised by civilised nations at the time at issue and today.

After it was alerted to such by the affected persons and the state prosecutor, the Constitutional Court must enable violations that cannot be covered or healed even by the passage of time to be redressed at any time. Considering this fact, the decision really had to rely to some extent on the legal fiction of “the existence of a substantive basis”, i.e. a criminal conviction that is then the basis for a retrial (Article 416 of the CrPA). Such legal fiction should have been created a long time ago by the legislature, especially after it became evident that for fifty years many innocent people unjustly suffered the consequences of such judgments on the basis of legal fictions, with no rights to moral or material redress.

This concurring opinion expressly wishes to draw the attention of the legislature and the public to the continued responsibility of the legislature (in spite of this decision) to regulate the normative options of redressing the mentioned injustices, as the powers of the Constitutional Court do not allow it to select the potential cases and to prevent those possible cases where a retrial would also be demanded by those who were justifiably and rightly convicted of crimes and proclaimed to be war criminals and consequently their assets were confiscated. It must be also underlined that crimes against humanity and war crimes are not time-barred and that in such cases it is still possible to initiate proceedings under the Military Courts Decree, which the Constitutional Court in this very part did not abrogate.

By including the Asset Confiscation and Confiscation Enforcement Act in the acts that could constitute the basis for denationalisation (point 18 of the first paragraph of Article 3 of the Denationalisation Act, hereinafter referred to as the DA), the legislature has already resolved the issue of the material redress of the affected persons. This decision of the Constitutional Court furthermore provides for the redress of the moral damage suffered on the basis of the application of the mentioned Act. By adopting additional regulations, the legislature may still prevent the potential financial effects of this decision from exceeding the limits already established by the DA. The Constitutional Court must not shirk the responsibility to protect the most basic right of everyone to be presumed innocent until found guilty by a final judgment. In doing so, it cannot resort to sanctimonious preaching as regards what would result if, in addition to the innocent, this procedural means were also exploited by those who are not innocent. When weighing whether it is permissible to allow, due to the lack of an adequate normative framework, the continuation of a situation which grossly violates human dignity, or to rather fill this legal gap with a decision of the Constitutional Court (until the legislature adopts certain measures), there can be no question for a constitutional court judge; he or she must vote in favour of the latter.

*Dr Tone Jerovšek*

*Dr Lovro Šturm*

*Franc Testen*

**DECISION**

At a session held on 8 March 2001 in proceedings to decide upon the constitutional complaint of A. A., Ž., represented by B. B., attorney in Z., the Constitutional Court

*decided as follows:*

**The constitutional complaint of A. A. against Supreme Court Order No. II Ips 55/98, dated 9 September 1998, in connection with Celje Higher Court Order No. Cp 780/97, dated 1 October 1997, and Celje District Court Order No. P 1209/95, dated 3 July 1997, is dismissed.**

*Reasoning*

**A**

1. In the challenged order the court of first instance decided that Slovene courts had no jurisdiction to decide on the dispute, and rejected the complainant's lawsuit. The appeal and the appeal to the Supreme Court were dismissed. The complainant filed a lawsuit against the Federal Republic of Germany and claimed damages for actions allegedly committed by the defendant during the Second World War. According to his statements, during the Second World War he and many others were forcibly removed from their parents and transported to Germany in order to be germanised. He claimed damages for the period he spent in a concentration camp, for emotional distress (due to the death of his parents and for destroying the happiness in his life), and for his property that was destroyed by the occupation authorities in 1942. In his constitutional complaint, the complainant contests the position taken in the challenged orders according to which the defendant enjoys immunity in proceedings before the courts of another state. The court of first instance allegedly substantiated the jurisdictional immunity of a foreign state by the rules of customary law, without actually stating them. The court of second instance allegedly substantiated its decision through an incorrect understanding of the principle *par in parem non habet iurisdictionem*, which has allegedly been obsolete for a long time. The complainant asserted

that jurisdictional immunity is not an absolute right and cases of *acta iure imperii* that violate *ius cogens* constitute an exception to this right. The complainant is not aware of a case in which jurisdictional immunity has been granted to a state that acted contrary to the fundamental principles of civilised nations. He argues that, in granting jurisdictional immunity, there is no difference between international and national courts. In his opinion, the Nuremberg International Military Tribunal confirmed the position that, in the event of a violation of the peremptory rules of international law, a state may not claim immunity. Furthermore, he alleges that the Supreme Court's position that international law principles have precedence over statutes is disputable. In the complainant's opinion, in interpreting the European Convention on State Immunity (hereinafter referred to as the ECSI)<sup>1</sup>, the court did not answer the question of whether the provisions of the Convention apply to *acta iure imperii*. The position that the provisions of the Convention are not part of customary law is allegedly erroneous. The complainant further rejected the absolute applicability of the rule *pacta tertiis nec nocent nec prosunt*. In his opinion, the obligation of subjects of international law to submit to the rules and general principles of international customary law does not depend only on their will, but on the rules adopted by the international community. The complainant's right to judicial protection (Article 23 of the Constitution and the first paragraph of Article 6 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) was allegedly violated due to an erroneous decision on the existence of the procedural requirements for the consideration of his lawsuit. It is alleged that the right to a legal remedy (Article 25 of the Constitution) was violated as the challenged orders failed to specify their reasons in sufficient detail. The provision of Article 153 of the Constitution was allegedly violated because, in their assessment, the courts failed to take into account the universal human values recognised by civilised nations, which are also a source of law. The complainant suggested that the Constitutional Court annul the challenged orders and decide that the courts of the Republic of Slovenia have jurisdiction to decide on his claim.

2. By the Order dated 30 May 2000, the panel of the Constitutional Court accepted the constitutional complaint for consideration.
3. The Supreme Court did not reply to the constitutional complaint.
4. The Federal Republic of Germany submitted a statement regarding the constitutional complaint.

It claims that state immunity is a principle recognised by international customary law. It explains that this principle originates from the sovereign equality of states in their mutual relations. The principle allegedly contributes to the prevention of legal and political conflicts by resolving disputes at an international level and not at a national level. The principle of state immunity allegedly applies precisely to so-called authoritative acts. It is alleged that the conduct of occupation forces or military units in connection with war events constitutes such an authoritative state act, regardless

1 The European Convention on State Immunity, signed in Basel on 16 May 1972.

of the question of whether it is legal or illegal. As a result, such authoritative act could allegedly not be the subject of a lawsuit filed before a court of another state. If individuals could enforce their claims for compensation for pecuniary and non-pecuniary damage against a foreign state before a court of their own state, this would lead to unpredictable consequences for international legal coexistence. The Federal Republic of Germany enclosed with the described position an explanatory document on state immunity that summarises the rules of international public law.

5. In the course of the proceedings, the Ministry of Foreign Affairs also submitted an information on state immunity.

## B

6. All three courts based their decisions on Article 26 of the Civil Procedure Act (Official Gazette SFRY [Socialist Federal Republic of Yugoslavia], No. 4/77, etc. – hereinafter referred to as the CPA77), according to which the rules of international law apply in proceedings against foreign states in the Republic of Slovenia. In the challenged order, the court of first instance stated that a foreign state enjoys immunity as a sovereign state, but not as a holder of civil rights and obligations. As the complainant's case entails the first situation, it rejected the lawsuit. The court of second instance dismissed the appeal and added in its reasoning that, in accordance with the rules of international law formed on the basis of treaties, customs, and judicial practice and in conformity with the principle of *par in parem non habet iurisdictionem*, foreign states enjoy jurisdictional immunity with regard to all acts performed in the exercise of sovereign authority (*acta iure imperii*). The Supreme Court confirmed the positions of the courts of first and second instance and dismissed the allegations stated in the appeal to the Supreme Court. It stated that the principle of *par in parem non habet iurisdictionem* has become obsolete in many aspects, but not to the extent that a foreign state could not claim jurisdictional immunity in cases in which it is sued for *acta iure imperii*. The jurisdictional immunity of states has evolved into international customary law on the basis of state practice. Subsequent conventions were based on that rule, but their provisions limited the scope of immunity (e.g. the ECSI; see also the Draft Articles on Jurisdictional Immunities of States and Their Property prepared by the United Nations International Law Commission). In the Supreme Court's opinion, Article 11 of the ECSI, which specifies some torts as exemptions to immunity, is neither part of domestic internal law nor part of international customary law, and thus it is irrelevant as to whether or not it also applies to *acta iure imperii*.

The Vienna Convention on Civil Liability for Nuclear Damage (Official Gazette SFRY, MP, No. 9/77), the Convention on International Liability for Damage Caused by Space Objects (Official Gazette SFRY, MP, No. 9/77) and the International Convention on Civil Liability for Damage Caused by Oil Pollution (Official Gazette SFRY, MP, No. 7/77), all of which in the complainant's opinion "exceed" the jurisdictional immunity rule, regulate acts that the state performs *iure gestionis*. The judgment of a Greek court, which the complainant enclosed with the appeal to the Supreme Court and which has not yet become final, can also not be considered part of international customary

law. Cases in which foreign states or individuals were tried before an international court are not equal to cases in which a foreign state is party to the proceedings before a court of another state. Furthermore, substantive provisions on liability for damages must not be confused with the question of jurisdictional immunity. Moreover the non-legal or ethical aspects of state acts do not influence the assessment of the existence of jurisdictional immunity. Lastly, the plaintiffs are not deprived of judicial protection as they have the possibility of claiming damages before the German courts.

7. A constitutional complaint may be lodged against violations of human rights and fundamental freedoms. Article 153 of the Constitution, which determines the hierarchy of legal acts, does not contain provisions [regarding human rights and fundamental freedoms]. However, the grounds on which the complainant substantiates the violation of Article 153 of the Constitution will be considered in the review of the violation of the right to judicial protection.
8. It is clear that this case does not concern a violation of the right to a legal remedy (Article 25 of the Constitution). The *ratio decidendi* for rejecting the complainant's lawsuit was the same in all three challenged judgments. By providing a reasoned answer to all of the complainant's allegations, the Supreme Court eliminated potential violations of the right to a legal remedy at the lower levels of the judiciary.
9. Regarding the right to judicial protection guaranteed in Article 23 of the Constitution and the first paragraph of Article 6 of the ECHR, the complainant challenges the following:
  - (1) the position of the courts that, in the event that a foreign state is sued before a court of another state, the foreign state may successfully rely on jurisdictional immunity for *acta iure imperii*, and
  - (2) the finding of the courts that the described position is a rule of international law which used to, in accordance with Article 26 of the CPA77, apply to cases in which a foreign state was sued before a Slovene court.
10. In constitutional complaint proceedings, the Constitutional Court cannot review the correctness of the challenged decisions in terms of substantive law and the assessment of the evidence by the courts. In accordance with Article 50 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), when examining a constitutional complaint, the Constitutional Court is limited to a review of whether the challenged decision is based on a specific legal position that is not acceptable from the perspective of the protection of human rights, or whether it is erroneous to such extent and lacks sound legal reasoning that it can be considered arbitrary (see, e.g., Order of the Constitutional Court No. Up-103/97, dated 26 February 1998, OdlUS VII, 118).
11. By challenging the findings of the courts as to which rule of international law was applicable for determining jurisdiction in cases where a foreign state is sued before a Slovene court, the complainant alleges an erroneous application of the law. Such claim could lead to the annulment of the challenged orders only if it were demonstrated that the finding of the courts is not only erroneous but that is so manifestly erroneous and without sound legal reasoning that it can be considered arbitrary. As substantiated hereinafter, the finding of the courts that a foreign state can successfully rely on jurisdictional immunity when it is sued before a court of another state for *acta iure imperii* was not arbitrary.

12. In accordance with Article 26 of the CPA77, which was applicable at the time of deciding on the complainant's case,<sup>2</sup> rules of international law applied in the event that foreign states were tried in the Republic of Slovenia. Sources of international law include treaties, international custom (as evidence of a general practice accepted as law), and the general principles of law recognised by civilised nations. In addition, judicial decisions and the teachings of the most highly qualified publicists of the various nations are applied as subsidiary means for the determination of the applicable law (Article 38 of the Statute of the International Court of Justice in Hague).
13. In the case at issue, there is no relevant treaty binding on the Republic of Slovenia. Furthermore, there is no general convention that regulates state immunity. States practice is omitting the rule of absolute immunity and moving towards accepting the principle of relative or limited immunity. In addition, the number of cases in which a state does not enjoy immunity is increasing. These developments reflect the changes in the function of the state: while its role was mostly that of a sovereign authority in the nineteenth century, it began to play an active role in the private sector, particularly after the Second World War. According to legal scholars, most states have already abandoned the rule of absolute immunity, but immunity still remains a general rule in the context of established state practice. As regards exceptions, there are (some) differences between states and different legal traditions. It is widely accepted that there is a distinction between the activities of a state as a sovereign authority (*acta iure imperii*), for which immunity is granted, and the activities of a state of a private-law or commercial character (*acta iure gestionis*), for which immunity is not granted. Some countries include further criteria in order to reduce exceptions.<sup>3</sup> Due to the difficulties in distinguishing between both types of activities, it is common for legal acts to determine a general rule and then separately list exceptions thereto. Examples of such include the ECSI, adopted within the Council of Europe, and the Draft Articles on Jurisdictional Immunities of States and Their Property, adopted by the United Nations International Law Commission at its forty-third session in 1991 (hereinafter referred to as the Draft Articles).<sup>4</sup> Legal scholars agree that the ECSI defines the existing practice adopted unanimously by European States.<sup>5</sup> Among the exceptions to immunity both, the ECSI and the Draft Articles, list claims for damages for an injury or the death of a person, or damage to tangible property caused in the territory of the state where the person claims damages, provided the author of the damage was present on the territory of that state at the time when the damage was caused (Article 11 of the

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2 The new Civil Procedure Act (Official Gazette RS, No. 26/99) maintained the provision in practically the same wording (see Article 28).

3 Jennings, Watts, *Oppenheim's International Law*, Volume 1, Introduction and Part I, Longman, 1992, pp. 341–363; Verdross, Simma, *Universelles Völkerrecht*, Duncker & Humblot, Berlin, 1984, pp. 761–774; Brownlie, *Principles of Public International Law*, Clarendon Press, Oxford, 1990, pp. 322–345; Shaw, *International Law*, Cambridge University Press, 1997, pp. 491–521; Combacau, Sur, *Droit International Public*, Montchrestien, Paris, 1997, p. 241 *et seq.*

4 Draft Articles on Jurisdictional Immunities of States and Their Property, Yearbook of the International Law Commission, 1991, Volume II, Part 2, pp. 13–62.

5 See, for example, Jennings, Watts, *op. cit.*, p. 343; Sucharitkul, *Immunities of Foreign States before National Authorities*, RdC 1976/1; Dinh, Daillier, Pellet, *Droit International Public*, L. G. D. J, Paris, 1992, pp. 429–433.

ECSI and Article 12 of the Draft Articles). The exception reflects a widely accepted rule of general tort law, according to which the injured party may sue for damages, not only before the court with jurisdiction on the basis of the defendant's place of residence, but also the place where the act giving rise to the damage occurred. This exception was determined in the interest of the injured party's protection. It is possible to conclude from the explanation of Article 11 of the ECSI and Article 12 of the Draft Articles that the provision was primarily intended to cover claims for damages from insured risks.

However, the wording of the provisions does not support such a narrow interpretation. It is even explicitly stated in the commentary to Article 12 of the Draft Articles that the provision does not differentiate between *acta iure gestionis*, on the one hand, and *acta iure imperii* on the other.<sup>6</sup> Nevertheless, these two documents do not support the conclusion that this rule, as a rule of international customary law, would be applicable in the complainant's case. The ECSI explicitly determines that the exceptions to immunity determined by the Convention do not apply to any activities of the armed forces of a specific state on the territory of another state (Article 31). The Draft Articles, which do not (yet) belong to the rules of international public law, are also not applicable to the proceedings that had commenced before they entered into force.

14. The presented theoretical positions from the field of international law, the efforts to codify such, and the adopted conventions substantiate the conclusion that the Supreme Court's position, in accordance with which states may claim immunity before the courts of another state for *acta iure imperii*, cannot be deemed arbitrary. The complainant's statements cannot rebut this conclusion. An answer to the question as to whether the ECSI, in particular Article 11 thereof, includes *acta iure imperii* is not relevant for the decision in the case at issue, as the Convention also includes a specific provision in accordance with which the Convention does not apply to the acts of the armed forces (Article 31). Furthermore, the allegation that the finding of the Supreme Court that the ECSI is not a record of the rules of international customary law is erroneous is not relevant. It is also not impossible to infer a different state of international customary law from the Greek court judgment, or from the article in which the author advocates the introduction of the rule that violations of the peremptory norms of international law (*ius cogens*) represent exceptions to immunity.<sup>7</sup> In the report from its fifty-first session, the UN International Law Commission, which has been revising the Draft Articles in order to update them,<sup>8</sup> notes the latest trend, which is the strengthening of the position that jurisdictional immunity should be denied to foreign states in the case of death or personal injury due to violations of the peremptory norms of international law on human rights, in particular the prohibition of torture. In this context, reference is made to civil disputes before domestic courts, in relation to which the report establishes that domes-

<sup>6</sup> Draft Articles on Jurisdictional Immunities of States and Their Property, *op. cit.*, p. 45.

<sup>7</sup> The Greek court judgment that the complainant enclosed with the constitutional complaint refers to the article of Richman, Siderman de Blake v. Republic of Argentina: Can the FSIA grant immunity for violations of *ius cogens* norms? *Brook Journal of International Law*, Vol. XIX, 1993, pp. 967–1008.

<sup>8</sup> The International Law Commission, Report of the work of its fifty-first session (3 May–23 July 1999), General Assembly, Official Records, Fifty-fourth session, Supplement No. 10 (A/54/10), UN, New York 1999, pp. 414–415.

tic courts have shown some sympathy to the above arguments in some cases; however, in most cases, the objection of states requesting jurisdictional immunity was upheld. The report makes reference to the US Foreign Sovereign Immunities Act, amended in 1996, which included monetary damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking among the existing exceptions to immunity. Consequently, the Constitutional Court concludes that the aforementioned cases reveal a trend in the future development of international law towards limiting the jurisdictional immunity of a state before foreign courts. In any case, the aforementioned cases cannot serve as evidence of general state practice accepted as law and therefore of the establishment of a rule of international customary law, which would allow Slovene courts to try foreign states in the event of violations of the peremptory norms of international law in the area of human rights protection as a consequence of a state's *acta iure imperii* (which can also be deemed to include the forcible transfer of children of a specific ethnic group during the war).

15. Furthermore, the assertion that, when granting immunity, there is no difference between international and national courts, is not substantiated. Jurisdictional immunity is namely granted in order for a state not to be sued before another subject of international law that is its equal. The Nuremberg International Military Tribunal did not decide on a lawsuit against a state for compensation for war damages; that court decided on the criminal responsibility of the representatives of the state. The correctness of the position of the Supreme Court that international law principles have precedence over statutes is not relevant for deciding the case at issue. The courts applied a statutory provision that refers to international law rules, but it still remains a statutory norm. Furthermore, the correctness of the position of the Supreme Court that the acts defined by the Convention on International Liability for Damage Caused by Space Objects are acts performed *iure gestionis*, is also not relevant for deciding the case at issue. The treaty namely contains the explicit provision that a lawsuit may be filed before a court of the liable state either by the injured state or by the injured natural person (Articles X and XI).
16. Having established that the decision of the courts on the rule of international law regarding jurisdictional immunity in cases in which a foreign state is sued before a Slovene court is arbitrary, and therefore not inconsistent with the guarantee of the equal protection of rights (Article 22 of the Constitution), it is necessary to review the complainant's first allegation summarised in Paragraph 9 of the reasoning of this Decision. The complainant asserted that the position of the courts, according to which a foreign state, when sued before a court of another state, may claim jurisdictional immunity due to *acta iure imperii*, was contrary to the right to judicial protection guaranteed by Article 23 of the Constitution and the first paragraph of Article 6 of the ECHR.
17. In accordance with Article 23 of the Constitution, everyone has the right to have any decision regarding his or her rights, duties, and any charges brought against him or her made without undue delay by an independent, impartial court constituted by law. From the perspective that is relevant for the present case, this constitutional provision guarantees the right to a decision on the merits regarding an individual's right.

18. The right to judicial protection guaranteed by the first paragraph of Article 6 of the ECHR is similar in terms of scope. The European Court of Human Rights (hereinafter referred to as the ECtHR) considers the right of access to the courts to be an integral part of the right to judicial protection. This right is not absolute and, when regulating this right, the state may determine limitations according to the needs and resources of the community and individuals. Limitations are admissible if they do not interfere with the essence of the right, if they pursue a legitimate aim, and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>9</sup> In this manner, in the case of *Waite and Kennedy v. Germany*, the ECtHR decided<sup>10</sup> that the decisions of German courts, by which actions against the European Space Agency (hereinafter referred to as the ESA) were dismissed on the grounds of jurisdictional immunity, interfered with the right of access to the courts (first paragraph of Article 6 of the ECHR), but that the interference was admissible. The courts based the challenged decisions on a statutory provision that was similar to Article 26 of the CPA77 and a provision of the Agreement on the Establishment of the ESA that provides for the jurisdictional immunity of this international organisation before a court of the state on the territory of which it operates. The ECtHR held that (1) the challenged judgments were not arbitrary; (2) they pursued a legitimate aim (according to the position of the ECtHR jurisdictional immunity of international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments); and (3) the applicants had reasonable alternative means at their disposal to protect effectively their rights under the Convention (the applicants could have appealed to the ESA Appeals Board, which is independent from the Agency and competent to decide on disputes that relate to Agency decisions and originate from the relationship between the Agency and its employees. They also allegedly had the opportunity to request reimbursement from the companies that had dismissed them.)
19. As a general rule, in the event of claims for damages, a court of the Republic of Slovenia has jurisdiction not only in cases in which the defendant permanently resides in the territory of the Republic of Slovenia, but also when the tort is committed in the territory of the Republic of Slovenia or a harmful consequence occurs in the territory of the Republic of Slovenia (see Article 55 of the Private International Law and Procedure Act, Official Gazette RS, No. 56/99). Such connection with the Republic of Slovenia has also been demonstrated in the complainant's case. As a reasonable connection between the complainant's case and the Republic of Slovenia has been demonstrated, the exclusion of judicial protection before Slovene courts entails an interference with the right to judicial protection.

9 See *Fayed v. the United Kingdom*, Judgment dated 21 September 1994, Publ. ECHR, Ser. A, Vol. 294-B, pp. 49–50, 65, and *Waite and Kennedy v. Germany*, Judgment dated 18 February 1999, 59, available at the web site [www.dhcour.coe.fr](http://www.dhcour.coe.fr).

10 The decision is cited in the previous note.

20. An interference with the right to judicial protection is admissible only if it is consistent with the principle of proportionality. Such entails that the limitation at issue must be required and necessary to reach the pursued constitutionally legitimate aim and must be proportionate to the importance of such aim (the third paragraph of Article 15 of the Constitution). The interference under review is not inadmissible for the reasons stated hereinafter.
21. Jurisdictional immunity is an expression of the principle of the equality of states and, thereby, the respect for the independence and integrity of another state. The rule *par in parem non habet iurisdictionem*, according to which legal entities with an equal position cannot leave the resolution of a dispute to the court of either of them, originates from this principle.<sup>11</sup> This aim is constitutionally legitimate and the exclusion of judicial protection is required and necessary in order to achieve it. More specifically, the aim can only be achieved by the exclusion of the jurisdiction of a court in another state. The exclusion of judicial protection in the Republic of Slovenia is also proportionate to the importance of the aim pursued. Respect for the principle of the sovereign equality of states is necessary in order to preserve international cooperation and cohesion between the states. On the other hand, by the challenged orders the complainant is not deprived of all judicial protection, but only of judicial protection before domestic courts. According to general rules on jurisdiction (*actor sequitur forum rei*), the complainant may sue the Federal Republic of Germany before its courts, where the plea of its jurisdictional immunity cannot be used. In its review of the proportionality in the narrower sense, the Constitutional Court also took into account that the case at issue concerns a state that applies the general standards on human rights protection and the principles of a state governed by the rule of law adopted within the Council of Europe, and that the decisions of its courts are subject to review by the institutions that operate at the level of the mentioned international organisation.
22. According to the aforementioned, the allegation of a violation of the right to judicial protection (Article 23 of the Constitution and the first paragraph of Article 6 of the ECHR) is not substantiated. Therefore, the Constitutional Court dismissed the constitutional complaint.

### C

23. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Franc Testen, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Lojze Janko, Milojka Modrijan, Dr Ciril Ribičič, Dr Lojze Ude, and Dr Dragica Wedam-Lukić. The decision was adopted unanimously.

*Dr Lojze Ude*  
*Vice President*

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11 Jennings, Watts, *op. cit.*, pp. 341–342; Shaw, *op. cit.*, pp. 491–492, Verdross, Simma, *op. cit.*, p. 763.

Decision No. **U-I-65/05**, dated 22 September 2005

### DECISION

At a session held on 22 September 2005 in proceedings to review constitutionality initiated upon the petition of Marta Dominika Jelačin, Ljubljana, the Constitutional Court

*decided as follows:*

1. The Act on the Judicial Review of Administrative Acts (Official Gazette RS, Nos. 50/97, 65/97 – corr., and 70/2000) is inconsistent with the Constitution.
2. The National Assembly must remedy the established inconsistency within a time limit of one year from the publication of this Decision in the Official Gazette of the Republic of Slovenia.

*Reasoning*

#### A

1. The petitioner challenges the first and second paragraphs of Article 62 and Article 34 of the Act on the Judicial Review of Administrative Acts (hereinafter referred to as the AJRAA). She alleges that the Administrative Court refused to provide her legal protection of her constitutional right to a trial within a reasonable time, as the proceedings in which this right was violated had already been concluded. She states that in the order rejecting the action the Administrative Court adopted the position, in conformity with the established administrative case law with reference to the position of the Constitutional Court, that in proceedings for the judicial review of administrative acts a party can only seek to establish, by an action, the existence of a violation of the right to a trial within a reasonable time as determined by Article 23 of the Constitution if the proceedings are still pending; if the proceedings before the court have already been concluded this right can no longer be violated, and thus such violation can no longer be prevented. In accordance with the mentioned position, if the proceedings are no longer pending, a party only has the possibility to claim compensation before the competent court in conformity with Article 26 of the Constitution. The Administrative Court allegedly adopted such a decision exclu-

sively due to the inconsistency of the first and second paragraphs of Article 62 of the AJRAA with Articles 23 and 157 of the Constitution. The petitioner emphasises that Article 23 of the Constitution ensures the right to a trial without undue delay as a comprehensive right, and not only as a “curtailed” right, as is regulated by the challenged Article 62 of the AJRAA – i.e. [it is applicable] only for instances where the proceedings in which a violation allegedly occurred are still pending. The petitioner agrees that after the proceedings have been concluded this right can no longer be violated; however, she stresses that the violation that has already occurred and its consequences have [also] not yet been remedied. Therefore, she is of the opinion that the challenged provision of the AJRAA should enable the affected party, even if judicial proceedings have already concluded, to request that the court establish that a violation occurred. In her opinion, the establishment of a violation is also a logical condition for the compensation determined by Article 26 of the Constitution to even be awarded. In order to determine the compensation in accordance with Article 26 of the Constitution, it is namely also necessary to prove the unlawfulness of [the conduct of] a state authority, which is something that cannot be proven by a civil court. The petitioner is convinced that the state can avoid its obligation to pay compensation pursuant to Article 26 of the Constitution on the basis of the fact that it has *de facto* a stronger position [than an individual]. The legal protection of the right determined by Article 23 of the Constitution is thus allegedly completely ineffective. According to the petitioner, only if statutory provisions determine the due conduct of the state clearly enough when the right of an individual to a trial without undue delay is violated can one speak of true legal protection of the mentioned right and of the public right to such protection in the correct meaning of the word. Finally, the petitioner emphasises that due to the fact that the challenged provision of the AJRAA is inappropriate and unlawful, the legislation in force does not fulfil the obligations that the state assumed by signing 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).

2. In its reply the National Assembly stated that the petition is not substantiated. Referring to hitherto positions of the Constitutional Court, it is of the opinion that in proceedings for the judicial review of administrative acts it is possible, on the basis of the provisions of the AJRAA, to achieve effective judicial protection of the rights guaranteed by Articles 23 and 157 of the Constitution, and that therefore the challenged provisions are not inconsistent therewith. The Government and the Ministry of Justice are [also] of the opinion that the challenged provisions are not inconsistent with the Constitution and they suggest that the Constitutional Court dismiss the petition.

#### **B – I**

3. In conformity with Article 24 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), anyone filing a petition to initiate proceedings must demonstrate his or her legal interest. A legal interest is demonstrated if the regulation whose review has been requested directly interferes with his or her

rights, legal interests, or legal position. In accordance with the established case law, a legal interest must be direct and concrete, and the possible granting of the petitioner's proposal must lead to an improvement in his or her legal position (see, e.g., Decision No. U-I-18/98, dated 19 April 2001, Official Gazette RS, No. 37/01, and OdlUS X, 76).

4. The petitioner substantiates her legal interest with the interpretation of the challenged provision of the AJRAA provided by the Administrative Court in Order No. U 2259/2004, dated 26 January 2005, by which it rejected her action filed due to a violation of the right to a trial within a reasonable time in an already concluded civil case. She alleges that she appealed against the Administrative Court Decision to the Supreme Court; however, she emphasises that in proceedings for the judicial review of administrative acts she cannot succeed, as the interpretation of the challenged provision of the AJRAA adopted by the Administrative Court is based on the established administrative case law and the equivalent position of the Constitutional Court. During the proceedings for the examination of the petition at issue, the Supreme Court decided on the appeal. The petitioner filed in due time a constitutional complaint (No. Up-526/05) against Supreme Court Order No. I Up 432/2005, dated 14 April 2005, by which her appeal was dismissed. With regard to the above, the petitioner demonstrates legal interest for the [initiation of the proceedings for the] review of the constitutionality of the challenged provisions of the AJRAA.
5. The Constitutional Court accepted the petition for consideration. Since the conditions determined by the fourth paragraph of Article 26 of the CCA were fulfilled, it proceeded to decide on the merits of the case.

## B – II

6. The right to judicial protection determined by the first paragraph of Article 23 of the Constitution entails the right of everyone to have any decision regarding his or her rights, duties, and any charges brought against him or her made without undue delay by an independent, impartial court constituted by law. A similar right is also guaranteed by the first paragraph of Article 6 of the ECHR. In its hitherto determination of the content of the right to judicial protection under Article 23 of the Constitution, the Constitutional Court has always proceeded from the general premise that the purpose of the Constitution is not to recognise human rights merely formally and theoretically, but that it is a constitutional requirement to ensure the possibility of effective and actual exercise of human rights (Decision of the Constitutional Court No. Up-275/97, dated 16 July 1998, OdlUS VII, 231). Concerning such, also the provisions of Article 5 of the Constitution need to be considered. This article is important as it contains the so-called positive obligations of the state or the individual branches of power. One of these is also the obligation of the state "to protect human rights and fundamental freedoms in its own territory." However, the protection of human rights should not only be taken as the obligation of the state to refrain from actions that would interfere with human rights or limit such; the protection of human rights also obliges it to take positive action by which it creates opportunities for the effective exercise of human rights to the greatest extent possible. Already in 1994, the Con-

stitutional Court stated the following in one of its decisions: “In a state governed by the rule of law, there must exist such a system of organisation that enables the implementation of the Constitution and laws and such a system of procedures that enables the exercise of rights and freedoms (Decision No. U-I-13/94, dated 21 January 1994, Official Gazette RS, No. 6/94, and OdlUS III, 8). The Constitutional Court thereby approximated [its position] with the requirement [to take positive action] arising from the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), in accordance with which the positive obligation of the state is a new, procedural aspect of the third generation human rights.<sup>1</sup> The obligation of the state to ensure the right to effective judicial protection also already arises from the requirements (principles) of a state governed by the rule of law (Article 2 of the Constitution). One of which is to achieve the exercise of rights in a peaceful manner and to thereby prevent the arbitrary and forcible resolution of disputes. By eliminating the right of persons to resolve disputes by themselves, the state assumed the obligation to ensure judicial protection as a manner of resolving disputes regarding rights and obligations; this obligation is met by the right of every legal entity to request such from the state.<sup>2</sup>

7. In conformity with these starting points, the Constitutional Court has already adopted a position in accordance with which the right to judicial protection determined by the first paragraph of Article 23 of the Constitution is not exhausted already by the fact that the possibility to submit a case to a court is ensured. Conversely, the meaning of the right to judicial protection lies in the guarantee that within a reasonable time the court will decide substantively and on the merits of the case submitted to its decision-making. Furthermore, from the requirement that human rights must be exercised in a manner such that their full effect is ensured, it follows that the right to judicial protection is also not exhausted when in an individual case the court issues a substantive decision on the merits. An integral part of the right to judicial protection is namely also the right to request that the judicial decision by which the court decided on a certain right or obligation be enforced. As a general rule, the purpose and aim of judicial protection are namely fully achieved only when a certain right or legal relation is realised, and not merely when a decision on the existence of such is adopted. Therefore, everyone who has been recognised a right with finality must be given the possibility and means to actually exercise such right (Decision of the Constitutional Court No. Up-181/99, dated 18 December 2002, Official Gazette RS, No. 7/03, and OdlUS XI, 292; Decision No. U-I-339/98, dated 21 January 1999, Official Gazette RS, No. 11/99, and OdlUS VIII, 13). The right to obtain a “determination” of a dispute and the right to achieve the enforcement of a final judgment form, also according to the established case law of the ECtHR, an integral part of the right of access to a court as ensured by the first paragraph of Article 6 of the ECHR.<sup>3</sup>

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1 B. M. Zupančič 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, Ljubljana, 2002, p. 112.

2 See also A. Galič, *Pravica do poštenega sojenja v pravnem postopku* [The Right to a Fair Trial in Civil Proceedings], doctoral dissertation, Ljubljana, 1998, p. 90.

3 See, e.g., the judgments in *Hornsby v. Greece*, No. 18357/91, dated 19 March 1997; *Gefima Immobiliare s.r.l. v.*

8. An essential integral part of the right to judicial protection is also the right to a trial without undue delay, which ensures everyone who participates in judicial proceedings as a party the possibility to assert his or her rights through the judicial protection thereof within a reasonable time.<sup>4</sup> What in such sense is at issue is a right that entails one of the essential conditions for the effective exercise of all other human rights. Its purpose is to ensure the effectiveness of judicial protection; judicial protection that is too late can nullify its effects. Namely, if judicial protection is too late, the affected person is in the same position as if he or she had no judicial protection at all (justice delayed is justice denied). The right to a trial within a reasonable time is also ensured by the first paragraph of Article 6 of the ECHR, which provides that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ‘within a reasonable time’ by an independent and impartial tribunal.” It follows from the case law of the ECtHR that the right to a trial within a reasonable time is of exceptional importance for the quality of the trial<sup>5</sup> and that the ECHR obliges contracting states to organise their legal systems in a manner such that courts can fulfil the requirements determined by the first paragraph of Article 6 of the ECHR, including the reasonable length of proceedings. The state must, therefore, organise its judiciary in such a manner that the actual exercise of this right is ensured.<sup>6</sup> This requirement follows from the positive obligation of the state in the protection of human rights. It is necessary to emphasise that in *Kudla v. Poland*<sup>7</sup> the ECtHR adopted a new position, namely that the question of whether in a concrete case concerning a decision on an applicant’s civil rights and obligations or a criminal charge against him, the applicant was accorded a trial within a reasonable time must be assessed separately from the question of whether an effective legal remedy to assert such right was available to him under the national law.<sup>8</sup> It emphasised that the ever increasing number of violations of the right to a trial within a reasonable time requires a cautious consideration of the threat to the rule of law posed by the fact that in the national legal systems of Member States effective legal remedies for the protection of the right to a trial within a reasonable time are not ensured. It drew attention to the fact that, on the basis of Article 1 of the ECHR,<sup>9</sup>

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*Italy*, No. 2274/93, dated 28 July 1999; *Jasiuniene v. Lithuania*, No. 41510/98, dated 6 March 2003; *Karahalios v. Greece*, No. 62503/00, dated 11 December 2003; and *Kutić v. Croatia*, No. 48778/99, dated 21 February 2002.

- 4 J. Čebulj in L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], p. 253.
- 5 *Guincho v. Portugal*, case No. 8990/80, Judgment dated 10 July 1984.
- 6 *Buchholz v. Germany*, case No. 7759/77, Judgment dated 6 May 1981.
- 7 Case No. 30210/96, Judgment dated 26 October 2000.
- 8 It thereby departed from the position that the first paragraph of Article 6 of the ECHR is a *lex specialis* in relation to Article 13 of the ECHR. Until this case, the ECtHR advocated the position that when a violation of the first paragraph of Article 6 of the ECHR is established, it is not necessary to separately assess allegations regarding the lack of appropriate legal remedies for the protection of the right to a trial within a reasonable time in the national law of a Member State, i.e. allegations regarding the violation of Article 13 of the ECHR.
- 9 Article 1 of the ECHR reads as follows: “High Contracting Parties shall secure to everyone within their juris-

state authorities bear the main responsibility for the exercise of the rights and freedoms guaranteed by the ECHR and that, therefore, the mechanism of [filing] an application before the ECtHR is only subsidiary to the human rights protection systems of the state. According to the ECtHR, this subsidiary character is expressed in Article 13 of the ECHR (the right to an effective legal remedy)<sup>10</sup> and in the first paragraph of Article 35 of the ECHR (admissibility criteria)<sup>11</sup>. The ECtHR emphasised that the purpose of the first paragraph of Article 35, which determines the rule that national legal remedies must first be exhausted, is to ensure contracting states the possibility to prevent or remedy the alleged violations even before they reach the ECtHR. Concerning such, it stated that the rule determined by the first paragraph of Article 35 is based on the presumption determined by Article 13 (to which it is tightly connected) that there exists an effective national legal remedy enabling the assertion of the alleged violations of the rights of individuals enshrined in the ECHR. According to the ECtHR, Article 13 of the ECHR, which is a direct expression of the obligation of contracting states to first and foremost protect human rights in the framework of their own legal systems, in such manner ensures individuals an additional safeguard so that they can effectively exercise these rights. From the viewpoint of the ECtHR, Article 13 of ECHR thus functions as a requirement that a national legal remedy is applied in order for the “probability of an accusation” under the ECHR to be substantively assessed and for just satisfaction to be awarded. In the reasoning of the mentioned Judgment, the ECtHR reiterated its position that the extent of the obligations of contracting states under Article 13 of the ECHR changes, namely depending on the nature of the applications of individual applicants; however, the legal remedy required thereby must be “effective” not only in theory but also in practice.<sup>12</sup> With regard to the right to a trial within a reasonable time, the ECtHR held that a legal remedy is effective if it either prevents an alleged violation or its continuation, or ensures just satisfaction. It should be emphasised that it follows from the case law of the ECHR that contracting states must ensure an effective legal remedy against violations of the right to a trial within a reasonable time also in cases where the violation has already ceased. In *Šoć v. Croatia*<sup>13</sup> the ECtHR established a violation of Article 13 of the ECHR, as the appellant had not had access to national legal remedies that would offer him appropriate satisfaction with regard to the alleged violations of the right to a trial within a reasonable time in proceedings that had already been concluded<sup>14</sup>.

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diction the rights and freedoms defined in Section I of this Convention.”

10 Article 13 of the ECHR reads as follows: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

11 The first paragraph of Article 35 of the ECHR reads as follows: “The Court may only deal with the matter after all national remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

12 Such position was also expressed in *Ilhan v. Turkey*, case No. 22277/93, dated 27 June 2000.

13 Case No. 47863/99, Judgment dated 9 March 2003.

14 In the mentioned case, the applicant alleged, *inter alia*, a violation of Article 13 of the ECHR, as allegedly

9. It is necessary to draw attention to the case of *Belinger v. Slovenia*<sup>15</sup> (the applicants alleged a violation of the right to a trial within a reasonable time in civil proceedings, which at the time of the filing of the application before the ECtHR had not yet been concluded), in which the ECtHR dismissed the preliminary objection of the Government regarding the inadmissibility of the application due to the non-exhaustion of national legal remedies (the first paragraph of Article 35 of the ECHR). In its consideration of the objection of the Government, the ECtHR reiterated the reasons adopted in the above-mentioned case of *Kudla v. Poland*, and established that the supervisory complaint (as provided for prior to the amendments to the Courts Act in 2000 and 2004)<sup>16</sup>, the judicial review of administrative acts, and the constitutional complaint could not be deemed effective legal remedies, i.e. legal remedies that are accessible to the complainant within an appropriate period of time both in theory and practice, and that could provide him or her just satisfaction and a reasonable possibility of success.
10. The right to a trial without undue delay determined by the first paragraph of Article 23 of the Constitution is among the rights whose judicial protection is not determined by a special law. However, since it entails a part of Article 23 of the Constitution, in conjunction therewith, with respect to the fourth paragraph of Article 15 of the Constitution, and as is the case with all other human rights and fundamental freedoms,<sup>17</sup>

no effective legal remedy was available that he could file with regard to the question of the excessive length of already concluded civil proceedings. The Government objected that the applicant had the possibility to file a constitutional complaint on the basis of Article 63 of the [Constitutional] Act on the Constitutional Court of the Republic of Croatia of 2002, which enables a party to file a constitutional complaint with regard to the length of proceedings even prior to the exhaustion of other legal remedies, while it also enables the Constitutional Court to impose a time limit on a court by which it must carry out a procedural action and, in the event a violation is established, award just satisfaction. According to the Government, in the applicant's case this possibility entailed an effective legal remedy with regard to the length of proceedings. The ECtHR did not accept the Government's objection, but established a violation of Article 13 of the ECHR. In the reasoning it stated that the Government did not cite any decision that would indicate that the Constitutional Court accepts for consideration cases related to the excessive length of already concluded proceedings. On the contrary, the decisions of the Constitutional Court concerning the application of Article 63 of the Act on the Constitutional Court of 2002 clearly demonstrated that the Constitutional Court adopted the position that Article 63 does not refer to cases concerning already concluded proceedings. According to the ECtHR, the case law of the Constitutional Court, the lack of case law supporting the Government's objection, as well as the unclear wording of Article 63 as regards its applicability in cases concerning already concluded proceedings, demonstrate that it is not possible to establish that Article 63 represents an effective legal remedy [in cases concerning the excessive] length of already concluded civil proceedings. Moreover, the ECtHR also did not establish that the applicant had at his disposal any other effective legal remedy.

- 15 Case No. 42320/98, the decision on the admissibility of the application dated 2 October 2001 and the Judgment (friendly settlement), dated 13 June 2002.
- 16 The Act Amending the Courts Act (Official Gazette RS, No. 28/30 – CtsA-C and Official Gazette RS, No. 73/04 – CtsA-D).
- 17 The fourth paragraph of Article 15 of the Constitution reads as follows: "Judicial protection of human rights and fundamental freedoms, and the right to obtain redress for the violation of such rights and freedoms, shall be guaranteed."

judicial protection and the right to have all consequences of its violation remedied must also be ensured. The exercise of the right to judicial protection in instances where no other judicial protection is envisaged by law is ensured within the framework of the judicial review of administrative acts on the basis of the second paragraph of Article 157 of the Constitution and on the basis of the third paragraph of Article 1 of the AJRAA. In conformity with the provision of the second paragraph of Article 157 of the Constitution (which is encompassed by the third paragraph of Article 1 of the AJRAA), in proceedings for the judicial review of administrative acts, the competent court also decides on the legality of individual actions and acts by which the constitutional rights of an individual are interfered with, if no other judicial protection is ensured. As the conduct of a court that does not issue a judgment without undue delay (within a reasonable time) entails an action by which the mentioned human right is interfered with, protection is ensured in proceedings for the judicial review of administrative acts against such conduct. Article 62 of the AJRAA determines that, in proceedings for the judicial review of administrative acts referred to in the third paragraph of Article 1 of that Act, the court may establish the illegality of an act or an action, prohibit the continuation of a concrete action, decide on the plaintiff's claim for the compensation for damage, and determine whatever is necessary in order for the interference with constitutional rights to be remedied and for legality to be re-established. The court decides without delay on the prohibition of the continuation of the activity and, if the illegal activity continues, on the measures intended to re-establish legality. If in the case at issue the court cannot decide without delay, it may, in conformity with Article 69 of the AJRAA, *ex officio* issue an interim injunction.

11. The Constitutional Court has already held that in cases in which proceedings are still pending it falls within the jurisdiction of the Administrative Court to decide on the existence of a violation of the right to a trial without undue delay (e.g. in Order No. Up-369/97, dated 21 January 1998, OdlUS VII, 116). Such a position was also based on the regulation in the AJRAA, which among the provisions on jurisdiction encapsulates the provision of the second paragraph of Article 157 of the Constitution (the third paragraph of Article 1 of the AJRAA). In addition, also other provisions of the AJRAA are adapted to the needs of the effective protection of human rights. For example, courts have multiple possibilities to adopt a decision on the merits of a claim (the first paragraph of Article 62); they are given broad authorisation to adjust the content of a decision to the nature of the violated constitutional right and to actually achieve what is necessary in order for the violation to cease, and may, for this purpose, issue a (regulatory) interim injunction (the second and third paragraphs of Article 62). The Constitutional Court adopted the position that such a regulation offers a sufficiently reliable basis to conclude that an action [initiating the procedure for] a judicial review of an administrative act can entail an effective legal remedy for the protection of the constitutional right to a trial without undue delay.<sup>18</sup> By Decision No. Up-277/96, dated 7 November 1996 (OdlUS V, 189), the Constitutional Court adopted

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18 Such reasoning was adopted even prior to the cases of *Belinger v. Slovenia*, *Kudla v. Poland*, and *Šoć v. Croatia*.

the position that judicial protection [in proceedings for] the judicial review of administrative acts would not be effective in instances where the right to a trial without undue delay is violated in proceedings before the Supreme Court. Therefore, in such cases it is admissible to directly file a constitutional complaint. By Decision No. Up-73/97, dated 7 December 2000 (Official Gazette RS, No. 1/01, and OdIUS IX, 309), the Constitutional Court emphasised that the mentioned adopted positions applied to instances where the violation still existed. In the case at issue, however, it adopted the position that applies to instances where the proceedings in which the right to a trial without undue delay was allegedly violated were already concluded. According to the position of the Constitutional Court, in such cases the protection of this right cannot be requested either within proceedings for the judicial review of administrative acts (as subsidiary judicial protection on the basis of the second paragraph of Article 157 of the Constitution) or (if the matter concerns a violation before the Supreme Court) directly by a constitutional complaint. The Constitutional Court based such position on the finding that the meaning of judicial protection against a still-existing violation of this right in the framework of proceedings for the judicial review of administrative acts and of a constitutional complaint is in that the continuation of the unnecessary delay of a court's decision-making is prevented. However, once the proceedings before the court are concluded, this right can no longer be violated, therefore the violation can no longer be prevented. The action by which the mentioned right was allegedly violated has namely already ceased. The affected person can request compensation for possible damage caused by such violation by an action for damages against the state on the basis of Article 26 of the Constitution; when in such proceedings [all] legal remedies have been exhausted, such a person can also file, under the conditions determined by the CCA, a constitutional complaint.

12. When assessing the challenged provisions of the AJRAA, the Constitutional Court must observe, irrespective of its positions mentioned in the preceding paragraph of the reasoning, the case law of the ECtHR, in accordance with which effective judicial protection of the right to a trial within a reasonable time is ensured only if it also encompasses protection that offers appropriate satisfaction. Such should be awarded to persons whose rights were violated in proceedings that have already been concluded.<sup>19</sup> The Constitutional Court must observe this case law irrespective of the fact that it was adopted in a case in which Slovenia itself did not participate in proceedings before the ECtHR. What is at issue is namely the clear and established practice of the ECtHR, in accordance with which the conditions that must be fulfilled in order for it to possibly be deemed, with regard to the ECHR, that the legal order of (any) contracting state contains an effective legal remedy against violations of the right to a trial within a reasonable time also in cases where the violation has already ceased are determined *in abstracto*. Furthermore, the Constitutional Court must observe the fifth paragraph of Article 15 of the Constitution, which determines that no human right or fundamental freedom regulated by legal acts in force in Slovenia (also the ECHR is such an act)

<sup>19</sup> As the ECtHR stated in *Šoć v. Croatia*.

may be restricted on the grounds that the Constitution does not recognise that right or freedom or recognises it to a lesser extent. With regard to the mentioned case law of the ECtHR, the fourth paragraph of Article 15 of the Constitution, in accordance with which the judicial protection of human rights and the right to obtain redress for the violation of such rights are guaranteed, must be interpreted in the spirit of the ECHR such that there follows therefrom the requirement that within the framework of the judicial protection of the right to a trial without undue delay also the possibility to claim just satisfaction in cases where the violation has already ceased must be ensured. In such respect, the criteria of the ECtHR for assessing whether a reasonable time for a trial has been exceeded must be taken into consideration. The ECtHR decides on the violation of the right to a trial within a reasonable time on the basis of the circumstances of each concrete case by taking into consideration in particular the following criteria: the complexity of the case, the conduct of state authorities, the conduct of the applicant, and the significance of the case for the applicant.

13. In accordance with the hitherto position of the Constitutional Court, if proceedings in which the right to a trial without undue delay was allegedly violated have already been concluded (with finality), the affected person can only file, under the legislation in force, an action for damages on the basis of Article 26 of the Constitution.<sup>20</sup> Such an action is decided on by a court in civil proceedings<sup>21</sup> in conformity with the general rules of the law of damages, which are regulated by the Code of Obligations (Official Gazette RS, No. 83/01 etc. – hereinafter referred to as the CO). On such basis, a court can award the affected person compensation for pecuniary and non-pecuniary damage if the prerequisites for liability for damages are fulfilled. There are, however, no special statutory provisions that would enable the affected person to assert the right to just satisfaction in the sense of the ECHR.<sup>22</sup> This also applies in the event compensation is claimed by an action within proceedings for the judicial review of administrative acts (the first paragraph of Article 62 of the AJRAA). Just satisfaction due to a violation of the right to a trial within a reasonable time in the sense of the ECHR namely does not entail compensation in the classic sense in accordance with the criteria of civil liability for pecuniary or non-pecuniary damage, which also applies with regard to compensation determined by Article 26 of the Constitution. What is at issue is satisfaction whose primary purpose is compensation due to the

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20 The first paragraph of Article 26 of the Constitution reads as follows: “Everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority performing such function or activity within a state or local community authority or as a bearer of public authority.”

21 Article 1 of the Civil Procedure Act (Official Gazette RS, Nos. 26/99, 96/02, 12/03 – official consolidated text, 2/04, and 36/04 – official consolidated text).

22 The assumption that proceedings for awarding compensation based on Article 26 of the Constitution ensure the affected person just satisfaction due to a violation of the right to a trial without undue delay after such has already ceased is also not confirmed by case law, as in the digital database of decisions of the Supreme Court and the Higher Court (IUS-INFO) there is no case in which just satisfaction was awarded due to a violation of the right to a trial without undue delay.

failure of the state to fulfil its positive obligation to ensure a system or organisation of proceedings that will enable individuals to obtain a decision of a court within a reasonable time.<sup>23</sup> Since the AJRAA, which in accordance with the second paragraph of Article 157 of the Constitution does indeed regulate the judicial protection of the right to a trial without undue delay, does not contain special provisions adjusted to the nature of the right at issue that would enable the claiming of just satisfaction in the event a violation of the right to a trial within a reasonable time has already ceased, it is inconsistent with the fourth paragraph of Article 15 of the Constitution in relation to the first paragraph of Article 23 of the Constitution (point 1 of the operative provisions).

14. As what is at issue is a case in which the legislature did not regulate a certain issue that it should have regulated, abrogation is not possible. Therefore, the Constitutional Court adopted, on the basis of the first paragraph of Article 48 of the CCA, a declaratory decision. On the basis of the second paragraph of Article 48 of the CCA, it imposed on the legislature the obligation to remedy the established inconsistency within a time limit of one year from the publication of the Decision in the Official Gazette of the Republic of Slovenia (point 2 of the operative provisions). In order to fulfil the guarantees determined by Article 5 and the fourth paragraph of Article 15 of the Constitution, and the requirements determined by the ECHR, the legislature will have to comprehensively regulate the protection of the right to a trial without undue delay in the AJRAA or in some other act. In establishing the system of the protection of the right to a trial without undue delay, the legislature will have to devote special attention to ensure that it does not additionally (over)burden the courts or, in other words, to ensure that the new legal remedy for the protection of the right to a trial within a reasonable time does not cause additional prolongation of court proceedings.<sup>24</sup> From the reasoning of the Judgment in *Kudla v. Poland*, relating to the obligation of the state to ensure effective legal remedies for the protection of the right to a trial within a reasonable time, it follows that it is not necessary that [the authority which] must decide on such a legal remedy is exactly a court; however, if it is not a court then it is the competences of such authority and the guarantees it pro-

23 In this respect, it should be mentioned that the ECtHR reserves for itself wide discretion with regard to deciding whether in a concrete case it will award monetary compensation as just satisfaction (and in what amount) due to a violation of a right determined by the ECHR, or whether in the concrete case at issue the mere establishment of the violation of a right itself already entails just satisfaction.

24 It is also worth mentioning the experience of Italy, which in order to ensure an effective legal remedy adopted a special act called *Legge Pinto*, in conformity with which anyone who has sustained pecuniary or non-pecuniary damage due to a violation of the right to a trial within a reasonable time determined by the first paragraph of Article 6 of the ECHR is entitled to just satisfaction. In criminal proceedings, the Higher Criminal Court has the jurisdiction to decide on alleged violations [of such right]. Concerning alleged violations before courts of general jurisdiction, the complaint must be filed with the Ministry of Justice; as regards proceedings before military courts, with the Ministry of Defence; concerning tax procedures, with the Ministry of Finance; and regarding all other procedures, directly with the Government. Appeals are decided on by the Court of Cassation. In practice, it has transpired that due to the significant number of cases also these courts face delays.

vides that are decisive for assessing whether the [available] legal remedy is effective. Furthermore, it is not necessary that what is at issue is a single legal remedy; what is important is the entirety of the legal remedies that are provided by national law.<sup>25</sup> In such respect, the Constitutional Court in particular draws attention to the inappropriateness – from the viewpoint of an effective system of the protection of human rights and the constitutionally determined competences of the Constitutional Court – of the possible regulation in accordance with which it is the Constitutional Court that would have competence as the first instance authority to assess the alleged violations of the right to a trial without undue delay in already concluded proceedings and (provided that a violation of this right is established) to decide on [awarding] just satisfaction.<sup>26</sup> Despite the fact that, in the case at issue, the Constitutional Court only assessed whether the legislation in force ensures effective judicial protection of the right to a trial without undue delay when a violation has already ceased, it points to the fact that, in view of the case law of the ECtHR, also a question of the effectiveness of the judicial protection of the right to a trial without undue delay in cases in which proceedings are still pending is justifiably raised. Therefore, in formulating statutory solutions for remedying the unconstitutionality established in the case at issue it would be necessary to also consider whether the legal remedies for ensuring the protection of the right to a trial without undue delay in cases where proceedings are still pending are appropriate, and whether they should be harmonised with the requirements of the ECtHR. Namely, one of the fundamental concerns of the state,

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25 In the mentioned case, the ECtHR also stated that the regulations in certain contracting states (Spain, Portugal) have proved that such legal remedies can be introduced and effectively applied. In such respect, the ECtHR referred to its decisions in *Gonzales Marin v. Spain*, case No. 29521/98, Order dated 5 October 1999; and in *Tome Mota v. Spain*, case No. 32082, Order dated 2 December 1999.

26 In such context, the experience of the Republic of Croatia can be instructive. In a series of cases, the Republic of Croatia was found liable for a violation of the first paragraph of Article 6 of the ECHR, as the ECtHR established that in its regulation and practice Croatia does not provide an appropriate and effective legal remedy against violations of the right to a trial within a reasonable time. Consequently, in 2002 Croatia adopted an amendment to the Constitutional Act on the Constitutional Court of the Republic of Croatia, on the basis of which the Constitutional Court became the first and last judicial instance for assessing violations of the right to a trial within a reasonable time (complainants did not have to exhaust other legal remedies beforehand). Following the amendment, the ECtHR refused to consider those applications that were filed after the constitutional act was amended and also those applications that the ECtHR received prior to the adoption of the constitutional act; these had to be decided on by the Constitutional Court in Zagreb. In 2001, the Constitutional Court only received 42 constitutional complaints related to a trial within a reasonable time, then as many as 450 in 2002, and 923 already in 2004. In February 2005, in a special report presented to the *Sabor* [i.e. the Croatian parliament] the Constitutional Court presented its position that due to the overburdening of the Constitutional Court and because the resolution of other constitutional complaints and the review of the constitutionality of regulations were being compromised, it was necessary to delegate the assessment of violations of the right to a trial within a reasonable time to ordinary courts. The Constitutional Court was to have jurisdiction regarding this matter only subsidiarily, upon a constitutional complaint against the decision of an ordinary court (for more detail, see C. Ribičič, *Hrvaška v objemu ESČP* [Croatia in the Embrace of the ECtHR], *Pravna praksa*, Vol. 24, Nos. 17–18, appendix, 28 April 2005).

and thus of all the three branches of power, is to ensure conditions for the effective exercise of the function of the judiciary.

15. The remedying of the established inconsistency with the Constitution requires a more complex statutory regulation, therefore the determination of the manner of implementation of a decision determined by the second paragraph of Article 40 of the CCA is not possible in the case at issue. This means that in the event of a possible violation of the mentioned right in already concluded proceedings, despite the established inconsistency with the Constitution, until such inconsistency is remedied, individuals only have the possibility to claim compensation for damage on the basis of Article 26 of the Constitution.

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16. The Constitutional Court adopted this Decision on the basis of Article 48 of the CCA and 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 Janez Čebulj, President, and Judges Dr Zvonko Fišer, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr Ciril Ribičič, Dr Mirjam Škrk, Jože Tratnik, and Dr Dragica Wedam Lukić. The decision was reached unanimously. Judge Krisper Kramberger submitted a concurring opinion.

*Dr Janez Čebulj*  
*President*

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#### **CONCURRING OPINION OF JUDGE MAG. MARIJA KRISPER KRAMBERGER, JOINED BY JUDGE DR ZVONKO FIŠER**

1. Despite my initial concerns, I voted for the decision reached by the Constitutional Court, and I agree with the principal grounds for the decision. Therefore, I concur that the violation of the right to a trial within a reasonable time or to a trial without undue delay requires special regulation as the legislation in force does not contain special provisions tailored to the nature of the considered right.<sup>1</sup> Initially, I was of the opinion that the valid provisions of Article 62 of the AJRAA, of Article 26 of the Constitution, and of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR) together with the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR) relating to Article 41 of the ECHR entailed a sufficient basis for its protection,<sup>2</sup> namely also after the proceedings that lasted too long were concluded (with finality). However, this was confirmed by neither the case law of the ordinary courts nor the case law of

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1 Paragraph 13 of the reasoning of the Decision of the Constitutional Court.

2 Also Paragraph 12 of the reasoning [of the Decision] of the Constitutional Court can be understood in such a manner.

the Constitutional Court, whereas, in the opinion of the ECtHR, only a legal remedy of national law that is accessible not only in theory, but also in practice, can entail an effective legal remedy.<sup>3</sup>

2. In this concurring opinion, I wish to draw attention to certain questions that were not decisive for the decision of the Constitutional Court, but will be important for the case law until a special law is adopted, and perhaps also for the legislature. As the Constitutional Court emphasised in particular in its Decision<sup>4</sup>, the obligation of the state to ensure the right to effective judicial protection follows already from the requirements (principles) of a state governed by the rule of law determined by Article 2 of the Constitution. This of course entails, firstly, that the state must ensure effective functioning of the judicial branch of power<sup>5</sup>, meaning, in the context of the mentioned right, trials without undue delay, i.e. within a reasonable time. As the fulfilment of this requirement is one of the biggest challenges not only for Slovenia but also for the majority of the Member States of the Council of Europe, punishing [courts] for their failure by determining a new independent legal remedy can have an effect that is the diametric opposite of the one desired. It can entail an additional burden on the courts and thereby [cause] proceedings to last even longer.<sup>6</sup>

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3 In *Belinger v. Slovenia*, the ECtHR expressly dismissed the preliminary objection of the Government of the Republic of Slovenia on the inadmissibility of the application due to the non-exhaustion of the national legal remedies, but it only dealt with the legal remedies that allegedly were available to the applicant during the proceedings (Article 62 of the AJRAA, the supervisory complaint, the judicial review of administrative acts, and the constitutional complaint); the Constitutional Court explained this in more detail in Paragraph 9 of the reasoning of the Decision.

4 Paragraph 6 of the reasoning of the Decision of the Constitutional Court.

5 At the international conference organised in the framework of the Council of Europe entitled How to shorten the length of civil judicial proceedings (Madrid, 11–13 July 2001; the materials from this conference are available in the Central Judicial Library of the Supreme Court of the Republic of Slovenia) how Member States tackled this problem was specifically presented. By legislative and organisational measures, Western European states strive to achieve greater discipline of parties to proceedings, a lesser number or the limitation of legal remedies, the out-of-court resolution of disputes, and, by means of various measures within the judiciary, to also interfere with certain previously “untouchable” rights of judges and parties to proceedings. In such manner, the Netherlands adopted a regulation similar to the Slovene “Hercules” system, called “The Flying Brigades”. Austria provides for the institute of “the caretakers of the law” (*Rechtspfleger*), who carry out execution, probate, and certain other non-litigious proceedings; Austria provided the basis for such regulation in its constitution. Officials resembling the caretakers of the law, however with less authorisations, also exist in, e.g., France, Belgium, Denmark, Sweden, and Germany. Italy adopted a regulation allowing for the shortening of the reasoning of decisions and also for [the adoption of] decisions without a reasoning. For such purpose, also Italy amended its constitution. France modernised civil proceedings by the introduction of the [so-called] “procedural contract” institute (*Contrat de la procédure*). This is a procedure in which the judge and the legal representatives of both parties agree on the date by which the legal representatives will make a statement on the decisive facts and on the date by which they will submit evidence. After such date, it is no longer possible to either allege new facts or submit new evidence; as for the judge, he or she must quickly call a hearing and then conclude proceedings as soon as possible.

6 In [endnotes] 24 and 26 to the reasoning of the Decision of the Constitutional Court, also the experience of and the special regulation of this legal relationship in Italy and in the Republic of Croatia are described,

### **The legal nature of the liability of the state for a violation of the right to a trial without undue delay**

3. In accordance with the hitherto position of the Constitutional Court, if proceedings in which the right to a trial without undue delay was allegedly violated have already been concluded (with finality), the affected person can file an action for the payment of compensation on the basis of Article 26 of the Constitution. The first paragraph of this Article determines that everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority (a judge or a court) performing such function or activity within a state (or local community) authority (or as a bearer of public authority). The right to compensation is placed among the human rights and can be invoked directly on the basis of the Constitution. The unlawfulness of actions is not determined in more detail in the mentioned provision of the Constitution. Furthermore, the nature of the liability of the person or authority who caused the damage is also not expressly regulated.<sup>7</sup>
4. The right to compensation is also regulated by Article 30 of the Constitution, but only as regards a certain conduct of state authorities and a certain circle of injured parties. In accordance with this provision, any person unjustly convicted [of a criminal offence] or deprived of his liberty without due cause has the right to compensation. The provision of Article 30 of the Constitution is thus significantly narrower than that of Article 26 of the Constitution. The “unlawful” actions are the deprivation of liberty without due cause and “unjust” conviction, although proceedings were carried out in conformity with the law and it is the outcome of proceedings (e.g. a final judgment by which a detainee was acquitted) that causes the consequence to be unlawful. In this provision also the nature of the liability is not determined, nor is the type of damage that is legally recognised. This right, the person liable and the injured party, the damage to be compensated, the mitigating circumstances, and the procedure for exercising such right are regulated in more detail in Chapter XXXII of the Criminal Procedure Act (hereinafter referred to as the CrPA, Articles 538 through 546)<sup>8</sup> and in the Code of Obligations (hereinafter referred to as the CO).
5. When the legislature is to regulate relations arising after proceedings that have lasted too long have concluded, it will first have to answer the question of what kind of legal

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which indicate that the regulation of the protection of this right causes additional delays in courts and thereby additional ineffectiveness of the legal system in these states. This is certainly not the purpose of the special protection of the right to a trial within a reasonable time.

- 7 Possible actions for recovery by the state against individual judges or other officials are not subject to the present consideration. Neither is the second paragraph of Article 26 of the Constitution, which determines that an injured party has the right to claim, in accordance with the law, compensation also directly from the person or authority that caused such damage. The subject of the consideration in the present Decision of the Constitutional Court is the relationship between the state and an individual.
- 8 Also the return of property after the annulment of a sentence of confiscation necessitated a special regulation (the Enforcement of Criminal Sentences Act, Official Gazette RS, No. 22/2000, etc., Articles 145 and 145. a through 145. č).

relation between the state and an individual actually is at issue in such a case. Such a relation is clearer while proceedings are pending, when the state must ensure that proceedings proceed apace and that the court acts in a manner such that it decides on a claim without a delay. However, when proceedings are concluded with finality, it is no longer possible to achieve a reasonable length of proceedings, and the violation has already ceased. The only remaining matter is to remedy the possible consequences that occurred due to the violation.<sup>9</sup> If, however, such remedying cannot be achieved by reinstating the case or in any other manner, it can only be achieved by means of compensation. After proceedings have been concluded, a relationship regarding damages is thus created between the state and the individual whose right to a trial without undue delay was violated, in which the individual has the status of the injured party.

6. Although in the IUS-INFO digital database there is no data on case law based on Article 26 of the Constitution, this does not imply that such case law does not exist. For example, a court partially granted the claim for damages of an injured party who substantiated the occurrence of damage by alleging that civil and execution proceedings were too lengthy.<sup>10</sup> The Higher Court based its Judgment on Article 26 of the Constitution. It established that this provision concerns a “type of strict liability of the defendant (the state), which did not manage to exculpate itself.” In the mentioned case, the court awarded the injured party SIT 800,000 for non-pecuniary damage that he had sustained due to the excessive length of proceedings, namely for his psychological damage due to the interference with his personality rights determined by Article 200 of the Obligations Act (now Article 179 of the CO). It substantiated its decision by the fact that the plaintiff suffered an interference with his mental integrity (indignation, helplessness, and disappointment with regard to the system of justice of the Republic of Slovenia). The court dismissed the claim for the compensation of pecuniary damage, as it established that the plaintiff had not proven such damage. Otherwise, the court deemed, in particular, the fact that in the civil proceedings the judgment was written and issued 15 months after the expiry of the statutorily determined time limit and the fact that in the execution proceedings the first attempt at a seizure was made only three years after a motion for execution was filed to entail the legally decisive circumstances due to which the conduct of the state was unlawful. Thereby it gave substance to the legal standard of a trial within a reasonable time, and at the same time established, by means of the interpretation of Article 26 of the Constitution, what type of liability for damages was at issue.
7. As mentioned above, Article 30 of the Constitution is concretised in Chapter XXXII of the CrPA. The entity liable to pay compensation for damage is the Republic of Slovenia.<sup>11</sup> The CrPA determines which actions the state is liable for, and under which condi-

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9 The fourth paragraph of Article 15 of the Constitution.

10 Ljubljana Higher Court Judgment No. II Cp 1174/2001, dated 12 February 2003, in relation to Ljubljana District Court Judgment No. III P 499/2000, dated 18 April 2001, unpublished.

11 If the matter concerns the recognition of the period of employment or insurance in conformity with Article 546 of the CrPA, then in addition to the state also the authority that did not recognise the injured party the appropriate period can be sued. However, if the matter concerns expungement from the criminal record, this

tions. Furthermore, the circle of persons entitled to compensation or rehabilitation and other rights is also determined. I would like to draw attention to the position adopted in [legal] theory and in the case law on the nature of the non-contractual liability of the state for damage determined by Articles 538 and 542 of the CrPA. The state is liable for damage irrespective of whether its authority that caused such was at fault or not. What is at issue is a specific civil liability for damage caused by such conduct determined by the CrPA<sup>12</sup>. This liability is based on objective circumstances, independently of subjective circumstances on the side of the authority which by its action caused the deprivation of liberty without due cause or an unjust conviction.<sup>13</sup> The state can be relieved of its liability if the injured party caused the occurrence of damage by his or her conduct (i.e. he or she was deprived of his or her liberty or convicted). In the case law, a series of problems arose in relation to the application of the CrPA (in particular with regard to the question of the “inadmissible conduct” of the injured party).<sup>14</sup>

8. The CrPA further regulates the procedure, which consists of two phases. Before filing an action for damages with the court, the injured party must request that the State Attorney’s Office reach an agreement with him or her on the existence of damage and on the type and amount of the compensation. If the request for damages is not granted or if the State Attorney’s Office and the injured party do not reach an agreement within three months from the filing of such request, the injured party may file an action for damages before the competent court. The case law indicates that settlements are rarely concluded between the state and injured parties, and such claims represent an additional burden on the courts. In the mentioned chapter, also the time-barring of a claim (three years) and the inheritance of claims for damages are regulated.
9. Although there is no special legislation that would regulate in more detail a violation of the right to a trial within a reasonable time, the wording of Article 26 of the Constitution gives enough support for the interpretation that what is at issue is a special type of strict liability. The state cannot be relieved of its liability otherwise than by proving that the interference with the right occurred outside of its sphere [of influence]. As a general rule, the cause is the injured party him- or herself, other participants in proceedings, or other events on which the state (a court, a judge) had no influence.<sup>15</sup> The fact that the matter concerns a special type of strict liability follows in particular from the fact that in view of its procedural role in proceedings, the judge must also have control over the behaviour of participants in such proceedings.

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must be carried out *ex officio* by the court that adjudicated at the first instance (Article 544 of the CrPA).

- 12 See, e.g., B. Strohsack: *Odškodninsko pravo in druge neposlovne obveznosti* [The Law of Damages and Other Non-Contractual Obligations], Uradni list, Ljubljana, 1996, p. 248.
- 13 For more on strict liability, see N. Plavšak in M. Juhart and N. Plavšak (Eds.), *Obligacijski zakonik s komentarjem, splošni del* [The Code of Obligations with Commentary, General Part], GV, Ljubljana, 2003, Vol. 1, p. 742 and the entire commentary on Article 131 of the CO, pp. 683 *et seq.*
- 14 For more on this, see M. Krisper Kramberger: *Nedovoljeno ravnanje po tretjem odstavku 542. člena ZKP* [Inadmissible Conduct in Accordance with the Third Paragraph of Article 542 of the CrPA], *Pravosodni bilten*, No. 3/2001, pp. 219–229.
- 15 N. Plavšak, *op. cit.*

Therefore, generally it is difficult to determine whether the judge in a concrete case had the possibility to influence their conduct. The same result can also be achieved with the interpretation that, as a general rule, the questions of liability and unlawfulness determined by Article 26 of the Constitution overlap. The liability depends on the finding of whether the conduct of a judge (a court) is unlawful.<sup>16</sup> Unlawfulness is a legal standard. If the matter at issue concerns a violation of the right to a trial within a reasonable time, the decision on unlawfulness and thereby on liability will depend on the finding of whether the time that the court needed to decide thereon in view of the circumstances of the concrete case was reasonable.<sup>17</sup> This is also how the ECtHR proceeds. In doing so, it takes into consideration the following factors in particular: the complexity of the case, the conduct of state authorities, the conduct of the applicant, and the significance of the case for the applicant. The case law of the ECtHR is extremely diverse as regards this question. The ECtHR assesses in particular whether it is parties or their authorised representatives who are at fault for proceedings lasting an inappropriately long time. On the other hand, the ECtHR also assesses whether certain cases are of such nature that they in themselves require faster adjudication.<sup>18</sup>

10. In accordance with Article 26 of the Constitution, courts decide in civil proceedings. In Paragraph 14 of the reasoning of its [present] Decision, the Constitutional Court refers to the reasoning of the Judgment of the ECtHR in *Kudla v. Poland*, in which the ECtHR expressly stated that it is not necessary that [the authority which] must decide on such a legal remedy is exactly a court. However, the Slovene legislature will not be able to avoid the fourth paragraph of Article 15 of the Constitution, which guarantees judicial protection of human rights. Thus, it will be necessary to decide whether proceedings for the judicial review of administrative acts or civil proceedings are more appropriate. I am of the opinion, however, that [the legislature] should follow the example of the CrPA, in which the preliminary procedure before the State Attorney's Office is regulated.

### **Just satisfaction**

11. In its Decision, the Constitutional Court did not address the question of what the term "just satisfaction" means and to which category of sanctions due to unconstitutional conduct it belongs. It left it to the legislature to decide on the definition, but

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16 For more on this, see D. Jadek Pensa 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, pp. 295 *et seq.*

17 For example, the fourth paragraph of Article 60 of the Courts Act (Official Gazette RS, No. 23/05 – official consolidated text, etc.) determines that it is deemed that a court delay occurred if the backlog of cases equaling the number of cases received in the last twelve months is demonstrated.

18 For example, in numerous decisions the ECtHR has held France liable due to excessively lengthy proceedings in which the plaintiffs, who were haemophiliacs, claimed compensation due to an infection with AIDS through blood transfusion. The ECtHR emphasised in particular that the matter concerned people whose life was nearing its end, therefore it was necessary to decide on the compensation within the shortest possible period of time in order for these people to be able to enjoy it at least for some time (the Judgment in *Vallee v. France*, No. 22121/93, dated 26 April 1994, and the Judgment in *Karakaya v. France*, No. 22800/93, dated 26 August 1994, etc.).

pointed to the case law of the ECtHR and to the positions adopted in its judgments. In its Decision, the Constitutional Court only drew attention to the fact that what is at issue is not classical compensation.

12. Article 41 of the ECHR determines that if the ECtHR finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the ECtHR shall, if necessary, afford just satisfaction to the injured party. This provision concerns compensation, which, however, is very general. In its judgments the ECtHR has gradually developed the criteria for awarding such compensation.<sup>19</sup>
13. The ECtHR affords just satisfaction only if the applicant in fact sustained damage and if a causal link exists between such damage and the established violation. Damage can be either pecuniary or non-pecuniary. The applicant must prove the damage. The ECtHR can award monetary compensation as just satisfaction; however, in certain cases it considers that already the mere finding of a violation of a [certain] right constitutes just satisfaction.<sup>20</sup> Hence, the ECtHR understands just satisfaction as compensation for pecuniary (monetary compensation) or non-pecuniary damage (monetary or non-monetary compensation).<sup>21</sup>
14. It was already the ECtHR which realised that proceedings for the determination of just satisfaction are complex and disproportionately lengthy. Applicants often do not submit all the relevant documents, thus causing that the ECtHR is obliged to impose a new time limit for the filing of supplements to the application several times.<sup>22</sup> In practice, cases in which the decision on just satisfaction is issued significantly later than the decision on the merits of the case (as to the existence of a violation) are frequent.<sup>23</sup>
15. Article 26 of the Constitution does not determine which type of damage is legally recognised and which type of compensation injured parties are entitled to.<sup>24</sup> For such

19 For more on this, see J. L. Sharpe, Article 50, in L.-E. Pettiti, E. Décaux, P.-H. Imbert, *La Convention européenne des droits de l'homme*, Economica, Paris, 1999, pp. 809–842.

20 In *G. Bottazzi v. Italy*, No. 34884, dated 24 June 1999, published in *Dignitas* No. 7–8/2000, p. 138, the ECtHR established that the applicant did not succeed in proving the occurrence of pecuniary damage, which was alleged to be a consequence of the excessively lengthy proceedings at issue. On the other hand, concerning non-pecuniary damage, the ECtHR did not concur with the objection of the Government that the mere establishment of the violation itself would already entail just satisfaction. It decided that the applicant certainly sustained certain non-pecuniary damage, which cannot be compensated by merely establishing a violation. Consequently, the ECtHR awarded the applicant monetary compensation.

21 Particularly interesting is the Judgment of the ECtHR in *Broniowski v. Poland*, in which it established that Article 41 of the ECHR could not be applied, and in the fifth paragraph the operative provisions of the [Judgment] invited the Government of Poland and the injured party to inform the Court within six months whether they have reached an agreement, or to submit their positions in connection with the resolution of the issue of compensation for nationalised property. The Court authorised the president of the ECtHR to reopen the proceedings if necessary (Judgment No. 31443/96, dated 22 June 2004).

22 See the note in relation to the case *G. Bottazzi v. Italy*.

23 See notes 26 and 27 in M. Krisper Kramberger, *Omejitev lastninske pravice v javnem interesu* [The Limitation of Private Property in the Public Interest], *Pravnik*, No. 4–5/97, p. 158.

24 Judgment No. II Cp 1174/2001, dated 12 February 2003, in relation to Ljubljana District Court Judgment No.

reason, general provisions of the law of damages regarding damage and compensation must be applied, i.e. the CO. This Act regulates pecuniary and non-pecuniary damage and compensation therefor. Compensation for non-pecuniary damage can be either monetary or non-monetary, whereas compensation for pecuniary damage can only be monetary.

16. In conformity with Article 132 of the CO, pecuniary damage includes the diminution of assets (ordinary damage) and the prevention of an increase in assets (lost profits). Such damage is in itself not problematic and the legislature will only have to decide whether it will deem [pecuniary damage] – and which [type thereof] – to also be legally recognised in the event of a violation of the right to a trial within a reasonable time.
17. It will be more difficult to regulate compensation for non-pecuniary damage. Already the general regulation in the CO is problematic. In accordance with the definition under Article 132 of the CO, non-pecuniary damage includes the infliction of physical pain or mental distress or fear on another person and damaging the reputation of a legal entity. The provisions of Articles 133, 134, and 178 of the CO, which regulate compensation for damage incurred by an infringement of personality rights, broaden the mentioned definition.<sup>25</sup> In such manner, in Article 178 of the CO other, i.e. non-monetary, types of compensation are determined (e.g. the publication of a judgment or the “performance” of another action by which the purpose achieved by compensation can be achieved). Although the right at issue does not fall among [those determined by] these provisions, I mentioned them because they point to a possible regulation of just satisfaction.
18. Naturally, the legislature can also decide to introduce a so-called tariff, that is, a sum of money determined in advance that depends on the amount of time exceeding a reasonable length of proceedings. However, such a regulation would only be in conformity with the case law of the ECtHR if courts are in every concrete case able to also consider the above-mentioned characteristics of the individual case and the conduct of parties and other participants in proceedings.

*Mag. Marija Krisper Kramberger*

*Dr Zvonko Fišer*

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III P 499/2000, dated 18 April 2001.

25 For more on this, see L. Koman Perenič, *Škoda in odškodnina* [Damage and Compensation], DZS, 2004, pp. 44 and 45, and in particular with regard to personality rights A. Polajnar-Pavčnik in M. Pavčnik, A. Polajnar-Pavčnik, and D. Wedam Lukić (Eds.), *Temeljne pravice* [Fundamental Rights], CZ, Ljubljana, 1997, pp. 150 *et seq.* The author does not consider the right to a trial within a reasonable time to fall within such rights.

Order No. **U-I-302/09, Up-1472/09, U-I-139/10, Up-748/10**,  
dated 12 May 2011

### ORDER

At a session held on 12 May 2011 in proceedings to review the petitions and constitutional complaints of IZOTERM PLAMA, d. o. o., Podgrad, represented by Dragan Sikirica, attorney in Sežana, and Sabina Zakrajšek, Ljubljana, represented by the law firm Odvetniška družba Čeferin, o. p., d. o. o., Grosuplje, the Constitutional Court

*decided as follows:*

1. The petitions for the initiation of the procedure for the review of the constitutionality of the second paragraph of Article 367c of the Civil Procedure Act (Official Gazette RS, No. 73/07 – official consolidated text and 45/08) are dismissed.
2. The constitutional complaint of Izoterm Plama, d. o. o., against Supreme Court Order No. II DoR 73/2009, dated 22 October 2009, is not accepted for consideration.
3. The constitutional complaint of Sabina Zakrajšek against Supreme Court Order No. II DoR 40/2010, dated 18 March 2010, and against Higher Court of Ljubljana Judgement No. I Cp 2769/2009, dated 4 November 2009, concerning the judgement of the District Court of Ljubljana, dated 8 April 2009, is not accepted for consideration.

*Reasoning*

#### A

1. Izoterm Plama, d. o. o. (hereinafter referred to as the first petitioner) submitted a constitutional complaint against the order referred to in Point 2 of the operative provisions of this Order, by which the Supreme Court dismissed its motion for leave to appeal. In the reasoning of the Order, the Supreme Court allegedly made only general reference to the non-existence of the conditions for leave to appeal determined by the first paragraph of Article 367a of the Civil Procedure Act (hereinafter referred to as the CPA), without explaining or substantiating its decision in any way. Such mere general reference by the Supreme Court to the provision of the second paragraph of Article 367c of the CPA allegedly violates the right of the first petitioner

to the equal protection of rights determined by Article 22 of the Constitution, and the right to a fair trial under the first paragraph of Article 6 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). The first petitioner – quoting *inter alia* the case law of the Constitutional Court<sup>1</sup> – emphasises that the court's duty to appropriately reason its decision is a direct expression of the right to be heard in court, and that it is only from the reasoning that it can be inferred whether the court even examined the statements of the parties to the proceedings and whether it ensured a fair trial. Even though the right to appeal on a point of law is not constitutionally guaranteed, according to the first petitioner, proceedings regarding an appeal on a point of law must satisfy the requirements of constitutional procedural guarantees – including the requirement to provide appropriate reasoning, which applies to all important procedural orders. Furthermore, a decision without a statement of reasons is allegedly arbitrary, as it is not clear on what basis the court reached its decision. Since the first petitioner argues that the alleged violations of human rights are a consequence of the application of the second paragraph of Article 367c of the CPA, this legal rule is allegedly inconsistent with Article 22 of the Constitution. The first petitioner, therefore, also submits a petition for the initiation of the procedure for the review of the constitutionality thereof.

2. Sabina Zakrajšek (hereinafter referred to as the second petitioner) submits a constitutional complaint against the judgements of the Higher Court of Ljubljana and the District Court of Ljubljana, and additionally challenges the order by which the Supreme Court dismissed her motion for leave to appeal against the second-instance judgement. Due to the fact that in the challenged order the Supreme Court refers, on the basis of the second paragraph of Article 367c of the CPA, to the non-existence of the conditions for leave to appeal only in general and non-specific terms, without explaining why these conditions are not satisfied, the second petitioner also submits a petition for the initiation of the procedure for the review of the conformity of the mentioned provision with the Constitution. In the petition, the second petitioner – giving *mutatis mutandis* the same reasons as the first petitioner – alleges an inconsistency with Article 22 of the Constitution, reasoning that the regulation is unacceptable from the point of view of the right to make statements before the court and the right to a fair trial. The party was allegedly prevented from learning whether the court examined her arguments at all, and from understanding why the doors of the Supreme Court were “slammed shut” on her. That the mentioned guarantees are also binding on the Supreme Court allegedly follows *inter alia* from Constitutional Court Decision No. Up-373/97, dated 22 February 2001 (Official Gazette RS, No. 19/01, and Odlus X, 108).

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1 Constitutional Court Orders Nos. Up-131/00, dated 30 May 2000 (OdlUS IX, 143) and Up-1515/06, dated 15 May 2007, and Decisions Nos. Up-39/95, dated 16 January 1997 (OdlUS VI, 71), Up-678/09, dated 20 October 2009 (Official Gazette RS, No. 88/09), and Up-232/09, dated 17 February 2000 (Official Gazette RS, No. 24/2000 and OdlUS IX, 131).

3. The National Assembly of the Republic of Slovenia emphasises in its response to the first petitioner's petition that the challenged regulation is necessary in order to fulfil the aims of the leave to appeal system. The essence of this system is allegedly to make it possible for the Supreme Court to focus on the substance of only those appeals on a point of law which it has deemed raise legal issues that are of great importance for the legal order from the objective standpoint of the development of case law and the consistency thereof. If the Supreme Court were required to provide a statement of reasons on the merits in orders dismissing motions for leave to appeal, this would preclude a disburdening that is essential if the Supreme Court is to realise its constitutionally defined role as the highest court in the state ensuring legal certainty and equal protection of rights by providing guidance and consistent case law. The regulation of leave to appeal is allegedly common in countries of the Germanic legal circle, whereas the European Court of Human Rights (hereinafter referred to as the ECtHR) has allegedly already ruled that it is not inconsistent with the procedural guarantees in the Convention if the reasoning of a "negative" decision issued by the highest court is merely formal.<sup>2</sup>
4. Similarly as the National Assembly, the Government of the Republic of Slovenia emphasises in its opinions regarding the petitions that the challenged regulation pursues two inextricably linked aims: (1) to ensure the manageability of the caseload of the highest court in the state, and (2) to ensure that the Supreme Court is capable of fulfilling its function of developing law through case law and ensuring the consistency thereof. The former aim is allegedly a necessary condition for the fulfilment of the latter, which in turn serves to protect human rights and fundamental liberties, and key constitutional principles (i.e. the rule of law, and constitutionality and legality). In the opinion of the Government, it does not follow from any of the constitutionally guaranteed rights that an order dismissing a leave to appeal should be reasoned on the merits, since the proceedings are already final at the time of the issuance of such an order. The key, in its assessment, is that an individual's right to recourse to the Supreme Court yields to the aim of providing a quality system of judicial protection of constitutionality and legality. The Government, furthermore, draws attention to the possibility of a constitutionally compatible explanation of the challenged provision, which it states the Constitutional Court should examine subsidiarily. The challenged provision can thus allegedly be interpreted as entailing that the Supreme Court reasons its decision concisely with reference to an adopted decision which proves that the case law is already established, i.e. that there has not been a divergence from the case law (and, hence, that there are no grounds for granting the leave to appeal determined by Article 367a of the CPA).
5. The petitioners responded to the responses of the National Assembly and the opinions of the Government by reiterating their positions in the petitions.

<sup>2</sup> It makes reference to the cases *X v. Germany* (decision by the European Commission of Human Rights, dated 16 July 1981) and *Buffenne v. France* (ECtHR judgment, dated 26 February 2002).

## B – I

6. The challenged second paragraph of Article 367c of the CPA stipulates: “It suffices for the reasoning of an order by which a motion for leave to appeal is dismissed that the court makes general reference to the non-existence of the conditions determined by Article 367a of this Act”. As indicated by the Government, this provision certainly does not prohibit a statement of reasons on the merits, but states as a general rule that such is not provided, which the Supreme Court applied in issuing both decisions challenged by the petitioners’ constitutional complaints. The Constitutional Court, therefore, had to review the allegations of the petitioners that the absence of a statement of reasons on the merits is inconsistent with Article 22 of the Constitution.

### **General Considerations Regarding the Constitutional Requirement to Provide a Statement of Reasons for Court Decisions**

7. The petitioners’ starting point is that constitutional procedural guarantees – *inter alia* the duty of the court to appropriately reason its decision – must be provided in all phases of court proceedings, including in proceedings where this is not required by the Constitution (e.g. in proceedings for extraordinary legal remedies). The Constitutional Court has adopted this position several times, *inter alia* in Decision No. Up-373/97, which is referred to by the second petitioner, and in Order No. Up-1514/06, which is cited by the first petitioner.
8. It is an established position of the Constitutional Court that the duty to reason court decisions is a component of a party’s right to make statements before the court as an aspect of Article 22 of the Constitution.<sup>3</sup> A reasoned court decision entails a realisation of the court’s duty to take a position on essential statements made by the party, which corresponds to the mentioned right of the party. But the constitutional meaning of the statement of reasons extends beyond the bare manifestation of the court having fulfilled its duty to hear the parties to proceedings. Its essential value lies in providing insight into the reasons for the very decision, in particular for a party which was unsuccessful in proceedings deciding its rights, obligations, or legal interests. This demonstrates the autonomous nature of the reasoning as an independent dimension of the right to a fair trial,<sup>4</sup> which is also one of the aspects of the equal protection of rights determined by Article 22 of the Constitution. In order to guarantee the human right to a fair trial, and to ensure trust in the judiciary, it is of great importance that a party, in particular if he was not successful in proceedings, can learn of the reasons behind a decision on his rights, obligations, or legal interests. The duty to state the reasons for a decision is also imposed on courts by the right to a fair trial determined by the first paragraph of Article 6 of the ECHR.<sup>5</sup> Since

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3 Cf. Constitutional Court Decision No. Up-39/95, dated 16 January 1997 (OdIUS VI, 71), and numerous others. Similar in A. Galič, *Ustavno civilno procesno pravo* [Constitutional Civil Procedure Law], GV Založba, Ljubljana 2004, p. 282.

4 Cf. Constitutional Court Decisions Nos. Up-147/09, dated 23 September 2010 (Official Gazette RS, No. 83/10) and Up-162/09, dated 16 December 2010 (Official Gazette RS, No. 3/11).

5 M. Viering in: P. van Dijk, F. van Hoof, A. van Rijn, and L. Zwaak (eds.), *Theory and Practice of the European*

everything that is required by the right to appropriate reasoning determined by the Convention is also guaranteed under Article 22 of the Constitution, the positions of the Constitutional Court regarding the alleged inconsistency with Article 22 of the Constitution are by extension its positions regarding the allegations of inconsistency with the first paragraph of Article 6 of the ECHR.

9. However, the fact that the right to appropriate reasoning is an independent component of the human right determined by Article 22 of the Constitution does not entail that its dimension is unlimited in scope and the same in all judicial decision-making. On the contrary, the scope of ensuring appropriate reasoning depends on the nature of the decision and the circumstances of the respective case.<sup>6</sup> Some factors which define the mentioned nature and circumstances may be inferred from the case law of the Constitutional Court and the ECtHR. The constitutional requirement to ensure appropriate reasoning correlates with certain other values in constitutional law, most notably, for example, with the human right to legal remedies. The degree of reasoning is, therefore, *inter alia* determined by what an effective legal remedy against a decision in each specific case requires.<sup>7</sup> The absence of a statement of reasons in a decision which realises the right to a decision on the merits, this right being an element of the human right to judicial protection determined by the first paragraph of Article 23 of the Constitution, results in a violation of that right as well.<sup>8</sup> On the other hand, the scope of the constitutional requirement to provide appropriate reasoning is narrower for decisions against which there is no legal remedy and which uphold the decisions of lower courts.<sup>9</sup> In such cases it is not insignificant that the party already enjoyed judicial protection at two levels, with the highest court merely repeating what the party has already heard (twice).<sup>10</sup>
10. The purpose of the human right to the equal protection of rights determined by Article 22 of the Constitution, which also includes the requirement to ensure appropriate reasoning of decisions, is to protect an individual in proceedings regarding his rights, obligations, and legal interests. The assessment of to what extent the proceedings refer to the individual position of the party is, therefore, an important – perhaps even the most fundamental – factor which determines the scope of the protection

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Convention on Human Rights, 4th edition, Intersentia, Antwerp – Oxford 2006, p. 595.

- 6 Such standpoint was already adopted in Constitutional Court Decision No. Up-147/09, and similar by the ECtHR, for example, in the cases *Ruiz Torija v. Spain* (judgment dated 9 December 1994) and *Hiro Balani v. Spain* (judgment dated 9 December 1994).
- 7 See Constitutional Court Decision No. Up-296/98, dated 20 April 2000 (OdlUS IX, 136), and essentially the same by the ECtHR in *Suominen v. Finland* (judgment dated 1 July 2003), Paras. 37 and 38.
- 8 See Constitutional Court Decision No. Up-162/09.
- 9 See, for example, Constitutional Court Decision No. Up-373/97 and the ECtHR judgment in the case *Garcia Ruiz v. Spain*, dated 21 January 1999.
- 10 The position of the German Federal Constitutional Court is that – with exceptions – the court of last instance is not bound by the duty to reason its decisions; the purpose of the reasoning is to enable the individual an appropriate defence of his rights, but when it comes to the decision of the court of last instance, the affected party no longer has recourse to a higher instance (Order BVerfGE 50, 287).

of the right to appropriate reasoning required by the Constitution. In cases when the question is whether the highest court will allow a legal remedy not guaranteed by human rights, as in the case under consideration, it is, therefore, also important to analyse whether the decision has implications for the public interest and to what extent it refers to the individual position of the parties.

**The Nature of the Procedure for Deciding on Granting Leave to Appeal and the Role Prescribed for the Supreme Court by the Constitution**

11. No human right guarantees the right to appeal on a point of law.<sup>11</sup> The legislature may, therefore, at a starting point decide whether it will grant an appeal on a point of law in civil matters, what purposes this extraordinary legal remedy will predominantly have, and whether it will subject it to access control (by the Supreme Court).
12. Pursuant to the second paragraph of Article 367 of the CPA, an appeal on a point of law is admissible if the value of the challenged part of the final decision exceeds EUR 40,000 (an admissible appeal on a point of law). If an appeal on a point of law is not admissible, it may be granted by the Supreme Court in accordance with Article 367a of the Act (leave to appeal); the Supreme Court cannot grant a leave to appeal when the law stipulates that no appeal on a point of law is possible, or when the value of the challenged part of the final decision does not exceed EUR 2,000 (the third and fourth paragraphs of Article 367 of the CPA). Pursuant to the first paragraph of Article 367a of the CPA, the Supreme Court may grant an appeal on a point of law if it may be expected that it will decide on a legal issue that is relevant to ensuring legal certainty, consistent application of the law, or the development of the law by means of case law. The Supreme Court grants an appeal on a point of law in particular in cases involving: (1) a legal issue with regard to which the decision of the court of second instance diverges from the case law of the Supreme Court, or (2) a legal issue with regard to which Supreme Court case law does not exist, in particular if the case law of the higher courts is not consistent, or (3) a legal issue with regard to which Supreme Court case law is not consistent. In accordance with the challenged provision, the Supreme Court does not need to provide a statement of reasons on the merits for deciding to dismiss an appeal on a point of law on the basis of the mentioned criteria.
13. The described system, with the institute of leave to appeal at its core, primarily establishes the appeal on a point of law as a means of achieving aims which are objectively important from the standpoint of the legal order as a whole. It enables the Supreme Court, as the highest judicial authority for the interpretation and application of the law, to decide on relevant legal issues, thereby ensuring the development of the law by means of case law.<sup>12</sup> It underlines and strengthens the Supreme Court's responsibility to ensure the consistency of case law in the state, thereby guaranteeing equality before

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11 Cf., for example, Constitutional Court Order No. Up-114/96, dated 25 September 1996, and numerous others.

12 See the Proposal of the Changes and Amendments to the Civil Procedure Act (CPA-D), Gazette of the National Assembly, No. 21/08. Cf. also A. Galič, *Za reformo revizije v pravnem postopku* [For a Reform of an Appeal on a Point of Law in Civil Procedure], *Pravna praksa*, No. 43 (2007), pp. 26 *et seq.*

the law.<sup>13</sup> With the exception of an admissible appeal on a point of law, therefore, the regulation of this extraordinary legal remedy focuses on the protection of the public interest. The subjective dimension of an appeal on a point of law, i.e. protecting parties' rights in specific disputes, is not primary (as is evident in Constitutional Court Decisions Nos. Up-1782/08, U-I-166/08, dated 18 June 2009, Official Gazette RS, No. 54/09, and Up-678/09, dated 20 October 2009, Official Gazette RS, No. 88/09). The principal manner in which the Supreme Court protects the particular interests of individuals is indirect, through the protection of the public interest.<sup>14</sup> This regulation of an appeal on a point of law affirms the role of the Supreme Court as a precedent court, as outlined in connection with the fundamental constitutional principles of a state governed by the rule of law and the separation of powers determined by the first paragraph of Article 127 of the Constitution, which states that the Supreme Court is the highest court in the state. When the Supreme Court takes positions on relevant legal issues within the scope of interpretation it has as the supreme authority of the third branch of power, it co-creates the law. It co-shapes the criteria that in similar cases in the future will serve as *ex ante* guidelines for courts and the addressees of legal rules in general. In such a manner it enhances the predictability of legal rules and, by extension, legal certainty. The regulation of the appeal on a point of law is, therefore, built upon the notion that, in a modern state governed by the rule of law based on the separation of powers and commitment to the protection of human rights, the Supreme Court makes a significant contribution to strengthening equality before the law and legal certainty by shaping *ex ante* guidelines on the basis of specific cases. The Court thus effectively exercises its role in the system of checks and balances in which it has the final say on the interpretation of laws (*cf.* the first paragraph of Article 127 of the Constitution).

14. The summariness of the reasoning of an order to dismiss an appeal on a point of law is in unison with such purpose of an appeal on a point of law, devised on the constitutional role of the Supreme Court as an important co-creator of the law. The procedure for deciding on granting leave to appeal is not designed to protect individual rights in specific cases; this is what proceedings at the first and second instances are dedicated to doing. It is at the first and second instances that the human right to effective judicial protection (including the execution of court decisions) and the human right to legal remedies are realised, and that is where the requirement to provide a statement of reasons on the merits in court decisions applies to its full extent. The purpose of the procedure for deciding on granting leave to appeal, however, is to find elements which go beyond the specific case and interests of the parties to the specific proceedings. It is a *sui generis* preliminary procedure in which a party attempts to raise an issue of public

13 *Ibidem*.

14 *Cf.* M. Bobek, Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe, The American Journal of Comparative Law, No. 1 (2009), pp. 62 and 63, on how it is the duty of the lower courts, in particular the court of first instance, to examine every case, whereas from the standpoint of the protection of individuals, it is optimal if the supreme court guides lower courts (by ensuring the consistency of the case law and by developing the law), thereby saving individuals from repetitive passage through the judicial system in order to know what the law is.

interest and whose consequence is a decision that does not significantly affect a party's individual position: it "only" causes a refusal of an appeal examination based on the public interest, which the Constitution does not require. The decision as to whether a party's case involves legal issues relevant to the legal order as a whole entails only an insignificant degree of deciding on the party's "rights, obligations, and legal interests". What the constitutional procedural requirement to ensure appropriate reasoning is designed for – protecting the individual position of a party (his right to know the reasons for a decision on his rights, obligations, or legal interests) – is not primary or decisive. This scope of individual protection corresponds to the degree of reasoning that is required under the challenged Article 367c of the CPA.<sup>15</sup> In other words, it does not follow from the right to make statements and the right to a fair trial determined by Article 22 of the Constitution that the Supreme Court must provide a statement of reasons on the merits as to whether based on the criterion of public interest it will grant a legal remedy that human rights do not demand. From the standpoint of this procedural guarantee, it suffices that in its order the Supreme Court merely makes a general reference to the legal reasons for dismissing the leave to appeal. The established position of the ECtHR is essentially the same: in cases when the supreme court or the highest court in the state dismisses a motion by reasoning that there is no legal basis for such, the requirements determined by the first paragraph of Article 6 of the ECHR are satisfied even by a very limited statement of reasons.<sup>16</sup>

15. Conversely, the requirement to provide a statement of reasons on the merits of the dismissal of a leave to appeal would dilute the meaning of an appeal on a point of law and, in systemic terms, weaken the importance of the Supreme Court in the constitutional system laid out in the first paragraph of Article 127 of the Constitution.<sup>17</sup> And

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15 Similar reasons are provided by the German Federal Constitutional Court, which stated that the absence of a detailed reasoning is not a particular shortcoming in the exercise of the applicant's human rights, and that a dismissal of a leave to appeal is limited to clarifying that access to the appeal on a point of law is not available. According to the German Federal Constitutional Court, this is not inconsistent with the system of judicial protection determined by the Constitution (NJW 2004, 1372; 1929).

16 See, for example, the judgments in the cases *Nerva and others v. the United Kingdom*, dated 11 July 2000 (the House of Lords Appeal Committee did not grant the right to a legal remedy with limited reasoning, by a decision implying that the case did not concern legal issues of fundamental importance), *Øvlisen v. Denmark*, dated 30 August 2006 (the *Procesbevillingsnævnet*, i.e. the appeals committee, rejected a motion for the admissibility of an appeal against the decision of a higher court with the reasoning that the case did not deal with legal issues of fundamental importance), and *Bachowski v. Poland*, dated 2 November 2010 (the Supreme Court only stated the typical formulaic sentence in the reasoning). For similar in ECtHR case law, see A. Galič, *Dostop do Vrhovnega sodišča v pravnem postopku v novejši praksi ESČP* [Recourse to the Supreme Court in Civil Procedure in Recent ECtHR Case law], *Pravna praksa* Nos. 6–7 (2011), pp. 7 *et seq.*

17 M. Bobek, *ibidem*, p. 41, notes that the system of cassation courts, where recourse to the supreme court is conceived as a party's right, over time has come to no longer serve almost any public purpose, even though cassation courts were conceived as guardians of the public interest. He states that supreme courts composed of hundreds of judges resolve tens of thousands of cases a year, the vast majority of which bring nothing new to the law, with decisions so short as to be almost incomprehensible and contradictions among the cases almost inevitable.

this is not (only) because the requirement to provide a full statement of reasons for a mass of procedural orders that are virtually insignificant with regard to the legal order as a whole could undermine the capabilities of the Supreme Court due to the resulting excessive caseload. What is crucial is that manageability and clarity with regard to the number of cases are inherent to the nature of precedent, and that everything the precedent court states is understood as a precedent (even what it writes with regard to the merits in the order dismissing a leave to appeal).<sup>18</sup> Only if the number of cases is manageable and it is possible to maintain an overview in terms of substance is it reasonable to expect that the cases will indeed serve as *ex ante* guidelines for courts and addressees of legal rules in general, thereby contributing to equality before the law and legal certainty. The option of only stating the formal reasoning of orders dismissing leaves to appeal is, therefore, necessary to ensure the precedential dimension of the Supreme Court's mission.<sup>19</sup> Such would actually be undermined by the requirement to provide reasoning on the merits of orders dismissing leaves to appeal, and consequently the position of the Supreme Court would be weakened, which is utterly important to the development of the law, the protection of the human right to equality before the law, and, in a broader sense, to the foundations of constitutional democracy.<sup>20</sup>

16. When a leave to appeal procedure demonstrates that the case is of fundamental importance and, therefore, requires a response on the merits from the Supreme Court, the objective importance of the case converges with the subjective interest of the parties. Only when the Supreme Court executes its public interest-based role with a decision on the merits on an appeal on a point of law will it also decide to a more significant extent on the individual right, obligation, or legal interest of the parties that had led to the initiation of judicial protection in the first place. In such cases the fulfilment of the role of a precedent court, which amounts to an exhaustive, extensive, and precisely expressed argumentation on the merits, will overlap with the procedural requirement to ensure appropriate reasoning determined by Article 22 of the Constitution.
17. Just as manifestly unfounded are the allegations of the petitioners that the challenged regulation is inconsistent with the prohibition of judicial arbitrariness determined by Article 22 of the Constitution. For an order to not have reasoning on the

18 Precedent, therefore, cannot exist without a limitation in quantity by means of access control. Its nature requires thorough consideration by the Supreme Court as to when the Supreme Court will speak up and how it will articulate its voice; due to their societal importance, the principal standpoints in decisions which should set a standard for future decisions must be carefully weighed and precisely worded.

19 Essentially the same in A. Galič, *Dostop do Vrhovnega sodišča v pravnem postopku v novejši praksi ESČP* [Recourse to the Supreme Court in Civil Procedure in Recent ECtHR Case law], p. 8.

20 Cf. A. Galič, *Za reformo revizije v pravnem postopku* [For a Reform of the Appeal on a Point of law in Civil Procedure], pp. 26 *et seq.*: The supreme court, as the highest court in the state, having special responsibility with regard to the development of case law, is jeopardised not just by a regulation in which recourse to the supreme court is excluded (and decision-making rendered impossible) but also – just as effectively, albeit not as obviously at first glance – by a regulation where recourse to the supreme court is too broadly enabled. Essentially the same in Proposal of the Changes and Amendments to the Civil Procedure Act (CPA-D), Gazette of the National Assembly, No. 21/08.

merits does not entail that the Supreme Court may decide on a leave to appeal on the basis of criteria that should not have been considered in the trial. What it does entail is that the court need not put into the reasoning of the order the chain of thought regarding the decision-making as to why the legal criteria for leave to appeal determined by the first paragraph of Article 367a of the CPA are not present. The concern of the petitioners that the absence of reasoning on the merits may adversely affect the party's ability to verify whether the Supreme Court may have decided arbitrarily does not suffice for the substantiation of the alleged inconsistency. In this respect, the Constitutional Court adds that the structure of the constitutional order must by all means include safeguards that should reduce the possibility of the system being abused. However, in order for a state governed by the rule of law to be able to fully function, it is inherently necessary to trust the highest judicial authority,<sup>21</sup> comprising experienced legal experts with high ethical integrity. The challenged regulation is necessary for the effective execution of a very important role of the Supreme Court. It is clear that this regulation is not such that it would expose parties to the danger of arbitrary interferences with their rights or legal interests.

18. In view of the above, the Constitutional Court hereby dismissed the petitions as manifestly unfounded (Point 1 of the operative provisions).

## B – II

### Constitutional Complaints

19. The Constitutional Court did not accept the constitutional complaints for review as the alleged violations of human rights and fundamental liberties are not demonstrated (Points 2 and 3 of the operative provisions).

## C

20. The Constitutional Court reached this Order on the basis of the second paragraph of Article 26 and the first indent of the second paragraph of Article 55b of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – CCA), composed of: Mag. Miroslav Mozetič, Vice President, and Judges Dr Mitja Deisinger, Dr Etelka Korpič – Horvat, Jasna Pogačar, Mag. Jadranka Sovdat, Jože Tratnik and Jan Zobec. The Order was adopted unanimously.

*Mag. Miroslav Mozetič*  
*Vice President*

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21 The need for trust in the judiciary due to its precedent power is also highlighted by B. M. Zupančič in *The Owl of Minerva: Essays on Human Rights*, Eleven International Publishing, Utrecht 2008, p. 372.

Decision No. **Up-1177/12, Up-89/14**, dated 28 May 2015

### DECISION

At a session held on 28 May 2015 in proceedings to decide upon the constitutional complaints of Luka Vraneš, Ljubljana, represented by Bojana Potočan, attorney in Ljubljana, the Constitutional Court

*decided as follows:*

1. Supreme Court Judgment No. II Ips 11/2008, dated 10 September 2012, is abrogated and the case is remanded to the Supreme Court for new adjudication.
2. Supreme Court Order No. II DoR 269/2013, dated 21 November 2013, Ljubljana Higher Court Judgment and Order No. II Cp 800/2013, dated 12 June 2013, and Ljubljana District Court Judgment No. P 3103/2007-III, dated 11 January 2013, are abrogated. The case is remanded to the Ljubljana District Court for new adjudication.

### *Reasoning*

#### **A**

1. By an action in civil proceedings filed on 10 October 2000, the complainant requested that the defendant (the Republic of Slovenia) pay compensation for non-pecuniary and pecuniary damage incurred due to his removal from the register of permanent residents and transfer into the register of foreigners. He was removed [from the register] after the decision of the Ministry of the Interior (hereinafter referred to as the MI), dated 2 August 1994, was served on him, by which his request to be granted Slovene citizenship was rejected, as granting him citizenship would allegedly constitute a threat to public order and the security of the state. The complainant initiated proceedings for the judicial review of administrative acts against this decision of the MI; however, by Judgment No. U 1312/94-9, dated 6 February 1997, the Supreme Court dismissed his action. The complainant succeeded in his efforts to have the mentioned decisions abrogated when the Constitutional Court adopted Decision No. Up-187/97, dated 4 November 1999 (OdIUS VIII, 299), and in the repeated proceedings he was granted [Slovene] citizenship (by a decision of the MI dated 1 June 2000). Since he

had to wait almost nine years to obtain a correct decision regarding his citizenship, in the subsequent action for damages he also claimed a violation of the right to a trial within a reasonable time. He alleged that he sustained pecuniary damage totalling SIT 7,885,529.70 (due to lost income from 24 March 1995 to 10 October 2000; due to having lost the right to an [ownership transformation] certificate; and due to the costs of administrative and judicial procedures). He assessed that his non-pecuniary damage amounts in total to SIT 16,835,897.00 (as a result of the psychological damage he suffered due to the defamation of his good name and reputation and as a result of the psychological damage he suffered due to the infringement of his personality rights). The court of first instance partly granted the claim for damages. It assessed that the defendant had acted unlawfully. It explained that the rejection of the application for citizenship had not been reasoned by citing specific conduct of the complainant that would substantiate the conclusion that he poses a threat to the security of the state; therefore, the decision of the MI was arbitrary, as was the Supreme Court decision upholding this decision, which did not take into account the then-established case law of the Constitutional Court. The court of first instance also stated that the complainant's right to a trial without undue delay was violated as well, as the procedure for granting him citizenship took an unreasonably long time. The court of first instance also established that the complainant's monetary claim had become partially time-barred. Due to the objection of the monetary claim being time-barred, it dismissed the claims for compensation for pecuniary damage stemming from the costs of procedures and the certificate, and partially also those stemming from lost income (until 10 October 1997). However, the court of first instance granted the complainant the remaining part of the claim for compensation for pecuniary damage (i.e. income lost from 10 October 1997 until the filing of the action in the amount of SIT 4,329,226.40). Due to the fact that the claim regarding the compensation for non-pecuniary damage for defamation (which happened as early as in 1996, when an official cut his identity card in half in front of everyone present and when he and his wife had to prove the existence of their marriage with two witnesses when he wanted to register her as the new owner of a vehicle) was time-barred, the court of first instance dismissed this claim as well. The court of first instance otherwise awarded compensation for the infringement of personality rights in the amount of SIT 5,000,000.00, but dismissed the remaining part of the claim that exceeded this amount. The total compensation awarded by the court of first instance to the complainant thus amounted to SIT 9,329,226.40.

2. Both parties filed appeals against the first instance judgment. The Higher Court partially granted the appeals of both parties to proceedings. It abrogated the judgment of first instance in the dismissed part regarding pecuniary damage (for income lost before 10 October 1997, for the certificate, and the costs [of the procedures]) and in the successful part regarding income lost in 2000 (amounting to SIT 1,122,392.04), whereas in the part referring to the decision on non-pecuniary damage (in both the dismissed part and in the successful part) and the remaining part of the awarded amount for pecuniary damage (income lost from 10 October 1997 until the end of 1999), it upheld the judgment. The Higher Court concurred with the position of the

court of first instance that the defendant had acted unlawfully (i.e. that the application had been rejected arbitrarily and that the procedure had been unreasonably long) and that the claim for compensation for damage that arose before 10 October 1995 became time-barred (due to the absolute limitation period having expired), as did the claim for compensation for non-pecuniary damage due to defamation. On the other hand, the Higher Court adopted a different position with regard to the time-barring of the claim for compensation for the remaining damage. It assessed that the course of the relative limitation period must be assessed with regard to the circumstances of the concrete case, and accepted the allegation in the appeal that in the concrete case the complainant had only been informed who the perpetrator was when the decision of the MI of 1 June 2000 on the granting of citizenship was issued, as only then was his assumption confirmed that the previous two decisions on the rejection of his application had been substantively incorrect. Since the procedure was concluded when the last decision of the MI was issued, the complainant was only then able to find out how long the procedure had lasted.

3. Both parties to proceedings filed revisions against the judgment of the second instance. The Supreme Court partially granted the revision of the complainant, but rejected it with respect to the decision on the costs. The Supreme Court partially granted the revision of the defendant and partially modified the Higher Court Judgment, namely point 3 of the operative provisions, such that it granted the appeal of the defendant also with regard to the successful part of the judgment of the court of first instance in so far as it had not been abrogated, and also in this part dismissed the claim. The Supreme Court based its decision on the position that the injured party's knowledge of two circumstances is important with regard to the onset of the course of the relative limitation period regarding claims for damages: knowledge of the damage and knowledge of the perpetrator (the first paragraph of Article 376 of the Obligations Act, Official Gazette SFRY, Nos. 29/78, 39/85, and 57/89 – hereinafter referred to as the OA). Knowing the perpetrator does not entail knowing that he or she is liable or what the basis for his or her liability is, but refers to the person [as such] who caused damage. The position of the Supreme Court was that in the concrete case the legislation on the basis of which the removal of the complainant from the register of permanent residents was carried out and which the Constitutional Court established was inconsistent with the Constitution (the Aliens Act, Official Gazette RS, No. 1/91-I, etc. – hereinafter referred to as the AA, and the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia, Official Gazette RS, No. 76/10 – official consolidated text – hereinafter referred to as the ARLSCFY) did not prohibit such claims or otherwise insurmountably interfere with the complainant's right to judicially request the fulfilment of the obligation (Article 383 of the OA). The complainant should have filed the action before the limitation period expired, and in the proceedings the (in)appropriateness of the statutory regulation then in force and its (in)consistency with the Constitution would then also be assessed, if necessary.
4. The court of first instance had to decide anew on the part of the defendant's claim for damages that was abrogated by the mentioned Higher Court Judgment and remand-

ed to the court of first instance for new adjudication. In the new trial it decided on the claim for compensation for pecuniary damage represented by the income lost in 2000, the value of the certificate that the citizens of the Republic of Slovenia received on the basis of the Ownership Transformation of Companies Act (Official Gazette RS, Nos. 55/92, 7/93, 31/93, and 1/96), and the costs of the administrative and judicial procedures incurred from 1994 to 1997. The court of first instance dismissed the claim in its entirety and decided that the complainant must reimburse the assessed costs of the defendant. It deemed that the claim made in the action dated 10 October 2000 was time-barred. The complainant filed an appeal against this judgment of the court of first instance. The Higher Court granted the appeal and abrogated the challenged judgment of the court of first instance in the part relating to the costs, and in this part remanded it to the court of first instance for new adjudication. In the remaining part, which it did not abrogate, it dismissed the appeal and upheld the judgment of the court of first instance. It adopted the position that the complainant's efforts to prove, in appellate proceedings, that the decision on the rejection of his application for citizenship was arbitrary, falls within the scope of efforts to limit damage and cannot have an influence on the assessment of the onset of the course of the limitation period. The alleged damage is a consequence of the rejection of the application for citizenship and the removal of the complainant from the register of permanent residents, which was a consequence thereof. This was the decisive circumstance for the assessment of when the limitation period began with regard to claiming compensation for the alleged damage. The complainant filed a motion for a revision of the Higher Court Judgment, which the Supreme Court rejected. In doing so, it referred to its position adopted in Judgment No. II Ips 11/2008, in accordance with which, with regard to claims for damages, the injured party's knowledge of two circumstances is crucial for [determining] the onset of the course of the relative limitation period: the damage and the perpetrator (the first paragraph of Article 376 of the OA). Knowing the perpetrator does not entail knowing that he or she is liable or what the basis for his or her liability is; it entails knowing [the identity of] the person who caused the damage. Since in the proceedings at issue also the courts of the first and second instance adopted such a position, the Supreme Court assessed that the complainant did not demonstrate the existence of the conditions for granting a revision.

5. The complainant alleges the violation of the rights determined by Articles 14, 18, 21, 22, 26, 34, 43, and 49 of the Constitution. He is opposed to the position and the reasons stated by the Supreme Court regarding the claim for damages being time-barred. He draws attention to the fact that it took the Supreme Court an unreasonably long time (no less than five years) to decide on the motion of the parties for a revision, with regard to which, according to the complainant, the reason for such lengthy revision proceedings was that the Supreme Court waited for the European Court of Human Rights (hereinafter referred to as the ECtHR) to decide in the case *Kurić and others v. Slovenia* (judgment dated 26 June 2012). The complainant is indeed of the opinion that his position is substantially different than that of the [so-called] erased persons, but it is true that he suffered consequences similar

to what they did. He explains that starting in 1976 he lived in various towns in Slovenia, namely as an officer of the Yugoslav People's Army, until 1990, when he was transferred to Samobor, Croatia. On 12 November 1991 he applied for Slovene citizenship, in conformity with Article 40 of the Citizenship of the Republic of Slovenia Act (Official Gazette RS, Nos. 1/91-I, 30/91-I, 38/92, and 13/94 – hereinafter referred to as the CRSA). Although he fulfilled all the statutory conditions, his application was rejected because granting him Slovene citizenship allegedly posed a threat to the security, defence, and public order of the state. Subsequently, in the repeated procedure, after he had received Decision of the Constitutional Court No. Up-187/97, by which the Supreme Court Judgment and the decision of the MI were annulled, the complainant was granted Slovene citizenship by a decision of the MI, dated 1 June 2000. By an action filed on 10 October 2000, the complainant claimed compensation from the state and was awarded (and also already received) compensation for non-pecuniary damage and compensation for lost income. By the challenged Judgment, No. II Ips 11/2008, dated 10 September 2012, the Supreme Court modified the Higher Court decision and dismissed the complainant's claim for damages in its entirety because it was time-barred. The complainant is firmly opposed to the position of the Supreme Court that the limitation period started already in 1994, when his application for citizenship was rejected with finality. Such a position of the Supreme Court allegedly places him in a position completely without rights and denies his constitutionally guaranteed right to compensation for damage. The complainant once again draws attention to the fact that his position should not be equated with the position of the so-called erased persons, because the latter justifiably expect, on the basis of the [above-mentioned] decision of the ECtHR, the adoption of a systemic solution in order to remedy the injustices that happened to them. The complainant, on the other hand, claimed damages from the state due to arbitrary decision-making in the procedure for acquiring citizenship, and his claim has already been decided on with finality. He is convinced that the position of the Higher Court adopted in Judgment No. II Cp 1428/2007 is correct. According to the Higher Court, the onset of the relative limitation period determined by the first paragraph of Article 376 of the OA must be assessed with regard to the circumstances of the concrete case. The complainant learned of the perpetrator of the damage only from the decision of the MI, dated 1 June 2000, i.e. this was when the prerequisites that enabled him to file a claim for damages were fulfilled. When the decision of the MI was issued on 1 June 2000 the complainant also learned of the damage incurred, however he had been subjected to violations of human rights and fundamental freedoms ever since 1994, when the decision rejecting his application for Slovene citizenship became final (this decision was, in fact, later abrogated). Due to the fact that the complainant could not have known, until the decision of the MI was issued on 1 June 2000, how long the situation in which his human rights and fundamental freedoms were violated would last, he also could not have known what the scope of the damage was. According to the complainant, the position of the Supreme Court regarding the [claim being] time-

barred is not only substantively erroneous, but it also does not take into consideration the circumstances of the concrete case and excessively protects the state in relation to the citizen. The complainant stresses that immediately after he learned, i.e. proved, that the rejection of his application for citizenship was unlawful, he filed a claim for damages by which he claimed from the state compensation for the damage he had sustained. He underlines that he did not hesitate for a moment when invoking his rights, whereas the state, on the other hand, took almost nine years to decide whether to grant him citizenship, which were followed by another 12-year procedure for the payment of compensation. The complainant is convinced that his claim for damages did not become time-barred also with regard to the positions adopted in the ECtHR Judgment in *Kurić and others v. Slovenia*.

6. By Panel Order No. Up-1177/12, Up-89/14, dated 15 April 2014, the Constitutional Court decided that the constitutional complaints be accepted for consideration. In conformity with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), it notified the Supreme Court thereof. In conformity with the second paragraph of Article 56 of the CCA, it sent the constitutional complaints to the opposing party in the civil proceedings, i.e. to the Republic of Slovenia, to reply thereto; the opposing party replied by a submission dated 8 May 2014. It stated that “it has no comments regarding the Panel Order of the Constitutional Court.” Otherwise, the defendant in the civil proceedings is of the opinion that since the Act Regulating Compensation for Damage Sustained as a Result of Removal from the Register of Permanent Residents (Official Gazette RS, No. 99/13 – hereinafter referred to as the ARCDSTRRR) entered into force, the complainant no longer has a legal interest to file his two constitutional complaints. It explained that the administrative procedure for granting citizenship was demanding and lengthy, with regard to which the complainant was granted citizenship on 1 June 2000. The opposing party dismissed the allegation that the civil proceedings for damages were lengthy and stated that the complainant had already been paid compensation on the basis of the judicial decision, which had become final (i.e. Ljubljana Higher Court Judgment No. II Cp 800/2013 in relation to Ljubljana District Court Judgment No. P 3103/2007-III, dated 11 January 2013), and that despite the Supreme Court Judgment, by which his claim for damages was dismissed, he did not reimburse the sum paid. Furthermore, the awarded compensation was allegedly higher than envisaged by the ARCDSTRRR. This is another reason why the defendant is of the opinion that the constitutional complaint is unfounded.
7. The reply of the defendant in the lawsuit was sent to the complainant, who responded thereto by a submission dated 30 May 2014. He dismissed the allegations of the defendant that he has no legal interest. He maintained that his position is essentially different from the position of the erased persons, as he claimed compensation for damage due to arbitrary decision-making in the procedure for acquiring citizenship, and his claim has already been decided on with finality. Also in other respects the complainant is convinced that the position of the Supreme Court that the claim is

time-barred is incorrect, which allegedly follows from the Judgment of the Grand Chamber of the ECtHR in *Kurić and others v. Slovenia*. The act regulating the question of the compensation to which the erased persons are entitled was only adopted after the complainant's claim had already been decided on with finality, therefore it cannot have an influence on his legal interest. With regard to the alleged violation of Article 18 of the Constitution, the complainant explains that he did not allege physical torture; however, with respect to all that has been said, he was certainly subjected to psychological torture, as he was unable to leave the state (even to attend his mother's funeral and the funerals of other relatives), he was without a permanent residence, without work, without the right to vote, he was not socially insured; in fact, he could not benefit from the fundamental human rights and citizenship rights ensured by the Constitution and the legal order of the Republic of Slovenia. The complainant also opposes the allegation of the defendant that the administrative procedure was so demanding that it justified the nine years of uncertainty in which he lived. The complainant labels as inappropriate the connection made by the defendant between the complainant's allegations regarding the length of procedures and the fact that the compensation has already been paid to the complainant. This fact allegedly does not affect the proceedings before the Constitutional Court. The complainant is convinced that the judgments of the courts of first and second instance were just and also legally correct; however, he disagrees with the Supreme Court decision and thus challenges it by the constitutional complaint.

### B – I

8. With regard to the doubt as to the legal interest of the complainant that the defendant in the lawsuit expressed in its submission dated 8 May 2014, it must be underlined that a favourable Constitutional Court decision would mean, for the complainant, an improvement in his legal position. In accordance with the transitional statutory provision (the first paragraph of Article 28 of the ARCDsRRR), the judicial proceedings for compensation for damage sustained as a result of removal from the register of permanent residents that were initiated before the same Act entered into force and which have not yet been decided on finally shall be concluded in conformity with the provisions of the Act (i.e. in conformity with the provisions of the ARCDsRRR). In the event of the abrogation of the challenged judgments and the case being remanded to the court of first instance for new adjudication, the court should take into account, when again assessing the complainant's claims for damages, the second paragraph of Article 11 of the ARCDsRRR, which determines that in proceedings initiated in accordance with this Act, the provisions regarding the time-barring of claims for damages from the act regulating obligation relations do not apply. Since the challenged judgments refer to the [above-mentioned] position regarding the time-barring of claims for damages, the legal position of the complainant would improve in this respect were the constitutional complaint to be granted. Therefore, the Constitutional Court deems that the procedural prerequisite of legal interest is fulfilled.

## B – II

9. One of the main allegations of the complainant is that the Supreme Court Judgment No. II Ips 11/2008 (which is challenged by the first constitutional complaint) is based on positions that are not acceptable from the viewpoint of the right to compensation determined by Article 26 of the Constitution. The complainant is firmly opposed to the position of the Supreme Court that his claims for damages are time-barred, in particular the position that the limitation period began already in 1994 when his application for citizenship was rejected and the relevant decision became final.<sup>1</sup> Such position of the Supreme Court allegedly placed the complainant in a position completely without rights and denied him the constitutionally guaranteed right to compensation for damage. In his opinion, the correct position is that of the Higher Court (adopted in Judgment No. II Cp 1428/2007), in accordance with which the course of the relative limitation period determined by the first paragraph of Article 376 of the OA must be assessed with respect to the circumstances of the individual case and that in the case at issue the complainant learned of the perpetrator of the damage only from the Decision of the MI dated 1 June 2000, meaning that only then were the prerequisites that enabled him to claim compensation for damage fulfilled.
10. In two cases the Constitutional Court has already assessed decisions of civil courts related to the liability of the state for removal from the register of permanent residents. By Order No. Up-1176/09, dated 5 July 2011, a Constitutional Court panel decided that the constitutional complaint filed against the decision of the courts to dismiss claims for damages by which the complainant claimed, from the Republic of Slovenia, the payment of compensation for pecuniary damage resulting from the fact that from the time he was removed from the register of permanent residents he had been unable to work, and due to the fact that his application for citizenship had been unjustifiably rejected, and [the payment of compensation] for non-pecuniary damage consisting of the psychological damage he suffered due to the lengthy procedure and lengthy unemployment, when he had no means of subsistence. The Constitutional Court adopted a similar decision in case No. Up-108/11. A Constitutional Court panel decided, by Order No. Up-108/11, dated 26 September 2011, that the constitutional complaint by which the complainant challenged the decision of the courts to dismiss his claims for compensation for pecuniary and non-pecuniary damage caused by his removal from the register of permanent residents would not be accepted for consideration. In both of the mentioned cases the Constitutional Court considered the allegations of the complainants in particular from the viewpoint of the constitutional procedural guarantees ensured by Article 22 of the Constitution

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1 On 12 November 1991, the complainant applied, in conformity with Article 40 of the CRSA, for Slovene citizenship. His application was rejected by a decision of the MI, dated 2 August 1994, although he fulfilled all the conditions determined by the first paragraph of Article 40 of the CRSA, because, according to the findings of the administrative authorities at the time, the complainant allegedly posed a threat to the security, defence, and public order of the state. Also the Supreme Court upheld such decision, which then remained in force until Decision of the Constitutional Court No. Up-187/97 was adopted. By a decision of the administrative unit dated 1 June 2000, the complainant was finally granted Slovene citizenship.

(i.e. from the viewpoint of the requirement of a reasoned judicial decision and the prohibition of arbitrary decision-making by the courts).

11. In the mentioned cases, the Constitutional Court did not consider the positions of the court from the viewpoint of the right to compensation for damage guaranteed by Article 26 of the Constitution. However, the allegations of the complainant in the case at issue do require an assessment from the viewpoint of the mentioned human right. In conformity with the established constitutional case law, there is a violation of the right determined by Article 26 of the Constitution when a court bases its decision on a certain legal position that from the viewpoint of this right would be unacceptable.<sup>2</sup> Therefore, the Constitutional Court must verify whether the challenged decision is based on positions that are not acceptable from the viewpoint of the right to compensation for damage determined by Article 26 of the Constitution.
12. In conformity with the first paragraph of Article 26 of the Constitution, everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority performing such function or activity within a state or local community authority or as a bearer of public authority. From this human right there follows, primarily, the general prohibition of exercising authority in an unlawful manner, regardless of which branch of power caused the damage.<sup>3</sup> The essence of the right to compensation for damage is to ensure compensatory protection from unlawful actions by the state power. In conformity with the first paragraph of Article 26 of the Constitution, the basis of this liability is (1) an unlawful action of a state authority, a local community authority, or a bearer of public authority, with regard to which what is at issue is (2) an action when exercising such authority or in connection with the exercise thereof, a consequence of which is (3) damage.
13. There is an established position in the constitutional case law that the forms of unlawful conduct by the state include its liability for omissions that refer to a certain defined or definable person, as well as liability for systemic deficiencies that can be attributed to the state or its apparatus as such (this is stated in Decision of the Constitutional Court No. Up-695/11). An interpretation in accordance with which the state would only be liable for those forms of unlawful conduct that can be attributed to a certain person or authority in connection with the performance of any function or other activity within a state or local community authority or as a bearer of public authority would namely be unacceptable from the viewpoint of the first paragraph of Article 26 of the Constitution. This would namely mean that the state would not be liable for unlawful conduct that cannot be attributed to a certain person or a certain authority, but [can only be attributed] to the state or its apparatus as such, and also not in cases where there is no individualised relation between the bearer of authority and the affected individual.<sup>4</sup>

2 Cf. Order of the Constitutional Court No. Up-2/04, dated 4 May 2005 (OdUS XIV, 46) and Decision of the Constitutional Court No. Up-695/11, dated 10 January 2013 (Official Gazette RS, No. 9/13).

3 Cf. J. Zobec, *Odškodninska odgovornost sodnika in odgovornost države zanj* [Liability of a Judge for Damage and the Liability of the State for such Judge], *Pravni letopis 2013* [Legal Chronicle 2013], p. 201.

4 One such instance was a case in which ensuring a trial without undue delay was not merely a responsibility

14. When assessing the content and the scope of the right guaranteed by Article 26 of the Constitution, one must take into account that the liability of the state for damage caused by state authorities, employees, and officials when exercising authority entails a specific form of liability. The specificity of this right follows from a particular position of the state vis-à-vis entities (citizens, legal entities, and also other persons situated on its territory). The state enters such legal relation vertically, i.e. when exercising authority or in connection with the exercise thereof, with regard to which it is bound by the constitutional prohibition of unlawful authoritative conduct.<sup>5</sup> By instituting the liability of the state for damage, affected individuals are protected against the occurrence of damage resulting from the authoritative conduct of [state] authorities.<sup>6</sup> The state is liable for damage caused when exercising the function of authority or in relation to its exercise, i.e. for *ex iure imperii* conduct.<sup>7</sup> With regard to the above, it is evident that in order to assess the liability of the state for damage, the classic rules of vicarious civil liability for damage do not suffice; when assessing individual prerequisites of the liability of the state, the mentioned specificities that originate from the authoritative nature of the functioning of its authorities must be taken into consideration (this is stated in Decision of the Constitutional Court No. Up-679/12, dated 16 October 2014, Official Gazette RS, No. 81/14). Even if a court applies, when assessing [the liability of the state], certain rules of the general law of obligations, it must apply them in a manner adapted to the characteristics of liability for damage under public law.
15. In a number of decisions the Constitutional Court has adopted a position on the violations of the human rights and fundamental freedoms of persons removed from the register of permanent residents when the legislation enabling independence was adopted.<sup>8</sup> It follows from these decisions that erased persons as citizens of the former

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of the courts, but of all three branches of power, i.e. including the executive, in particular through the organisation of the judicial administration, as well as the legislative administration through the adoption of appropriate legislation. Cf. Decision of the Constitutional Court No. Up-695/11, Paragraph 13 of the reasoning.

5 This is stated by J. Zobec, *op. cit.*, pp. 185–228.

6 This is stated by I. Crnić, *Odgovornost države za štetu, Pravo u gospodarstvu*, Zagreb, 1–2 (1996), p. 117.

7 Cf. R. Pirnat, *Protipravnost ravnanja javnih oblasti kot element odškodninske odgovornosti javnih oblasti oblasti* [The Unlawfulness of the Conduct of Public Authorities as an Element of the Liability of Public Authorities for Damage], an article published in proceedings entitled *Odgovornost države, lokalnih skupnosti in drugih nosilcev javnih pooblastil za ravnanje svojih organov in uslužbenecv* [The Liability of the State, Local Communities, and Other Bearers of Public Authority for the Conduct of Their Authorities and Officials], *Zbornik Inštituta za primerjalno pravo* [Proceedings of the Institute for Comparative Law], III. dnevi civilnega prava [3<sup>rd</sup> Civil Law Days], Ljubljana 2005, p. 21.

8 Firstly, the Constitutional Court established, by Decision No. U-I-284/94, dated 4 February 1999 (Official Gazette RS, No. 14/99, and OdlUS VIII, 22), that the AA was inconsistent with the Constitution, because it did not determine the conditions for obtaining permanent residence permits for the citizens of other republics of the former SFRY who did not opt for citizenship of the Republic of Slovenia or whose applications for citizenship were rejected. By Decision No. U-I-246/02, dated 3 April 2003 (Official Gazette RS, No. 36/03, and OdlUS XII, 24), the Constitutional Court established the unconstitutionality of the ARLSCFY because it did not allow the citizens of other republics of the former SFRY who on 26 February 1992 were removed from the register of permanent residents and who obtained a residence permit in conformity with the ARLSCFY

Socialist Federal Republic of Yugoslavia (hereinafter referred to as the SFRY) were treated unequally compared to other foreigners who had lived in Slovenia before its independence and whose permanent residence permits remained valid in conformity with Article 82 of the AA. In order to remedy the established unconstitutionality, in 2010 the legislature adopted the Act Amending the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia (Official Gazette RS, No. 50/10 – ARLSCFY-B). By this Act, the legislature strived to allow erased persons to obtain a legal status by obtaining a permanent residence permit under milder conditions than those set forth by the AA, and also to enable the issuance of special decisions by which their legal status would be recognised *ex tunc*. As the Constitutional Court established by Decision No. U-II-1/10, dated 10 June 2010 (Official Gazette RS, No. 50/10, and OdlUS XIX, 11), by [adopting] a special regulation regarding the issuance of permanent residence permits and by *ex tunc* recognition of actual residence, the legislature provided moral satisfaction as a special form of remedying the consequences of the violations of human rights that occurred due to removal from the register of permanent residence. In such a manner it accomplished the task imposed on it by the fourth paragraph of Article 15 of the Constitution. The Constitutional Court already at that time warned that the question of the liability of the state for damage determined by Article 26 of the Constitution could be raised in cases when damage was caused to individuals due to their removal from the register of permanent residence because they were deprived of the rights that are conditional upon permanent residence in the Republic of Slovenia.

16. In the case *Kurić and others v. Slovenia*, the Grand Chamber of the ECtHR decided that the recognition of violations of human rights and the issuance of permanent residence permits to erased persons are not sufficient measures to remedy the injustices [that occurred] on the national level. Taking into account the long period during which the complainants suffered because they were in jeopardy and in legal uncertainty, and with respect to the gravity of the consequences that the removal caused them, the Grand Chamber of the ECtHR adopted the position that such recognition of a violation of human rights and the issuance of permanent residence permits to the complainants are not appropriate and sufficient measures to remedy the injustices [that occurred] on the national level. The ECtHR established that the complainants were not awarded appropriate monetary compensation for the years

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to also obtain a permanent residence permit *ex tunc*; because it did not regulate the position of those persons against whom the measure of the forced removal of an alien from the state was imposed; and because it did not determine the criteria for defining the condition of actual residence [necessary] for obtaining a permanent residence permit. Furthermore, in a number of concrete proceedings in which erased persons endeavoured to obtain the restitution of rights related to their lost permanent residence, the Constitutional Court also decided in favour of the erased persons (see Decisions of the Constitutional Court No. Up-336/98, dated 20 September 2001 (Official Gazette RS, No. 79/01, and OdlUS X, 225); No. Up-333/96, dated 1 July 1999 (OdlUS VIII, 286); No. Up-60/97, dated 15 July 1999 (OdlUS VIII, 292); No. Up-20/97, dated 18 November 1999 (OdlUS VIII, 300); No. Up-152/97, dated 16 December 1999 (OdlUS VIII, 302); and No. Up-211/04, dated 2 March 2006 (Official Gazette RS, No. 28/06, and OdlUS XV, 40)).

when they were vulnerable and exposed to legal uncertainty. With regard to the possibility that they would claim and be awarded compensation on the national level, the ECtHR established that none of the erased persons received satisfaction for the damage sustained in the form of a final and binding judgment, although several proceedings were pending. The State Attorney's Office also did not grant any of the complainants' claims for compensation. The ECtHR deemed that their chances of receiving compensation in the Republic of Slovenia were too remote to possibly influence the assessment of that concrete case. It assessed that the facts of that case unveiled the deficiencies of the Slovene legal order, a consequence of which is that the entire group of erased persons was still denied the right to compensation due to violations of their fundamental rights.<sup>9</sup>

17. The positions of the ECtHR regarding the application of the rules on time-barring are also important for the assessment of the case at issue. These rules determine that due to the expiration of a time limit, the creditor loses the right to judicial protection of his or her rights.<sup>10</sup> The creditor must namely not be passive and must promptly [request] protection of his or her rights; however, on the other hand, in a certain moment it is necessary to ensure that the legal relation is regulated definitively. The ECtHR has emphasised in a number of judgments that the existence of limitation periods is by itself not incompatible with the European Convention on Human Rights (hereinafter referred to as the ECHR). The institute of time-barring namely pursues multiple legitimate aims: primarily, it is intended to ensure legal certainty and to determine a time limit for judicial invocation of claims, which serves to protect the creditor against the invocation of time-barred claims. In addition, the limitation period prevents the court from adopting decisions on events that occurred in the too distant past and with regard to which there no longer exist sufficient and reliable evidence. However, the task of the court is to establish, in each individual case, whether the application of rules on time-barring, taking into account the nature of the limitation period, is compatible with the requirements under the ECHR.<sup>11</sup> Too rigid application of limitation periods, where the court does not take into account the circumstances of the concrete case, can namely entail an inadmissible interfer-

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9 The Grand Chamber of the ECtHR based the Judgment in the same case, dated 12 March 2014, on similar positions, by which it further decided on the amount of the compensation for pecuniary damage. In paragraph 18 of the reasoning of the Judgment dated 12 March 2014, the ECtHR emphasised the importance of Decision of the Constitutional Court No. Up-695/11 for the assessment of the liability of the state for damage in conformity with Article 26 of the Constitution, in particular [the importance of] the position that this Article of the Constitution cannot be interpreted narrowly and that there can exist liability of the state for unlawful conduct that cannot be attributed to an individual or a certain authority that falls within the competence of the state, but to the state itself. According to the Grand Chamber of the ECtHR, that Decision of the Constitutional Court is important for the implementation of the main judgment in that case.

10 For more detail, see S. Cigoj, *Teorija obligacij, Splošni del obligacijskega prava* [Theory of Obligations, The General Part of the Law of Obligations], Časopisni zavod Uradni list SR Slovenije, Ljubljana 1989, pp. 406 *et seq.*

11 Cf. Judgments of the ECtHR in *Stubbings and Others v. the United Kingdom*, dated 22 October 1996; *Stagno v. Belgium*, dated 7 July 2009; and *Howald Moor and Others v. Switzerland*, dated 11 March 2014.

ence with the right of access to the court, if it renders the application of an available legal remedy disproportionately difficult for the party or if it prevents the party from applying it. The application of limitation periods and preclusive time limits must not be such as to prevent the effective protection of rights.<sup>12</sup> Otherwise, such can result in an interference with the party's right of access to the court, which is not proportionate to the purpose of ensuring legal certainty and the just conduct of proceedings.<sup>13</sup>

### B – III

#### Decision on the first constitutional complaint

18. The Constitutional Court must assess, by taking into consideration the constitutional dimension and the aspect of the ECHR regarding the dilemma at issue, whether the (restrictive) interpretation and application of rules on time-barring by which the Supreme Court reasoned the decision on the rejection of the complainant's claims for damages entail an excessive interference with the right guaranteed by Article 26 of the Constitution.<sup>14</sup> Such consideration follows from the supposition that the court's decision-making on the liability of the state for damage for *ex iure imperii* conduct requires an appropriate adaptation of the classic civil law institutes (i.e., in the case at issue, rules regarding time-barring) to the particularities that follow from the public law nature of the liability of the state for damage. The purpose of the Constitution is not to merely formally and theoretically recognise human rights; it is namely a constitutional requirement that the possibility of the effective and actual exercise of human rights be ensured.<sup>15</sup> Therefore, the key question for assessing the case at issue is whether due to the position of the Supreme Court regarding the time-barring it was

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- 12 This is precisely what happened, according to the ECtHR, in the case *Howald Moor and Others v. Switzerland*, in which the Swiss courts decided that the limitation period and the preclusive time limit began already when the plaintiff was exposed to asbestos (the day the damage occurred), regardless of the scientific finding that the illness at issue is, as a general rule, latent for a long period of time, meaning that when the damage arises (the deterioration of health and the related pain and trouble), the limitation period has, as a general rule, already expired. In such circumstances, the court should have taken into consideration, when calculating the limitation period, that the injured party was unable to be aware of his illness sooner and that, consequently, he was not able to file an action. The ECtHR thus established a violation of Article 6 of the ECHR and awarded the applicants (the plaintiff's heirs) damages and the costs of proceedings.
- 13 Cf. the Judgment of the ECtHR in *Stagno v. Belgium*. In that case, the ECtHR assessed that overly strict application of the rules regarding time-barring by Belgian courts, which had not taken into account the special circumstances of the case, prevented the applicants from using the available legal remedy.
- 14 By the positions adopted in the challenged Judgment No. II Ips 11/2008, the Supreme Court set the course of case law with regard to the assessment of claims for damages of erased persons. As can be seen from the IUS-INFO legal database, the Supreme Court regularly refers thereto (e.g. in cases No. II Ips 137/2010, dated 10 September 2012; No. II Ips 1017/2008, dated 10 September 2012; No. II Ips 1202/2008, dated 10 September 2012; No. II Ips 360/2010, dated 27 September 2012; No. II Ips 635/2009, dated 1 October 2012; No. II Ips 304/2009, dated 18 October 2012; No. II Ips 70/2010, dated 8 November 2012; No. II Ips 99/2011, dated 15 November 2012; No. II Ips 449/2010, dated 7 November 2013; No. II DoR 269/2013, dated 21 November 2013; and No. II Ips 129/2013, dated 19 December 2013).
- 15 Cf. Decision of the Constitutional Court No. Up-275/97, dated 16 July 1998 (OdlUS VII, 231).

made disproportionately difficult for the complainant to effectively invoke, in an action for damages, the right to compensation for damage due to the alleged unlawful action of the state. The assessment regarding the acceptability of the position regarding time-barring in the case at issue depends, to a significant extent, on the question of whether the Supreme Court appropriately assessed the specific circumstances that erased persons and, among them, also the complainant were in, i.e. by taking into consideration the positions of the Constitutional Court regarding the specific position of erased persons and the positions expressed in the Judgment of the Grand Chamber of the ECtHR in the *Kurić and others v. Slovenia* case.

19. At the beginning of its reasoning, the Supreme Court correctly stated that damage caused by the state and its authorities while exercising authority does not give rise to classic liability, but to a special type of liability that exists as the protection everyone enjoys from potential damage caused by the state by its unlawful actions, and that the liability of the state in such cases falls within public law. However, the remainder of the reasoning of the challenged judgment does not reflect that the Supreme Court adapted the assessment of the case at issue to the public law nature of the liability of the state, in particular also considering the special position of erased persons such as follows from the decisions of the Constitutional Court and the ECtHR. The Supreme Court proceeded from the position that the injured party's knowledge of two circumstances is important with regard to the course of the relative limitation period regarding claims for damages: knowledge of damage and of the perpetrator (the first paragraph of Article 376 of the OA). Knowledge of the perpetrator includes knowledge of the conduct of this person in the real world, but not also a legal assessment (i.e. of the unlawfulness) of the perpetrator's conduct. It is therefore the plaintiff who carries the risk that the assessment that the perceived damaging conduct of the defendant is unlawful will [perhaps not] be made promptly. Therefore, in the opinion of the Supreme Court, the decision of the MI dated 1 June 2000 is not relevant for the time-barring in the case at issue. According to the Supreme Court, the final rejection of the complainant's application for citizenship of the Republic of Slovenia in 1994 and his removal from the register of permanent residents that occurred at that time were the legally relevant grounds for awarding non-pecuniary damages for the infringement of personality rights. In the assessment of the Supreme Court, the complainant has suffered psychological damage ever since, because he could not be employed and could not buy the apartment [he had been residing in], because he did not have health and social insurance, because he had no right to vote, and because he lived in very difficult material conditions, people ignored him, and he was humiliated, all of which was reflected in his psyche. The Supreme Court thus concurred with the court of first instance that the complainant had known for more than three years before filing the action who the perpetrator of the damage was and he was certainly aware of the damage while it was happening. According to the Supreme Court, the position of the Higher Court is erroneous, namely that the three-year limitation period could only start when the decision of the MI on granting citizenship, dated 1 June 2000, was adopted and that only then was the complainant's assumption con-

firmed that there were no reasons for refusing to grant him citizenship, i.e. that the previous decision on that matter was substantively erroneous, while at the same time he also discovered how long the procedure had lasted.

20. The courts could also have taken the circumstances of the complainant – due to the fact that he was removed from the register of permanent residents – as a basis for suspending the course of the period of limitation (Article 383 of the OA and Article 360 of the Code of Obligations, Official Gazette RS, No. 97/07 – official consolidated text – hereinafter referred to as the CO).<sup>16</sup> The term insurmountable obstacles concerns a legal standard that has to be filled in by the court in every concrete case. It denotes obstacles that actually prevent the creditor from judicially requesting the fulfilment of the obligation.<sup>17</sup> Already the described course of decision-making with regard to obtaining citizenship in the concrete case reflects the obstacles that the complainant was faced with when the authorities in power decided on his case. In addition to these circumstances, which are specific to the complainant's case, also the broader context has to be taken into consideration, in particular the fact that despite the decisions of the Constitutional Court, the state (via the executive and legislative branches of power) delayed, for a number of years, the remedying of the consequences of the violations of human rights that erased persons were victims of.<sup>18</sup> It also follows from the Judgment of the Grand Chamber of the ECtHR in *Kurić and others v. Slovenia* that the existing legal regulation denied erased persons access to [obtaining] compensation for violations of their fundamental human rights. In such circumstances, the possibility of erased persons filing claims for damages against the state was merely hypothetical, i.e. without any real chance of success.
21. The Supreme Court rejected the possibility of applying the institute of time-barring by substantiating that the existing legislation (i.e. the AA and the ARLSCFY) did not prohibit filing claims for damages, nor did it otherwise insurmountably interfere with the complainant's right to judicially request the fulfilment of the obligation (Article 383 of the OA). According to the position of the Supreme Court, not even the legislation on which the removal of the complainant from the register of permanent residents was based, and which the Constitutional Court established was inconsistent with the Constitution, allows a different interpretation of time-barring. The Supreme Court concluded its assessment with the finding that there does not (yet)

16 Article 383 of the OA read as follows: The limitation period shall not run while the creditor is unable to judicially request the fulfilment of the obligation due to insurmountable obstacles. The same wording is included in Article 360 of the CO.

17 Among the reasons for the suspension of the period of limitation (*impedimentum praescriptionis*) one can find, in particular, the absolute or relative impossibility to invoke a claim, as well as instances where the invocation of a claim is rendered difficult in practice or is inappropriate due to a special mutual relation between the two parties (a relation of dependence). Such is stated by S. Cigoj, *op. cit.*, pp. 407 and 412.

18 The unresponsiveness of the competent authorities in power entailed disrespect for the decisions of the Constitutional Court and thus a violation of Article 2 and of the second sentence of the second paragraph of Article 3 of the Constitution, which is what the Constitutional Court has drawn attention to in its annual reports ever since 2003.

exist a legal basis that in the circumstances of the case at issue would allow the complainant to succeed despite the defendant's objection to the time-barring. However, such reasoning of the Supreme Court is not acceptable from the viewpoint of the constitutional duty of a court, in the event it considers the statutory provision that it has to apply in a concrete case to be unconstitutional, to stay the proceedings and initiate proceedings before the Constitutional Court (Article 156 of the Constitution), whereas otherwise it must (within the limits of the methods of interpretation that are established in the legal field) find a constitutionally consistent interpretation of the statutory norm.<sup>19</sup> Also from the Judgment of the ECtHR in *Kurić and others v. Slovenia* there followed the duty of the court to interpret the statutory regulation on which the decision was based in a manner that is not contrary to the reasons the ECtHR adopted in that judgment. If the Supreme Court assessed that within the framework of the statutory regulation in force no interpretation was possible that would be consistent with the requirements under the Constitution and the ECHR, it should have stayed the proceedings and initiated proceedings for a review of the constitutionality of the statutory regulation before the Constitutional Court (Article 156 of the Constitution), which it did not do.

22. According to the Supreme Court, "it is not correct to look for an impediment against time-barring in the fact that the administrative decision on the rejection of the plaintiff's application for citizenship was valid at the time, as before it was annulled there was no impediment to the plaintiff's claim for damages." Allegedly, already in the proceedings for the judicial review of administrative acts initiated against the mentioned administrative decision the complainant had the possibility to claim compensation for damage caused by the execution of the challenged act (Article 11, the second paragraph of Article 27, and the fourth paragraph of Article 42 of the Act Regulating Proceedings for the Judicial Review of Administrative Acts, Official Gazette SFRY, No. 4/77, etc.). Such position presupposes that already when he was invoking his primary legal protection (i.e. during the administrative procedure in which he strove to obtain citizenship), the complainant should also have filed claims for damages against the state. However, it is not realistic to expect that an individual requesting that the state grant him [a certain] legal status (e.g. a citizenship) would at the same time claim compensatory protection against the state.<sup>20</sup> Such position only represents a hypothetical

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19 This is what the Constitutional Court stated in Decision No. U-I-83/11, Up-938/10, dated 8 November 2012 (Official Gazette RS, No. 95/12), Paragraph 13 of the reasoning.

20 In German case law, a rule was formed within the context of the assessment of the liability of the state for damage (which is based on Article 34 of the German Constitution [i.e. *Grundgesetz*], whereby the assessment of such liability in fact leans on the civil law institutes of liability for damage, in particular on Article 839 of the Civil Code – BGB) that in the event an individual invokes his or her primary legal protection (e.g. in proceedings for the judicial review of administrative acts he or she requests that an unlawful legal act be abrogated or annulled), the course of the limitation period is interrupted (*Verjährungsunterbrechung durch Ergreifung des Primärrechtsschutzes*) with regard to possible claims for damages. The provisions regarding time-barring from the BGB were substantially amended when the Act Modernising the Law of Obligations Act (*Gesetz zur Modernisierung des Schuldrechts*, dated 26 November 2001) entered into force on 1 January 2002. Following this

possibility for the complainant to claim compensatory protection against the state, which is not compatible with the requirements of the Constitutional Court and the ECtHR regarding effective and actual exercise of human rights.

23. With regard to the above, the position of the Supreme Court regarding the time-barring of claims for damages turns out to be unacceptable already from the viewpoint of the general requirement that, with respect to the circumstances of the individual case, the court must apply the rules regarding limitation periods in such a manner that the filing of claims available to a party is not rendered disproportionately difficult or even prevented [altogether]. In the case at issue, the Supreme Court imposed, by its rigid interpretation of the rules regarding time-barring, a disproportionate burden on the complainant with regard to the invocation of the right to compensation for damage guaranteed by Article 26 of the Constitution. The Supreme Court had certain leeway for interpretation of the statutory regulation that served as the basis for deciding, within the framework of which it could have enabled the complainant effective invocation of compensatory protection against the state. With regard to the special circumstances that accompanied the removal of persons from the register of permanent residents, and the fact that the state postponed the matter for a number of years before definitively regulating their position, the position of the Supreme Court regarding the time-barring of the complainant's claims for damages is not acceptable.
24. The Constitutional Court assesses that by its interpretation of the rules regarding time-barring, the Supreme Court rendered it disproportionately difficult for the complainant to effectively invoke the right to compensation for damage against the state (Article 26 of the Constitution), namely damage caused by his removal from the register of permanent residents, or [even] prevented him from doing so. For such reason, the Constitutional Court abrogated the challenged judgment and remanded the case to the Supreme Court for new adjudication (point 1 of the operative provisions). When deciding anew, the Supreme Court will have to take into consideration the reasons stated in this Decision, in particular also the fact that the case at issue concerns public law liability for damage that requires an adapted application of the criteria for assessing the liability of the defendant for damage, in particular due to the special circumstances which erased persons were in, including the complainant.
25. Since the Constitutional Court abrogated the challenged judgment due to the established violation of the right determined by Article 26 of the Constitution, it did not assess the other alleged violations of human rights and fundamental freedoms.

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statutory amendment, the rules on the suspension of the limitation period (*Hemmung der Verjährung*) are applicable for the majority of the states of the facts that previously were the basis for an interruption of the course of the limitation period. In such manner, the position from the case law on the interruption of the limitation period due to the invocation of primary legal protection (e.g. filing an action for annulment in proceedings for a judicial review of administrative acts) is still being applied, however, now [such a situation] is deemed to be grounds for a suspension of the course of the limitation period. This is stated by F. Ossenbühl and M. Cornils, *Staatshaftungsrecht*, 6<sup>th</sup> Edition, Verlag C. H. Beck, Munich 2013, p. 110. The same is also stated by T. Maunz and G. Dürig (Ed.), *Grundgesetz, Kommentar – Art. 34*, Verlag C. H. Beck, Munich 2009, p. 117.

## **B – IV**

### **Decision on the second constitutional complaint**

26. The judicial decisions challenged in case No. Up-89/14 are based on substantively the same reasons and the same positions regarding the time-barring of the complainant's claim for damages as the Supreme Court Judgment mentioned in point 1 of the operative provisions. In the repeated proceedings, the court decided anew on the claim for compensation for pecuniary damage amounting to EUR 19,523.84. By taking into consideration the positions the Supreme Court adopted in Decision No. II Ips 11/2008 and the fact that the complainant's application for citizenship was rejected with finality by a decision dated 2 August 1994, the Higher Court adopted the position that the claim filed on 10 October 2000 was time-barred. The Higher Court did not accept the complainant's position that the limitation period started when he received, on 1 June 2000, the decision of the MI. In doing so, it referred to the position of the Supreme Court that what is decisive for the onset of the course of the limitation period is the injured party's knowledge of the conduct of the perpetrator in practice and not knowledge of the legal assessment (i.e. of the unlawfulness) of the perpetrator's conduct. It explained that the complainant's efforts to prove, in legal remedy proceedings, the arbitrariness of the decision rejecting his application for citizenship falls within the scope of efforts to limit damage and cannot have an influence on the assessment regarding the onset of the course of the limitation period. By referring to its own positions adopted in Judgment No. II Ips 11/2008, the Supreme Court dismissed the complainant's motion to grant a revision.
27. The judicial decisions challenged by the second constitutional complaint are based on substantively the same positions that the Constitutional Court established entail a disproportionate interference with the complainant's right to compensation determined by Article 26 of the Constitution. Therefore, the Constitutional Court also abrogated the judicial decisions stated in point 2 of the operative provisions and remanded the case to the court of first instance for new adjudication.

## **C**

- 28 The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Etelka Korpič – Horvat, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The decision was reached unanimously.

*Mag. Miroslav Mozetič*  
*President*

Decision No. **Up-879/14**, dated 20 April 2015

### DECISION

At a session held on 20 April 2015 in proceedings to decide on the constitutional complaint of Ivan Janez Janša, Velenje, represented by the law firm Odvetniška družba Matoz, o. p., d. o. o., Koper, the Constitutional Court

*decided as follows:*

1. Supreme Court Judgment No. I Ips 2457/2010, dated 1 October 2014, Ljubljana Higher Court Judgment No. II Kp 2457/2010, dated 21 March 2014, and Ljubljana Local Court Judgment No. II K 2457/2010, dated 5 June 2013, are abrogated insofar as they refer to Ivan Janša.
2. The case is remanded to a different judge of the Ljubljana Local Court for new adjudication.

### *Reasoning*

#### **A**

1. The Ljubljana Local Court found the complainant guilty of the commission of the criminal offence of accepting a gift for unlawful intervention under the first paragraph of Article 269 of the Criminal Code (Official Gazette RS, No. 95/04 – official consolidated text – hereinafter referred to as the CC) in conjunction with Article 25 of the CC. It sentenced him to two years in prison and imposed an accessory penalty of a fine in the amount of EUR 37,000.00, and required him to pay the costs of the criminal proceedings and the court fee. The Higher Court dismissed the appeal of the complainant's defence counsels. The complainant's defence counsels filed a request for the protection of legality against the final judgment that was dismissed by the Supreme Court.
2. The complainant alleges violations of the rights determined by Article 22, the first paragraph of Article 23, Article 27, the first paragraph of Article 28, and Article 29 of the Constitution, as well as Article 6 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).

3. The complainant alleges a violation of the right to independent and impartial proceedings determined by the first paragraph of Article 23 of the Constitution due to the fact that his requests to disqualify Local Court Judge Barbara Klajnšek and Supreme Court Judges Branko Masleša and Maja Tratnik [from adjudication] were not granted. He emphasises that in this highly sensitive and politically charged case every reasonable doubt should have been excluded as to whether in the given circumstances the courts adjudicated impartially and the judges should have exercised even greater care and protected the aspect of impartial proceedings, which requires the courts to ensure the external appearance of impartial adjudication (i.e. the objective aspect of the right determined by the first paragraph of Article 23 of the Constitution). The complainant particularly criticises the conduct of Supreme Court Judge Branko Masleša. He claims that the latter raised doubts about his impartiality with his speech at the Days of the Slovene Judiciary on 6 June 2014, and therefore he should have been disqualified [from adjudication]. The complainant further alleges a violation of Article 23 of the Constitution due to the fact that, after the time at which the complainant's request for legal protection was to be considered became known, President Branko Masleša adopted the decision that he would be presiding over all sessions of the criminal law panel until the end of 2014, namely also in the complainant's case. By such conduct, he allegedly selected the case in which he was to decide, even though the case was already being considered, and therefore he was acquainted with its subject matter as well as the parties to the proceedings, and consequently also the complainant's right to a duly appointed judge was allegedly violated. The complainant alleges that with regard to Supreme Court Judge Branko Masleša there existed not only objective but also subjective reasons that cast doubt on his impartiality. From the perspective of the possible influence of the court, objective circumstances could have allegedly created the appearance that not every reasonable doubt regarding the impartiality of the court's adjudication was excluded. In the complainant's assessment, such circumstances also existed with regard to Supreme Court Judge Maja Tratnik.
4. The complainant further alleges a violation of the principle of legality stemming from the first paragraph of Article 28 of the Constitution from several perspectives. He initially states that the abstract definition of the criminal offence under the first paragraph of Article 269 of the CC is contrary to the requirement of the certainty of laws (*lex certa*) and therefore it opens the door for violations of the rights of individuals who trust that their rights, legal interests, and obligations will not be decided on in an arbitrary manner. The complainant further alleges that the statutory elements of the criminal offence of accepting a gift for unlawful intervention under the first paragraph of Article 269 of the CC do not follow from its description, and the described conduct also did not result in an unlawful state of the facts as the required unlawful consequence. The abstract description of the alleged criminal offence in the operative provisions of the first instance judgment is allegedly already incomprehensible and internally contradictory, and the statutory elements of the criminal offence are allegedly not concretised and described in the concrete part of

its description. In the complainant's opinion, it is not stated how and in what manner he allegedly fulfilled the statutory element of "acceptance of the promise", but the statutory text from the abstract part of the description is simply reiterated in its concrete part and thus an essential element of the criminal offence is missing. The description of the act as a past event allegedly also does not contain the decisive facts that would concretise the alleged criminal offence. Thus, allegedly, neither the time nor the place of the commission of the criminal offence were stated. Allegedly, even if all the statements regarding facts alleged in the act of indictment were true, a conviction could not follow from such facts, and therefore the court was even barred from initiating criminal proceedings against the complainant. As criminal proceedings have nevertheless been initiated, the complainant believes that due to the inability to concretise the elements of the criminal offence, a judgment of acquittal should have been adopted. The court was allegedly not even allowed to establish the conduct that entailed the commission of the criminal offence, on the basis of either direct or circumstantial evidence, as the prosecutor failed to include such in the act of indictment. According to the complainant's allegations, in the case at issue the courts even applied circumstantial evidence to establish the existence of facts that the prosecutor did not even invoke, but only such facts allegedly allowed for the conclusion that the promise had been accepted. The complainant emphasises that the official act that the unlawful exertion of influence was intended to affect is not clarified and described in the concrete part of the description of the criminal offence, and it further does not identify the public officials at whom the influence was to be directed. He claims that he committed none of the alleged acts and that it is absurd if a person is convicted not because he or she accepted the promise of [the payment of] a commission, but because he or she monitored the preparations for conducting a procedure, supervised such procedure, and was informed of who would be proposed as the local agent. He stresses that the Finnish court acquitted the Finnish citizens identified in the operative provisions of the judgment of the charge that they had committed the criminal offence of active bribery. In the complainant's opinion, therefore, considering the connection between a promise and its acceptance, the failure to prove that a promise had been made simultaneously entails the failure to prove the acceptance of the promise as well.

5. The complainant further claims that the criminal proceedings against him were unfair and that his right to a defence determined by the first indent of Article 29 in conjunction with Articles 22 and 23 of the Constitution and Article 6 of the ECHR was violated. He states that the factual and legal aspects of the charge that would have enabled him [to prepare] an effective defence do not follow from the description of the criminal offence and as a result the adopted judgment surprised him. He is of the opinion that, given the unclear allegations, he could only deny [that he had committed] the criminal offence, as it is impossible to defend oneself against an allegation that one has committed a criminal offence at an unknown place, at an unknown time, and through an unknown method of communication. The lack of clarity of the description of the criminal offence is allegedly further reinforced by the Supreme

Court's position that the statutory element of "acceptance of the promise" was concretised in the form of the payment of a commission, as nothing of that kind had been claimed by the prosecutor and it also did not follow from the final judgment. The mere assertion that the complainant had accepted the promise of the payment of a commission without a description of other clear and concrete circumstances of the commission of the criminal offence allegedly did not enable him [to prepare] an effective defence. In addition, the courts allegedly failed to clarify some of the essential circumstances contained in the concrete description of the criminal offence, e.g. what the basis was for the finding that the complainant had in fact been informed of the promise of payment that had been made, that he had accepted such and agreed thereto, and that he had accepted such with the intent to exploit his influence and intervene in the performance of an official act, although not even the amount of the promised commission was known. In the complainant's opinion, such reasoning does not even satisfy the minimum requirements regarding the duty to state reasons and therefore it also entails a violation of Article 22 of the Constitution.

6. The complainant also alleges a violation of Article 22 of the Constitution due to the arbitrary and manifestly erroneous definition of complicity. He claims that the allegation of complicity is only stated in the abstract description of the criminal offence, but it allegedly does not follow from the concrete part of the description or the reasoning of the judgment. The complainant draws attention to the otherwise established position of the Supreme Court that courts violate the criminal statute if an allegation of complicity is only included in the abstract part of the description [of the criminal offence in the judgment] but is not concretised in the concrete description. In addition, with regard to the nature of the alleged criminal offence and the manner in which the complainant allegedly committed it, complicity in the criminal offence under adjudication is allegedly already conceptually excluded. The acceptance of the promise as such is allegedly an intimate decision and an expression of the perpetrator's will, which allegedly does not allow for complicity. Allegedly, case law also deems that only a person who acted in the course of the commission of a criminal offence can be deemed an accomplice, and complicity can be substantiated merely on the basis of a decisive contribution to the commission of a criminal offence only by way of an exception, whereby such an exception has to be interpreted strictly.
7. By adopting a circumstantial judgment the courts allegedly violated the presumption of innocence determined by Article 27 of the Constitution and consequently the right to the equal protection of rights determined by Article 22 of the Constitution. The complainant states that in his case the court did not apply circumstantial evidence as control evidence to confirm the established facts, but it applied circumstantial evidence as fact, whereby the circumstantial evidence did not even follow from his conduct but from the conduct of others. The court allegedly inferred the existence and truthfulness of one circumstantial piece of evidence from another piece of circumstantial evidence. The conclusion regarding a decisive fact was allegedly reached by such fabrication of circumstantial evidence. The complainant

believes that instances of drawing conclusions merely on the basis of circumstantial evidence always lead to a subjective and therefore arbitrary interpretation of the truthfulness of an as yet unknown fact and consequently the presumption of innocence and the *in dubio pro reo* principle derived therefrom are at risk. In light of all of the above, [the adoption of] a circumstantial judgment was allegedly not admissible in the complainant's case. The complainant emphasises that the same circumstantial evidence also allows for the opposite conclusion to be drawn, namely that the criminal offence had not been committed, which is allegedly proven by the assessment of the evidence by the Finnish court in its judgment of acquittal. According to the complainant's assertions, the confirmation of the challenged judgments would entail that in criminal proceedings anyone could be convicted on the basis of the slightest circumstantial evidence and consequently the principle of innocence would be transformed into a presumption of guilt.

8. The Supreme Court, which upheld the Higher Court and the Local Court Judgments and thereby confirmed the positions adopted by the lower courts, first presented its position regarding the allegations of the complainant and the other two persons convicted in the same criminal proceedings<sup>1</sup> regarding the violations of Article 28 of the Constitution on a general level. After highlighting the protected object as regards the criminal offences of corruption and the incrimination of preparatory acts relating thereto, which it believes to be the case with regard to the acceptance of a promise, it adopted the position that such criminal offence is completed by the mere acceptance of the promise of a reward. Relying on grammatical interpretation, it held that the acceptance of a promise is not an open-textured legal term, but it entails concrete conduct by which someone accepts something that is offered or given by another. In the case at issue, such was allegedly the promise of a reward (i.e. a benefit). In the opinion of the Supreme Court, the acceptance of a promise is thus not an indefinite legal term, but a clear normative statutory element, the content of which is known and unambiguously defined. At a general level, the Supreme Court adopted the position that the subjective and objective limits of a trial have to be determined by the procedural act of indictment, and the defendants have to be given an opportunity to acquaint themselves with the charge as well as the facts and evidence that it is based on in order to enable them [to prepare] a defence. Relying on established case law, it developed the premise that, from the perspective of their statutorily determined elements, the act of indictment and the judgment must be regarded in their entirety. If the law defines an individual element of a criminal offence with sufficient precision, the courts allegedly should not reiterate such in the description of the relevant facts of the concrete case or describe it in different words, since, with regard to the clarity and comprehensibility of the operative provisions [of the judgment], such would be superfluous. In accordance with such, in individual cases legal terms from the statutory text could allegedly assume the role of facts, as the concretisation of the statutory element would not be reasonable or in some instances it would not even be possible

1 Namely Ivan Črnkovič and Anton Krkovič.

at all. The description of a criminal offence must contain all the decisive facts that concretise the offence, however, in the opinion of the Supreme Court, the principle of legality is not breached if the description of a criminal offence contained in the operative provisions of a judgment is construed in connection with the judgment's reasoning. From such, the Supreme Court inferred the position that the principle of legality is not violated if an element of the criminal offence is not precisely defined in the operative provisions [of the judgment], but is sufficiently substantiated in the reasoning. The Supreme Court summarised the outlined position by concluding that the description of the criminal offence in the operative provisions [of the judgment] and the reasoning constitute a whole, that they supplement each other, and that in instances when the statutory element of a criminal offence is sufficiently defined and is not open-textured the same terms can be applied to define the statutory element also in the concrete description of the facts of a given case and that that element can subsequently be considered to be a fact.<sup>2</sup>

9. The Supreme Court then applied the above-described general position in the assessment of the statements of the individual convicted persons. With regard to the complainant Janša, it emphasised that the benefit (i.e. the reward) was precisely described by the promise of the payment of a commission on the sale in accordance with the contract and that it was sufficiently concretised; the percentage of Wolf's commission was defined as a special bonus in which the agreed commission was taken into account and the amount from which the commission was to be calculated was defined precisely. In the assessment of the Supreme Court, the acceptance of the promise is described as the payment of the commission (which the convicted party Janša accepted in the name of the SDS political party); that description as such was allegedly sufficiently defined, concrete, and clear, as the promise of what had been accepted was allegedly clear. After stating its position that the promise of a reward was accepted in the time period between 10 August and 22 August 2005, the Supreme Court concretely described that on 22 August 2005, in accordance with Janša's instructions, Zagožen requested a prepayment of 30% of the promised commission and a contract that would include the prepayment (whereby the acceptance of the promise of a reward was manifested in the external world); the Supreme Court thus linked the description of the promise of the reward with the acceptance of the promise and with the request for payment in the sense of the realisation of the promise of the reward. The Supreme Court agreed with the position of the Higher Court that the omission of a description of the method of communication does not entail that not all of the statutory elements of the criminal offence were sufficiently described, as the method of communication does not constitute a statutory element of the alleged criminal offence. It emphasised that the method of communication can be outwardly expressed in such a manner that it leaves detectable clues in the external world, however it can also entail covert conduct that is manifested in the external world, but the circumstances of such communication are only known to the

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2 See Paras. 13–21 of the reasoning of the Supreme Court Judgment.

persons involved. Therefore, in accordance with the position of the Supreme Court, the manner in which a perpetrator accepted a promise does not necessarily have to be established and concretised, as such concerns dealings that are concealed and are not carried out openly and in the presence of witnesses.<sup>3</sup> In the assessment of the Supreme Court, “the acceptance of the promise of the payment of a reward is concretised by the description of the commission on the sale according to the contract and the percentage as well as the statement that the commission was to be calculated on the basis of the amount of EUR 161,900,000.00”; “the commission in the sense of the promised reward is thus concretised with sufficient precision and the statutory element of acceptance of the promise is also concretised in such manner – i.e. he accepted the promise of the payment of a commission.”<sup>4</sup>

10. In response to the complainant’s statements that the description of the offence also has to include a description of the recipient’s state of awareness and his or her will to accept the promise and agree to it which is manifested in a manner that is externally perceptible, the Supreme Court replied that such concern statements that do not belong in the description of the offence, but the court also clarified those elements of the criminal offence in the reasoning of the judgment, while as a general rule the subjective element [i.e. the *mens rea*] of the offence is not described in the operative provisions of the judgment.<sup>5</sup> With regard to the statement of the time of the commission of the criminal offence, the Supreme Court clarified that the time of the commission thereof was sufficiently concretised as also the dates of other key events were stated and that the time of the commission of the criminal offence is not a legally relevant circumstance that would refer to the statutory elements of the criminal offence, but it can be important for other reasons that were not invoked by the defence (e.g. statutes of limitation). With regard to the place of the commission of the criminal offence, the Supreme Court held that the complainant was precluded from invoking this aspect because he did not raise this issue with regard to the jurisdiction of Slovene courts in his appeal and therefore in its assessment the legal remedies have not been substantively exhausted with regard to this allegation.<sup>6</sup> In response to the complainant’s allegations with regard to the inclusion in the description of the offence of the public officials whom the complainant was supposed to influence in the performance of an official act in connection with Patria, the Supreme Court replied that the statutory element of the official act is described as a confidential public tender procedure, i.e. an act within the competence of a state authority that is substantiated by statutory provisions and thus also correctly described. The Supreme Court held that the defence interpreted the content and meaning of the relevant provisions erroneously and that the description of the criminal offence is not de-

3 See Para. 24 of the reasoning of the Supreme Court Judgment.

4 See Para. 25 of the reasoning of the Supreme Court Judgment.

5 See Para. 32 of the reasoning of the Supreme Court Judgment.

6 While in his appeal the complainant stated that the description of the offence does not concretise where the offence had been committed, he did not in fact stress the issue of jurisdiction with regard to such (see the third paragraph on p. 33 of the appeal).

ficient or incomprehensible and if all the statements regarding the facts in the act of indictment were true, a conviction would follow from the alleged facts; it agreed with the complainant's statement that the choice of a local industrial partner does not constitute an official act, but, in the opinion of the Supreme Court, such was not even alleged in the description of the offence.<sup>7</sup>

11. In response to the defence's allegation that it is unclear what the statement in the operative provisions "according to the instructions of Ivan Janša" entails, as the abstract part of the description of the offence does not allege that the convicted party Janša committed the offence by requesting a reward, the Supreme Court replied that the description of the offence to which the defence counsels' cited statements are linked states that, in accordance with Janša's instructions, Zagožen required a prepayment of 30% of the promised commission from Niittynen through Wolf and Riedl (22 August 2005), which entails a description of the realisation of the previously accepted promise of a reward; in the opinion of the Supreme Court, that allegation does not refer only to Zagožen, but that part of the description precisely describes Zagožen's conduct in accordance with the instructions of the convicted party Janša and therefore, also with regard to such, the operative provisions of the judgment are not contradictory or incomprehensible. In the assessment of the Supreme Court, given the precise description of the conduct of the "persons offering the reward" as well as the sufficiently concretised "acceptance of the promise of a reward", it cannot be claimed that also the circumstances of the offer that was made were completely unclear.<sup>8</sup>
12. With regard to the alleged violation of the right to impartial proceedings determined by the first paragraph of Article 23 of the Constitution due to the fact that Supreme Court Judge Branko Masleša was not disqualified from adjudication, the Supreme Court adopted positions in two orders of the plenary session of the Supreme Court. By the Order of 27 August 2014, it dismissed the request for his disqualification as it deemed that there existed no reasons to indicate the subjective or objective partiality of Branko Masleša, whereby it also assessed the allegations from the perspective of his potential participation in the panel that was to decide on the extraordinary legal remedy. It held that in his speech President Branko Masleša did not inadmissibly prejudge this criminal case as he emphasised that he did not dare to engage in an assessment of the correctness and legality of the final judgment, and he also firmly rejected the allegation regarding his personal prejudices and convictions. As in the opinion of the Supreme Court there existed no evidence to the contrary, it did not doubt the impartiality of President Branko Masleša. Allegedly, no negative or hate speech against the complainant Janša followed from the speech of 6 June 2014; on the contrary, Branko Masleša, as the president of the state's highest court, simply responded to the conduct (i.e. the placement of the signs of a former military court next to the sign of the Ljubljana Higher Court) of the political party that is led by the

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7 See Para. 37 of the reasoning of the Supreme Court Judgment, and pp. 71 and 72 of the Judgment of the court of first instance.

8 See Para. 56 of the reasoning.

convicted person at issue and in particular to the message that such conduct conveys. In the assessment of the plenary session of the Supreme Court, the decisive circumstance was that Branko Masleša did not act in his capacity as a judge, but responded to the pressures exerted on the judges and judiciary in his capacity as the President of the Supreme Court, namely in the function that pertains to the president of the highest court in the state within the framework of the judicial administration and which cannot be equated with the function of a judge. In the opinion of the plenary session of the Supreme Court, the speech at issue was a justified and, with regard to his function, appropriate response to the repeated attacks on the Slovene judiciary, which had been increasing progressively, in particular because they originated from politicians. With regard to the above and by reference to the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), the plenary session of the Supreme Court held that the fears of the convicted party Janša regarding the partiality of President Branko Masleša were not objectively justified.

13. In the Order of the plenary session of the Supreme Court of 29 September 2014, by which the Supreme Court Judges also dismissed the complainant's second request for the disqualification of the president of the panel, i.e. Branko Masleša, the Supreme Court did not consider the question of whether his speech of 6 June 2014 may have influenced his impartiality; it did, however, assess if Branko Masleša's decision to preside over all sessions of the criminal law panel until the end of 2014, which also included the case at issue, affected his impartiality. It held that in light of all the circumstances the doubt regarding the impartiality of the president of the panel, i.e. Branko Masleša, was not justified, as his decision was consistent with the annual work schedule and he communicated this on 4 September 2014, i.e. before the determination of the agenda of the session in the complainant's case on 16 September 2014. The Supreme Court adopted the interpretation that such a decision was necessary from the perspective of the functioning of the criminal law department.
14. By Order No. Up-879/14, dated 11 December 2014, the Constitutional Court accepted the constitutional complaint for consideration and suspended the implementation of the challenged judgments until the final decision insofar as they refer to the complainant. In accordance with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA), it informed the Supreme Court of the acceptance of the constitutional complaint.

#### B – I

15. The complainant, *inter alia*, asserts that the act of indictment and the challenged judgment do not contain a concrete description of the conduct that constituted the commission of the offence and that would allow the conclusion that the complainant accepted the promise of a reward, but the operative provisions are satisfied with merely quoting the abstract definition of the criminal offence. The essence of the allegations thus lies in the question of the concretisation of the statutory element "acceptance of the promise of a reward" in accordance with the first paragraph of Article

269 of the CC. The Constitutional Court assessed those statements of the complainant from the perspective of the principle of legality in criminal law that is guaranteed by the first paragraph of Article 28 of the Constitution.

16. In accordance with the first paragraph of Article 28 of the Constitution, no one may be punished for an act that had not been declared a criminal offence under law or for which a penalty had not been prescribed at the time the act was committed. By this provision, the Constitution regulates the principle of legality in criminal law, which has also been recognised as a general principle of international law (*lex certa*) by the international community. The Constitution defines it as a substantive law<sup>9</sup> safeguard in criminal proceedings – as a human right whose observance is intended to prevent the state from applying criminal law repression against individuals in an arbitrary manner. As the Constitutional Court already held in Decision No. U-I-335/02, dated 24 March 2005 (Official Gazette RS, No. 37/05, and OdlUS XIV, 16), this provision determines a number of conditions, namely:

the prohibition on determining criminal offences and penalties by implementing acts inferior to laws or by customary law (*nullum crimen, nulla poena sine lege scripta*);  
the prohibition on defining criminal offences and penalties in empty, undeterminable, or unclear terms (*nullum crimen, nulla poena sine lege certa*);  
the prohibition on applying [interpretation by] analogy when establishing the existence of criminal offences and sentencing (*nullum crimen, nulla poena sine lege stricta*);  
the prohibition on the retroactive effect of regulations that determine criminal offences and prescribe penalties for such (*nullum crimen, nulla poena sine lege praevia*).

17. The above-stated prohibitions give rise to constitutional counter-obligations that are firstly directed at the legislature. In order to protect persons, society as a whole and its values, the legislature may only determine by law (“declared **under law**” – *lex scripta*) which conduct of individuals is inherently wrong (*mala in se*) or unacceptable to such a degree that it has to be prohibited (*mala prohibita*) and sanctioned under criminal law. The prescribed penalties are severe, as on such basis it is possible to deprive individuals of their liberty (the second paragraph of Article 19 of the Constitution). The requirement of [incrimination by] law simultaneously entails that only the legislative power may determine what is criminal and it may do so only by means of a special act that has a special position within the legal system (i.e. a law) and that the Parliament adopts in a special, *ex ante* regulated procedure (the legislative procedure, Article 89 of the Constitution). When defining a criminal offence, the legislature must act with such a degree of certainty (“**declared** under law”) that it is possible to completely clearly distinguish between conduct (actions and omissions) that is criminal and conduct that falls outside the scope of criminal liability. It draws this distinction by defining the elements of individual criminal offences with sufficient certainty. The requirement of the certainty of criminal statutes (*lex certa*) is a special

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9 The Constitutional Court already stated in Order No. Up-24/98, dated 10 July 2002, that the first paragraph of Article 28 of the Constitution, due to its wording, is only applicable to infringements of substantive criminal law that are constitutionally relevant.

constitutional requirement in comparison to the principle of precision and clarity, as one of the principles of a state governed by the rule of law enshrined in Article 2 of the Constitution, which applies to all regulations. The legislature may nevertheless apply indefinite<sup>10</sup> and open-textured<sup>11</sup> legal terms when defining criminal offences if the content of the prohibited conduct can be precisely construed by means of established methods of interpretation. However, it may not apply empty, undeterminable, or unclear<sup>12</sup> terms. The principle of certainty, which clearly distinguishes between criminal and non-criminal conduct, is also directly connected with the requirement of the prohibition of *analogia legis* and *analogia iuris* (*lex stricta*)<sup>13</sup> already at the level of the legislature. The substantive constitutional safeguard stemming from the first paragraph of Article 28 of the Constitution is directed at individuals who have to know in advance what is incriminated as only such enables them to adjust their conduct. They must be able to predict<sup>14</sup> what kind of consequences their conscious conduct may produce, they have to know where the border lies in terms of which the legislature outlined the scope of criminal liability and outside of which there lies the area of their general right to act freely (Article 35 of the Constitution) without being subject to criminal liability. Hence the logical prohibition of the retroactive determination of criminal offences (*lex praevia*).

18. What the Constitution prohibits the legislature from doing, on one hand, and what, on the other, it requires of it in order to ensure that this human right is taken into account when defining criminal offences must equally be applied to the interpreter of the law. The latter must not interpret a statutory provision that is as such not inconsistent with the Constitution in such a way so as to assign to it a meaning that would entail a violation of a human right. In criminal proceedings courts are required to interpret substantive criminal law in accordance with the Constitution, just as the courts are required to interpret statutes in such a manner in general.<sup>15</sup> Whether the courts have interpreted the law in accordance with the Constitution – to be precise, in accordance with human rights and fundamental freedoms – is the sole criterion of constitutional judicial control that the Constitutional Court exercises over adju-

10 See Order of the Constitutional Court No. U-I-220/98, dated 16 July 1998 (OdlUS VII, 155) (a large quantity, high value, or great danger of weapons or explosives).

11 See Order of the Constitutional Court No. Up-356/04, U-I-455/06, dated 7 December 2006 (OdlUS XV, 107) (a serious threat in conjunction with endangering security).

12 See Order of the Constitutional Court No. Up-541/06, dated 18 January 2008.

13 See Order of the Constitutional Court No. Up-190/97, dated 18 September 1997, and Decisions of the Constitutional Court No. U-I-213/98, dated 16 March 2000 (Official Gazette RS, Nos. 33/2000, and 39/2000 – corr., and OdlUS IX, 58), and No. U-I-73/09, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 33).

14 “The purpose of the principle of legality is to prevent a criminal conviction for an act regarding which an individual could not predict that it is a criminal act.” See Orders of the Constitutional Court Nos. Up-62/99, dated 4 July 2000, and Up-437/00, dated 27 February 2003.

15 Regarding the requirement that statutes have to be interpreted in accordance with the Constitution, see M. Pavčnik in: M. Pavčnik and A. Novak (Eds.), (*Ustavno*)*sodno odločanje* [(Constitutional) Judicial Decision-Making], GV Založba, Ljubljana 2013, pp. 73–75.

dication. Such also defines the constitutional law relationship between the Constitutional Court and the (regular) courts, the highest of which is, in accordance with the first paragraph of Article 127 of the Constitution, the Supreme Court. Consequently, the Constitutional Court has constantly repeated that in proceedings regarding constitutional complaints it does not review if the courts correctly applied substantive law (and procedural law, or if they have correctly established the facts), however, it does review if they have violated a human right or fundamental freedom with their interpretation of the law. In principle, this must also apply with regard to a review of whether the courts interpreted the law in accordance with the right stemming from the first paragraph of Article 28 of the Constitution. The conditions stemming from the mentioned substantive constitutional safeguard thus constitute the starting point for defining the constitutional requirements that the courts have to observe when they interpret provisions of criminal laws.

19. The substantive constitutional safeguard of the principle of legality in criminal law refers to the judgment and not the act of indictment.<sup>16</sup> Such follows already from the wording of the first paragraph of Article 28 of the Constitution, which declares that no one “may be punished.” Only a court can pronounce a penalty (including the deprivation of liberty) for a criminal offence when it establishes that an individual committed such an offence and that he or she is also guilty, which also follows from the first paragraph of Article 23 of the Constitution. Whether the act of indictment presented by the state prosecutor acting as the party to the criminal proceedings representing the state is substantiated may only be decided by an independent court by a judgment issued in fair judicial proceedings, in the framework of which respect for all of the defendant’s rights has been guaranteed (the first paragraph of Article 135 of the Constitution). A judgment by which an individual is punished for a criminal offence is thus an act that, viewed from the perspective of the review of the Constitutional Court, has to respect all constitutional safeguards, including the safeguard stemming from the first paragraph of Article 28 of the Constitution. In constitutional complaint proceedings the Constitutional Court reviews if [the judgment at issue] observed such, but it does not engage in a review of the act of indictment, as the review thereof is a matter for the criminal court.
20. As in accordance with the *lex scripta* requirement criminal offences may be determined exclusively by the legislature by law, this constitutional requirement importantly supplements the general constitutional law relationship between the legislative power, which adopts the laws, and the judicial power, which interprets them (the second paragraph of Article 3 of the Constitution). This requirement prevents courts from including anything in the scope of criminal liability that the legislature did not clearly and definitely include already at an abstract level through a definition of the elements of an individual criminal offence. This obligation is stronger than the general obligation that binds judges to laws (Article 125 of the Constitution) and it reduces the freedom of criminal judges when interpreting the law. Only those methods

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16 As held by the Constitutional Court already in Order No. Up-366/05, dated 19 April 2007.

of interpretation that remain strictly within the possible meaning of the wording are admissible, while the use of analogy is inadmissible (*lex stricta*).<sup>17</sup> The requirement of the strict interpretation of criminal laws is also consistent with such.<sup>18</sup> A judge must constantly be aware of the constitutional *lex scripta* requirement – namely the requirement that strictly binds the interpreter to the law, as the legislature is the one who determines the scope of criminal liability by law. The interpreter of that law – i.e. the judge – does not possess such a power and his or her interpretation of the law has to remain entirely within that scope. As a consequence of the observance of the above-mentioned constitutional requirement, the separation of the competences that the Constitution vests in the legislature from the competences that pertain to the courts also constitutes a constitutional law aspect that the Constitutional Court has to review within the framework of the first paragraph of Article 28 of the Constitution. If the Constitutional Court did not include this constitutional law aspect in its review, control of the observance of the *lex scripta* and *lex stricta* requirements in individual criminal proceedings would be fundamentally impaired.

21. The *lex certa* requirement entails that a criminal law must be definite, certain, clear, and predictable, which, on one hand, is a question of the objective semantic precision of the text in its objective meaning, and, on the other hand, of the subjective comprehension of that meaning in the sense that the perpetrator knows *ex ante* what constitutes criminal conduct. When the courts interpret the statutory elements of a criminal offence and extract the abstract statutory definition of the criminal offence, they naturally interpret the statutory elements with regard to the concrete facts of the given case (i.e. the past event) that are relevant from the perspective of the abstract definition of the criminal offence – they namely interpret the statutory definition of the criminal offence with regard to the legally relevant facts of a concrete case. A conviction for a criminal offence is only possible after the court extracts the abstract, i.e. statutory, definition of the criminal offence from the statutory provision and the legally relevant facts from the concrete case, and by means of their subsequent comparison establishes that the legally relevant facts of the case constitute an example of the statutory definition of the criminal offence to which a legal consequence (i.e. a criminal sanction) is linked.<sup>19</sup> If we wish to verify whether the courts observed the *lex scripta*, *lex certa*, and *lex stricta* requirements<sup>20</sup> when interpreting a criminal law (i.e. when extracting the statutory definition of a criminal offence), the legally relevant facts of the concrete case become the content that has to be compared to the content of the interpreted element of the criminal offence –

17 As held by the Constitutional Court already in Decision No. U-I-213/98, as well as in Decision No. U-I-73/09.

18 As held by the Constitutional Court already in Order No. Up-190/97, and expressly also in Decision No. Up-265/01, dated 26 October 2001 (Official Gazette RS, No. 88/01, and OdlUS X, 228).

19 Cf. M. Pavčnik, *Teorija prava*, 4. pregledana in dopolnjena izdaja [Theory of Law, fourth revised and supplemented edition], GV založba, Ljubljana 2011, pp. 312–319, and M. Pavčnik, *Argumentacija v pravu* [Argumentation in Law], Cankarjeva založba, Ljubljana 1998, p. 27.

20 With regard to the circumstances of the case at issue, the *lex praevia* requirement does not require further consideration.

i.e. to the content of the statutory definition of the criminal offence. Only after the content that defines one of the legally relevant facts of the concrete case has been established is it namely possible to review whether the court, by deeming that such content was decisive from the perspective of the statutory definition of the criminal offence, attributed to the statutory provision content that is imprecise in and of itself or even content that the legislature did not include in the scope of criminal liability.<sup>21</sup> The decisive facts must include descriptions of all of the statutory elements of the criminal offence at the level of the legally relevant facts that have been extracted from the concrete case – therefore we can also speak of a description of the criminal offence that has to include all of the statutory elements of the criminal offence, as it is only through them – and only through all of them together – that the individual's conduct (an action or omission) that corresponds to the conduct that falls within the scope of criminal liability is defined.<sup>22</sup> The content of an individual legally relevant fact (or of a number of legally relevant facts) has to correspond to the content of an individual element of the criminal offence as determined by law, which entails that the interpretation of an element of the criminal offence may only encompass such legally relevant facts of a concrete case that correspond definitely and strictly (*lex certa* and *lex stricta*) to the statutory definition of the criminal offence.

22. With regard to what has been stated in the preceding paragraph, it has to be particularly emphasised that such does not concern the question of the correct application of substantive law, but the question of its constitutionally consistent interpretation from the perspective of the requirements stemming from the first paragraph of Article 28 of the Constitution. The review of the Constitutional Court does not include a review of whether the courts correctly established a decisive fact with

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21 With regard to, e.g., the question of whether the criminal offence of unauthorised crossing of the state border also encompasses cases where the border has not been crossed (which was a fact established in the judicial proceedings), the Constitutional Court considered that fact, which the courts had established as one of the legally relevant facts of the case, and compared it to the fact stemming from the abstract definition of the criminal offence as determined by the legislature. From Decision No. Up-265/01: "The Constitutional Court deems that it clearly follows already from a grammatical interpretation of the definition of the criminal offence of unauthorised crossing of the state border that the crossing of the border of the Republic of Slovenia is a statutory element of the offences under all of the paragraphs of Article 311 of the CC. The border of the Republic of Slovenia is also the attacked value with regard to that criminal offence. The cited criminal offence is included in the chapter entitled Criminal Offences against Public Order and Peace. A characteristic of the criminal offences under this chapter is that they protect the internal public order of the Republic of Slovenia. An act that did not include a crossing of the border of the Republic of Slovenia therefore cannot constitute the criminal offence under Article 311 of the CC." Cf. also Decision No. Up-40/94, dated 3 November 1995 (OdlUS IV, 136), which concerned the question of whether scrips constituted money and as such they were encompassed by the criminal offence of counterfeiting money.

22 In Decision No. Up-265/01 the Constitutional Court particularly emphasised that only all of the elements of the criminal offence, taken together with the value protected by criminal law that was the reason for the incrimination of the act in the first place, show the actual substantive content of the criminal offence and the purpose of its incrimination.

regard to the concrete case,<sup>23</sup> as such is not an aspect of the principle of legality in criminal law, but it entails the question of the correct establishment of the facts or the correct assessment of the evidence, which lie in the competence of the regular courts. In its review, the Constitutional Court is bound by the established facts. The concept of the description of the criminal offence as it is applied by the Constitutional Court cannot be equated only with the description of the criminal offence contained in the operative provisions of a judgment. Whether the description of the legally relevant facts of the case is in its entirety included in the operative provisions, or whether it is partially included in the operative provisions and partially in the reasoning through the concretisation of the decisive facts, is namely not a question of constitutional law, but a question of the correct interpretation of criminal procedural law, which is a matter that lies in the competence of the regular courts and not the Constitutional Court. Even if the operative provisions only contained the finding that an individual committed a specific criminal offence and the sentence imposed on him or her for such, while the entire description of the criminal offence was included in the reasoning of the judgment,<sup>24</sup> such would not be of relevance from the perspective of constitutional law, as the Constitution does not prescribe the structure of a criminal judgment of conviction. Consequently, the position of the Supreme Court that the operative provisions of a judgment and its reasoning constitute a whole cannot be the subject of a review by the Constitutional Court; it is thus irrelevant for a constitutional review whether a specific decisive legally relevant fact of the case is included in the operative provisions of a judgment or in its reasoning. It is, however, important that it is included in the judgment.

23. In order for an individual's conduct to constitute a criminal offence and for the perpetrator to also be guilty of such, his or her conduct must fulfil all of the objective and subjective elements of the criminal offence.<sup>25</sup> From such as well as from the above-provided explanations there follows the requirement that the description of the criminal offence (i.e. the legally relevant facts of the concrete case when compared to the statutory definition of the criminal offence) has to contain all of the elements of the criminal offence. If any element is omitted, such entails a violation of the principle of legality in criminal law. The Constitutional Court has repeated this

23 It is a matter of the assessment of the evidence whether the court correctly established the existence of an element of the criminal offence (i.e. a decisive legally relevant fact of the case that entails an element of the criminal offence); as held already in Order No. Up-167/96, dated 15 June 1998. See also Orders of the Constitutional Court No. Up-456/01, dated 21 May 2003, and No. Up-38/06, dated 8 May 2007.

24 The same is also applied, e.g., by German and French criminal courts, which the same as Slovene courts deem that only the operative provisions of a judgment become final. See, e.g., Judgment No. 11/06308357 of the 17<sup>th</sup> Panel of the *Tribunal de Grande Instance de Paris* on the basis of a private law suit of Marine Le Pen against the alleged perpetrators, dated 16 February 2012 ([http://www.juritel.com/Ldj\\_html-1601.html](http://www.juritel.com/Ldj_html-1601.html)), and *Landgericht Bochum* Judgment No. 2 Kls 35 Js 158/07, dated 1 April 2008 (<http://openjur.de/u/131083.html>).

25 Decision of the Constitutional Court No. Up-758/03, dated 23 June 2005 (Official Gazette RS, No. 66/05, and OdlUS XIV, 96).

position on a number of occasions.<sup>26</sup> It substantiated this by clarifying that unless the description of the criminal offence contained all of the elements of the criminal offence, a conviction would entail a conviction for something that is not a criminal offence.<sup>27</sup> For this to be the case, it already suffices that only one element of the criminal offence is omitted from its description. Such a situation may come about in different ways. In the event that one of the elements of the criminal offence is omitted from the description of the criminal offence, such entails precisely an example of the above stated – a conviction for something that is not a criminal offence. However, we also arrive at the same conclusion in the event that a court interprets an element of a criminal offence in such a manner that it thereby extends the scope of criminal liability as determined by law: the court interprets the legislature's precise definition of a statutory element of the criminal offence extensively and thereby violates the *lex certa* [requirement]; at the same time it violates the *lex scripta* and *lex stricta* requirements if through its interpretation it itself determines that also conduct that the legislature did not include in the scope of criminal liability is criminal.<sup>28</sup> It is for this reason that the requirement that all of the elements of the criminal offence have to be included in the description of the criminal offence is of such importance from the perspective of the substantive constitutional safeguard stemming from the first paragraph of Article 28 of the Constitution.

24. The requirement that the description of the criminal offence has to include all of the statutory elements of the criminal offence cannot extend to something that does not constitute an element of the criminal offence at the level of the statutory definition of the criminal offence. If, e.g., the time, place, and manner in which the criminal offence was committed are not in themselves elements of the criminal offence, their absence from the description of the criminal offence cannot entail a violation of the first paragraph of Article 28 of the Constitution.<sup>29</sup>
25. In addition to requiring that all of the statutory elements of the criminal offence have to be included in the description of the criminal offence, the Constitutional

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26 Held by the Constitutional Court already in Order No. Up-190/97 as well as in Orders No. Up-24/98, No. Up-354/00, dated 25 September 2002, No. Up-456/01, and No. Up-1023/05, dated 28 February 2008, and Decisions No. Up-259/00, dated 20 February 2003 (Official Gazette RS, No. 26/03, and OdlUS XII, 51), and No. Up-758/03.

27 Decision of the Constitutional Court No. Up-758/03.

28 As in the example in Decision of the Constitutional Court No. Up-265/01, which concerned the question of whether the criminal offence of unauthorised crossing of the state border also encompasses cases where the border has not been crossed. In that example the statutory offence formally existed, but in reality the interpretation of the courts led to a situation wherein the statutory element of the crossing of the state border was not included in the description of the criminal offence. The case thus entailed a conviction for an act that did not constitute a criminal offence. As it deemed that the criminal offence also encompassed the facts of the concrete case in which no crossing of the border occurred, the court at the same time extended the scope of criminal liability into an area that the legislature did not include in the abstract definition of the criminal offence.

29 See Order of the Constitutional Court No. Up-24/98. If the time of the commission of a criminal offence is an important circumstance for the legal qualification of the criminal offence, but its definition in terms of a limited period of time instead of a date is not in itself disputable from the perspective of the first paragraph of Article 28 of the Constitution; held by the Constitutional Court in Order No. Up-62/99.

Court has hitherto not required that concrete conduct (i.e. the legally relevant facts of the concrete case), which we can subsume under the individual elements of the alleged criminal offence as follow from the statutory definition of the criminal offence, has to be included in the description as well. However, from the perspective of what was stated above in Paragraph 21 of the reasoning of this Decision, such a requirement is the logical continuation of the requirement of the existence of all of the statutory elements of the criminal offence. Only once we know the content of every individual fact within the framework of the legally relevant facts<sup>30</sup> can we namely conduct a comparison with what the legislature determined to be an element of the criminal offence at the level of the statutory definition of the criminal offence.<sup>31</sup> If we do not know the content of the conduct that the court determined to constitute an element of the criminal offence in the framework of the legally relevant facts of the case, if such element is namely not even formulated from the established facts regarding the perpetrator's conduct and thus concretised, we cannot review if the courts interpreted the statutory text in accordance with the requirements stemming from the first paragraph of Article 28 of the Constitution.

26. In light of the above, the complainant's allegation that the description of the criminal offence for which he was convicted does not contain the concretisation of the statutory element of acceptance (of the promise of a reward) as such is only included as a copy of that element from the statutory definition of the criminal offence under the first paragraph of Article 269 of the CC, can be linked precisely to the requirements that stem from the principle of legality in criminal law. With regard to what was stated in Paragraph 19 of the reasoning of this Decision, the Constitutional Court does not review an act of indictment when assessing if such allegation of the complainant is substantiated.

## B – II

27. The wording of the first paragraph of Article 269 of the CC (accepting a gift for unlawful intervention) reads as follows: "(1) Whoever requests or accepts a reward, gift or any other benefit or the promise or offer of such benefit for him- or herself or for another in exchange for the exploitation of his or her position or influence to intervene so that a certain official act be performed or not be performed, shall be sentenced to imprisonment not exceeding three years." The statutory elements<sup>32</sup> of this criminal offence are: 1) whoever, 2) for him- or herself or for another, 3) accepts 4) the promise of a reward 5) with the intent to exploit his or her position or influence to intervene so that 6) an official act be performed. The acceptance (of the promise of a reward) is an independent statutory element and entails an act of com-

30 As in Decision of the Constitutional Court No. Up-40/94, e.g., whether the case involved the forgery of "a banknote" or "a scrip".

31 In the case of Decision of the Constitutional Court No. Up-40/94, e.g., "money".

32 As the complainant was convicted of accepting the promise of a reward as one of the manners in which this criminal offence can be committed, we leave aside the commission thereof by requesting a reward (a gift or other benefit) hereinafter.

mission. This is a criminal offence that the perpetrator commits by active conduct. It is already clear on the basis of a grammatical interpretation that for the offence to be completed it suffices that the promise is accepted; there is no requirement that the perpetrator also actually intervenes. If the intervention occurs, such still concerns the criminal offence under the first paragraph of Article 269 of the CC, and the same is true if a benefit (a reward) is received in exchange for the intervention. Such a conclusion is already dictated by a grammatical interpretation of the third paragraph of Article 269 of the CC (accepting a benefit for intervening with regard to an unlawful official act), which only refers to the second paragraph of Article 269, namely to instances of unlawful intervention with regard to unlawful official acts, and not also to instances of unlawful intervention with regard to lawful official acts that otherwise would have to be or could be performed (the first paragraph of Article 269 of the CC).<sup>33</sup> The first paragraph of Article 269 of the CC thus encompasses the mere acceptance of the promise as well as the perpetrator's possible further actions, i.e. from (an attempt at) intervening to actually receiving the reward (benefit) for the intervention.

28. Thus, under the first paragraph of Article 269 of the CC, already the acceptance of the promise of a reward with the intent to intervene of itself is punishable, which is due to the state's commitments in accordance with Article 12 of the Criminal Law Convention on Corruption (the Act Ratifying the Criminal Law Convention on Corruption, Official Gazette RS, No. 26/2000, MP, No. 7/2000 – ICLCC). The Supreme Court is of the opinion that this criminal offence entails the criminal sanctioning of intent that has not yet been realised, namely the perpetrator's specific intent to commit a certain criminal offence that is usually regarded as extremely dangerous or serious. The criminal offences that entail the criminal sanctioning of corruptive conduct are without a doubt dangerous and they affect an important social value – trust in the lawful and honest conduct of public officials and bearers of power that perform official acts, or as the Supreme Court held: "... the commitment of the entire society and of each individual to the proper and lawful functioning of state services and other services operating in the public interest." In the opinion of the Supreme Court, precisely the perpetrator's specific intent entails the distinguishing element that separates the determination of criminal liability for a preparatory act from conduct that is not criminal.
29. However, it has to be established that the specific intent is only one of the elements of the criminal offence – a subjective element that has to be distinguished from the element of acceptance (of the promise of a reward), which is an objec-

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33 The second, third, and fourth paragraphs of Article 269 CC read as follows: "(2) Whoever exploits his or her position or influence and intervenes with the intent that an official act that should not have been performed is performed, or that an official act that should or could have been performed is not performed, shall be subject to the same punishment as under the preceding paragraph. (3) A perpetrator who accepts a reward, a gift, or any other benefit for him- or herself or for another, for the intervention referred to in the preceding paragraph shall be sentenced to imprisonment of one to five years. (4) The reward, gift, or other benefit received shall be confiscated."

tive element of the criminal offence. As such, the latter has to be detectable in the external world. The perpetrator can namely only commit this criminal offence with his or her conduct (even if he or she, e.g., accepts the reward through an intermediary – an assistant), as it is crucial for the acceptance of the reward that the perpetrator's will regarding such is expressed. It is clear that a precondition for the commission [of this criminal offence] is the prior offer of the promise of a reward that is accepted by the perpetrator. An agreement is thus concluded between the person making the promise of a reward and the person accepting the promise of a reward, which the latter concludes precisely by the specific intent to exploit his or her influence or position to intervene with regard to an official act.<sup>34</sup> At the moment when the perpetrator decides by him- or herself to accept the promise of the reward he or she has not yet committed the criminal offence. Such is logical as it would entail the criminalisation of thought, which would be inadmissible. It can definitely not be attributed to the legislature that it wanted to enact such by the first paragraph of Article 269 of the CC. The expressed will to accept (the promise of a reward) must reach the person who made the promise. It does not suffice if it remains in the sphere of the individual's privacy, which other persons cannot access.

30. As the courts held, the method of communication, i.e. the manner in which the promise is accepted, is not a statutory element of the criminal offence under the first paragraph of Article 269 of the CC. This is correct. If it were, such would entail that the criminal offence – accepting the promise of a reward – could only be committed in a precisely determined manner by means of which the legislature would have additionally narrowed the scope of criminal liability for this offence. In what manner the acceptance is realised is therefore irrelevant. What is decisive is whether it occurs. However, such does not entail that it is not necessary to define at the level of the legally relevant facts of the concrete case the perpetrator's conduct that could be detected in the external world and by means of which the perpetrator fulfilled precisely that statutory element of the criminal offence. The possibility that this requirement could be replaced with a concretisation of other statutory elements of the criminal offence is excluded. When the manner of the acceptance of the promise is known, which is only possible in instances when there exists evidence regarding such, then also the perpetrator's conduct that of itself entails the acceptance (of the promise of a reward), whereby the manner of acceptance only represents accompanying circumstances that are not relevant from the perspective of the statutory element. It is logical that, as the Supreme Court held, criminal offences of corruption are carried out in secret and not publicly and in the presence of witnesses (who do not participate in the agreement). This makes them even more dangerous and there is little chance that in the commission of such a criminal offence the perpetrator's

34 Baucon speaks of criminal offences of encounter [derived from the German concept of *Begegnungsdelikte*]; see P. Baucon, *Korupcijska kazniva dejanja zoper uradno dolžnost in javna pooblastila* [Criminal Offences of Corruption against Official Duties and Public Authorisations], *Pravosodni bilten*, No. 1 (2006), p. 63.

direct conduct that entails the expression of the will to accept (the promise of a reward) could be established. The Supreme Court especially cautioned that the agreement on the acceptance of the promise of a reward can be tacit, that there can also be acceptance through conclusive conduct. In such an instance there would thus be a conclusive acceptance of the promise of a reward. However, such would only entail one of the possible manners of accepting the promise. There still remains the need for an outward expression of the perpetrator's conduct that can substantiate, in accordance with logic and experience, that the will to accept (the promise of a reward) has been expressed. Such may only be conduct of the perpetrator that in the context of the circumstances of the case at issue allows the credible conclusion that the perpetrator accepted the promise of a reward.

31. Regardless of the manner in which the acceptance of the promise of a reward is realised, the first paragraph of Article 28 of the Constitution determines constitutional boundaries to be respected by the regular courts when assessing which of the legally relevant facts of a concrete case correspond to the statutory element of acceptance (of the promise of a reward) in accordance with the first paragraph of Article 269 of the CC. The constitutional requirements stemming from the principle of legality are binding on regular courts whenever they interpret the statutory element of acceptance (of the promise of a reward), regardless of whether they are assessing the complainant's conduct that entails the direct acceptance of the promise or the complainant's conduct that indicates the acceptance of the promise. If the acceptance of the promise has not been directly detected, there exists a danger that the court might include a wide range of conduct of the individual that as such is not characteristic of expressing the acceptance (of the promise of a reward). This could lead to a broadening of the scope of criminal liability. Consequently, in this regard only such conduct is relevant that by its nature and content and in the circumstances of the case at issue allow that the existence of that statutory element is established beyond a reasonable doubt. When the court decides on such, it has to take into consideration that practically the only objective element of the criminal offence that can be attributed precisely and only to the perpetrator of that criminal offence is the acceptance (of the promise of a reward). The other objective elements are independent of his or her conduct (the reward, the promise of the reward, the official act). Therefore, in the interpretation of this element of the criminal offence – in the extraction of the statutory definition of the criminal offence with regard to the legally relevant facts of the concrete case – the *lex scripta*, *lex certa*, and *lex stricta* requirements have to be given even further emphasis; this is even more true if in the circumstances of the case at issue the existence of this essential element of the criminal offence is derived from the perpetrator's other conduct. This namely entails that as such the conduct that entails the acceptance of the promise of a reward cannot even be assessed from the perspective of certainty and strictness because we do not even know it. From these perspectives, we can only assess the conduct from which we draw conclusions regarding the existence of the statutory element of the criminal offence.

32. In addition to the existence of all other statutory elements of the criminal offence, the acceptance of the promise of a reward determined by the first paragraph of Article 269 of the CC thus requires that the perpetrator has to express the will to accept (the promise of a reward) with his or her own conduct or at least indicate acceptance with his or her own conduct on the basis of which, given its nature and content and in the circumstances of the case at issue, the existence of this statutory element can be established beyond a reasonable doubt. The constitutional requirements stemming from the first paragraph of Article 28 of the Constitution are thus in any event a constituent part of the assessment of the statutory element and the legally relevant facts of the concrete case that a regular court has to perform. Disregard for these requirements entails a violation of the right determined by the first paragraph of Article 28 of the Constitution.

### B – III

#### **The alleged unconstitutionality of the first paragraph of Article 269 of the CC**

33. The complainant first alleges that the first paragraph of Article 269 of the CC is inconsistent with the principle of certainty. The unclear statutory provision allegedly enables arbitrary punishment, which is allegedly confirmed by the positions adopted by the regular courts that the alleged criminal offence is committed already with the acceptance of the promise, whereby it is not necessary that the perpetrator in fact intervenes. With regard to the presented constitutional law positions (Paragraph 17 of the reasoning of this Decision), in the case at issue there could have occurred a violation of the principle of certainty if the statutory provision was in fact unclear and indefinite to such an extent that it would allow arbitrary punishment. In such a case, in accordance with the second paragraph of Article 59 of the CCA, the Constitutional Court would firstly assess the constitutionality of the statutory provision on the basis of which the challenged judgments were adopted. However, the case at issue is not such a case.
34. Already a grammatical interpretation of the wording of the first paragraph of Article 269 of the CC leads to the conclusion that for the criminal offence of accepting a gift for unlawful intervention to be completed an intervention is not required when the criminal offence is committed in the form of “accepting the promise of a reward or benefit”. In the statutory text thus the conditional form is applied, i.e. “in exchange for the exploitation of his or her position or influence to intervene”, which points to the intent that was the reason for the acceptance of the promise of the reward or benefit; however, the mere acceptance of the promise actually suffices for the completion of the criminal offence. The above-stated shows that the meaning of the statutory terms can be construed by means of established methods of interpretation and therefore the complainant’s allegation that the first paragraph of Article 269 of the CC is contrary to the *lex certa* requirement is not substantiated. However, whether the regular courts also interpreted the clear statutory provision in accordance with the Constitution is not the subject of the assessment of the constitutionality of the statutory provision, but the subject of the review of the positions adopted in the challenged judgments.

## B – IV

### The existence of the elements of the criminal offence

35. The complainant alleges that not all of the statutory elements follow from the description of the criminal offence of which he was convicted and this allegedly entails a violation of the principle of legality stemming from the first paragraph of Article 28 of the Constitution.
36. With regard to such, the regular courts adopted the same position, namely that all of the elements of the criminal offence, including the decisive facts, follow from its description.<sup>35</sup> The court of first instance deemed that the description was already sufficiently defined by the listing of the statutory elements of the criminal offence. Allegedly, the description of the criminal offence has to include in particular the decisive facts that express the statutory elements of the criminal offence, but not the facts and circumstances on the basis of which conclusions regarding the so-called internal subjective facts (the content of consciousness, will, intent, etc.) are drawn. With regard to the statutory element of acceptance (of the promise of a reward), the court of first instance adopted the position that the facts and circumstances that were applied to substantiate the statement that the complainant accepted the promise of a reward are matters that belong in the reasoning by means of which that statutory element is established. In connection with the statutory element of “influence”, however, it deemed that the statutory definition is open-textured as regards its content and that it is already realised when the perpetrator accepts the offer of a benefit, at which point it is not even necessarily true that he or she will actually have to intervene with others. According to the assessment of the court [of first instance], the time and place of the commission of the criminal offence, while important for the individualisation of the concrete criminal offence, do not constitute elements of the criminal offence in question, and in any event all of the statutory elements of the criminal offence and the decisive facts follow from the description. The Higher Court and the Supreme Court confirmed this position; according to their assessment, the manner in which the promise was accepted does not constitute a statutory element, and the same is also true with regard to the time and place of the commission of the criminal offence.
37. From the perspective of the first paragraph of Article 28 of the Constitution, the relevant question is whether the act for which the complainant was convicted, provided that his guilt had been proven beyond a reasonable doubt, even constitutes a criminal offence at all. A comparison of the statutory elements of the criminal offence with the legally relevant facts of the concrete case shows that from a formal legal perspective the description of the criminal offence contains all of the statutory elements: for the political party SDS (*“for another”*)<sup>36</sup> and through Jože Zagožen, Ivan Janša (*“whoever”*) accepted (*“accepts”*) the promise of the payment of a commission

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35 See pp. 55–57 of the reasoning of the Judgment of the court of first instance, Paras. 30 and 31 of the reasoning of the Higher Court Judgment, and Paras. 23–25, 31–37, and 44 of the Supreme Court Judgment.

36 The statutory elements that were concretised by means of alleged facts are provided in italics.

on the sale [at issue] in accordance with the contract that had been agreed on as a 4.2% commission for Walter Wolf (*“the promise of a reward”*), even though the political party SDS was not entitled to any kind of commission on the sale in accordance with the contract concluded between the company Patria and the company RHG, with the intent that as the Prime Minister, the President of the SDS political party, a former minister, and an influential personality he would intervene (*“with the intent to exploit his influence to intervene”*) with those persons at the Ministry of Defence of the Republic of Slovenia who participated in the confidential public tender procedure and the company Patria, or more precisely, its local agent would be selected as the best tenderer, whereby the confidential public tender procedure is an official act (*“official act”*). As the courts established, the complainant instructed Jože Zagožen to request the prepayment of 30% of the promised commission. In light of the fact that all of the statutory elements of the criminal offence can be derived from the above-presented description, the complainant’s allegations that are aimed at the positions of the regular courts regarding the existence of the elements of the criminal offence are not substantiated. As was already clarified in Paragraph 24 of the reasoning of this Decision, the time, place, and manner of the commission of the criminal offence are not statutory elements and therefore their absence in the description of the criminal offence cannot entail a violation of the first paragraph of Article 28 of the Constitution. The case at issue thus is not a situation wherein a statutory element was omitted from the description of the criminal offence, but concerns the question of whether the statutory element of acceptance (of the promise of a reward) was concretised.

## B – V

### **The concretisation of the element of the criminal offence of acceptance (of the promise of a reward)**

38. The complainant was found guilty of accepting, between 10 August 2005 and 22 August 2005, through Jože Zagožen and for the political party SDS, the promise of the payment of a commission on the sale in accordance with the contract between the company Patria and the company RHG that had been made by the leading employees of the company Patria Vehicles Oy, Tuomas Korpi, Heikki Hulkkonen, and Reijo Niittynen. The political party SDS was not entitled to the commission, and the leading employees of the Patria company allegedly promised it with the intent that Ivan Janša as an influential personality would exert influence on those persons at the Ministry of Defence of the Republic of Slovenia who participated in the confidential public tender procedure and that Patria, or more precisely its local agent, would be selected as the best tenderer, whereby the confidential public tender procedure is an official act. Subsequently, on 22 August 2005 Jože Zagožen, allegedly with the same intent and in accordance with the complainant’s instructions, requested through Walter Wolf, and the latter further through Hans Wolfgang Riedl, the prepayment of 30% of the promised commission from Reijo Niittynen. In accordance with the court’s position, the facts and circumstances by which the statement that the complainant accepted the promise of a reward is substantiated are matters that belong

in the reasoning of the judgment. Thereby the complainant allegedly committed the criminal offence under the first paragraph of Article 269 of the CC.

39. All of the courts that decided on the merits of the charges against the complainant were faced with the complainant's allegation that the statutory element of acceptance (of the promise of a reward) simply reiterates the statutory element of the criminal offence without concretising the complainant's conduct that allegedly entailed the acceptance (of the promise of a reward). In accordance with the position of the Supreme Court, when a certain statutory element cannot be concretised by a different formulation or if such would not be feasible, it suffices for the concretisation of the criminal offence if the (abstract) term is applied or reiterated in the (concrete) description of the criminal offence. Such allegedly occurs in instances that concern statutory elements that are expressed in words that have a clear, precisely determined, and concrete meaning. The term to accept (the promise of a reward) allegedly entails concrete conduct by which someone accepts something that is offered or given, i.e. promised, by another. In individual cases, when they are included in the factual description of the real life event, such terms from the statutory text allegedly assume the role of facts. The court of first instance and the court of second instance also adopted in principle the same position, but expressed it partly differently (the acceptance of the promise of a reward is a fact that is established and substantiated by facts and circumstances, which the court states in the reasoning of the judgment). Consequently, the reiteration of the statutory element of the acceptance (of the promise of a reward) in the description of the criminal offence allegedly entailed a sufficient concretisation of the alleged criminal offence or a statutory element thereof. Such a position of the Supreme Court (and of the court of first instance) has to be understood from the perspective of its interpretation of the provision of criminal procedural law that requires that the description of the criminal offence contain all decisive facts (in the operative provisions of the judgment) that concretise the criminal offence, while with regard to other circumstances it suffices that they are included in the reasoning of the judgment, whereby the judgment has to be reviewed as a whole. As was already pointed out (Paragraph 22 of the reasoning of this Decision), whether conduct that due to its nature and content may, beyond a reasonable doubt, result in the realisation of the statutory element is included in the operative provisions of the judgment or in its reasoning is not a constitutional law question. What is of relevance for constitutional law is whether such conduct is clearly included in the judgment among the legally relevant facts of the concrete case that can be compared to the statutory element of acceptance (of the promise of a reward). Only in such instances can a review from the perspective of the first paragraph of Article 28 of the Constitution be performed.
40. As was already stated (Paragraph 30 of the reasoning of this Decision), a court may not replace the concretisation of one of the statutory elements of the criminal offence with the concretisation of other statutory elements of the criminal offence. Otherwise we would allow for instances where a statutory element at the level of the legally relevant facts of the concrete case would not even have been realised. In

such a case, a conviction for the criminal offence would entail a conviction for an act that lacks a statutory element, namely an act that the legislature did not even determine to be a criminal offence. Therefore, in this regard already as a starting point attention has to be drawn to the constitutionally unacceptable positions of the regular courts entailing that the circumstances in connection with the other statutory elements indicate that the complainant accepted the promise of a reward. The Supreme Court linked the complainant's acceptance (of the promise of a reward) with the concretised statement of the commission ("the acceptance of the payment of a reward is concretised by the description of the commission on the sale according to the contract and the percentage as well as that the commission was to be calculated on the basis of the amount of EUR 161,900,000.00" and "the commission in the sense of the promised reward is thus concretised with sufficient precision and the statutory element of acceptance of the promise is also concretised in such manner – i.e. he accepted the promise of the payment of a commission")<sup>37</sup> and with the intent underlying the acceptance of the promise that is linked to the complainant's position and thereby with the potential influence of the persons at the Ministry of Defence of the Republic of Slovenia with regard to the choice of the supplier in the purchase of armoured vehicles. What the Supreme Court in this regard deemed to constitute the outward expression of the acceptance of the promise of a reward is connected to the reward (benefit) itself or the promise of the reward and the intent underlying the acceptance of the promise. However, the acceptance (of the promise of a reward or benefit) is an independent statutory element that must not be interpreted in such a manner that it is merged with the other statutory elements and such that the realisation of those statutory elements would automatically also entail the realisation of that statutory element.<sup>38</sup> The concretisation of the reward (i.e. the benefit) and the intent thus cannot be applied to substantiate that the complainant actually accepted the promise of the reward. The mere existence of the reward (or even only of the promise of the reward) or the existence of the intent to accept it (even if the promise of a reward had been made) namely do not indicate that the complainant's conduct was criminal, unless it can be established that the acceptance (of the promise of a reward) in fact occurred – unless namely also that statutory element had been realised. The above-stated positions are thus already as such inconsistent with the first paragraph of Article 28 of the Constitution.

41. When the regular courts, from the court of first instance to the Supreme Court, replied to the [allegations regarding] the missing concretisation of the acceptance of the reward, they adopted the position that it suffices if the description of the criminal offence (from the perspective of the courts in the operative provisions) contains the decisive facts (whereby as regards the acceptance, the mere reiteration of the statutory element suffices due to its clarity and precisely determined meaning), while their

<sup>37</sup> See Para. 25 of the reasoning of the Supreme Court Judgment.

<sup>38</sup> Cf. also Decision of the German Federal Constitutional Court Nos. 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, dated 23 June 2010.

concretisation is a matter that belongs in the reasoning of the judgment, whereby the operative provisions and the reasoning in any event entail a whole. As was already highlighted in Paragraph 22 of the reasoning of this Decision, which part of the judgment has to contain the concretisation of the individual elements of the criminal offence is not important from the perspective of constitutional law, it may also be included in the reasoning of the judgment. However, it is important that it is included in the judgment. In connection with such, the Supreme Court expressly stated that the fact there occurred acceptance (of the promise of a reward) in the time period between 10 August and 22 August 2005 is concretised by the description that, in accordance with the complainant's instructions, on 22 August 2005 Jože Zagožen requested a 30% prepayment of the promised commission and a contract determining the prepayment. Thereby the acceptance of the promise of the reward was allegedly expressed in the external world. The mentioned position indicates that with regard to the complainant's instructions to request the prepayment of the promised commission the Supreme Court concluded that the complainant had accepted the promise of the reward. Thereby Jože Zagožen's alleged request for the prepayment of the promised commission was concretised. The act of giving instructions for the request attributed to the complainant, however, is not concretised in any manner. By its content and nature the term "to give instructions" is comparable to the term to accept (the promise of a reward). The complainant could only have realised it through his own conduct. If such conduct was not directly detected, it could only entail such conduct that in the circumstances of the case at issue could have led to the conclusion that the instructions had been given. Such entails that, with regard to the above-stated positions of the court of first instance and the Supreme Court, already the first instance court should have concretised not only the statutory element of acceptance (of the promise of a reward), but also the complainant's conduct "to give instructions to request the prepayment of the commission". It follows from the challenged judgments that the court [of first instance] did not establish conduct of the complainant that would have as such directly entailed the acceptance (of the promise of a reward) or direct conduct that would have as such entailed the giving of instructions to request [the prepayment]. Therefore, already the court of first instance should have extracted from all of the established facts those facts regarding the complainant's conduct that in the circumstances of the case and due to their nature and content even allowed the existence of the statutory element of acceptance (of the promise of a reward) to be established beyond a reasonable doubt. If it deemed that the complainant's instructions to request the prepayment constituted such conduct, it should have equally extracted the facts that indicate precisely that.

42. Therefore, it does not follow from the challenged judgments that when establishing whether the decisive facts (i.e. the ones that they should have deemed to constitute the legally relevant facts of the concrete case) correspond to the statutory element of acceptance (of the promise of a reward) the courts performed a review from the perspective of the constitutional requirements stemming from the principle of legality, although the complainant had been invoking them throughout the proceedings.

With regard to what was stated in the preceding paragraph, the courts further did not satisfy that requirement through the concretisation of the other statutory elements of the criminal offence.

43. It follows from the above-stated that in interpreting the statutory element of acceptance (of the promise of a reward) under the first paragraph of Article 269 of the CC, the courts failed to consider the requirements stemming from the first paragraph of Article 28 of the Constitution. Already as a result of this the challenged judgments violated the complainant's right ensured by the Constitution in terms of a constitutional substantive safeguard of defendants in criminal proceedings. Consequently, the Constitutional Court abrogated the challenged provisions (Point 1 of the operative provisions). In light of the nature of the established violation, it remanded the case to the court of first instance for new adjudication, namely in such a manner that a different judge of the Ljubljana Local Court is to decide thereon (Point 2 of the operative provisions).
44. In the new proceedings, the court will have to take into account the positions adopted in this Decision when defining the legally relevant facts of the case at issue. In accordance with those positions, it will have to extract the legally relevant facts of the case from all of the established facts of the past event in question in order to compare them with the statutory definition of the criminal offence, which it will have to obtain through an interpretation of the statutory term of acceptance (of the promise of a reward) in accordance with the requirements stemming from the first paragraph of Article 28 of the Constitution. It will have to take into account that the individual established instances of conduct that are as such not characteristic of an acceptance of the promise of a reward do not entail a realisation of that statutory element. Only due to the circumstances in which it occurred can such conduct allow the conclusion that a promise was accepted. In such instances, it is important from the perspective of the first paragraph of Article 28 of the Constitution that a complainant's conduct always remains at the centre of the determination of the relevant statutory definition of the criminal offence. From the perspective of the interpretation of the statutory element of acceptance (of the promise of a reward) it is therefore important whether in the given circumstances the conduct of the complainant enables such a conclusion to be drawn. The inclusion – in this statutory element – of conduct embedded in the established circumstances of the case that due to its content and nature cannot suffice as proof of definite external detection of the complainant's acceptance of the promise of a reward, for example, would entail an interpretation extending its meaning. It is further clear that the promise of a reward, if such in fact was made, does not indicate the complainant's conduct – i.e. its acceptance. However, the latter is precisely what is decisive for the realisation of this statutory element of the criminal offence as one of the elements of the criminal offence under the first paragraph of Article 269 of the CC.
45. As the Constitutional Court abrogated the challenged judgments already due to the established violation of the right determined by the first paragraph of Article 28 of the Constitution, it was not necessary to review the other alleged human

rights violations. The Constitutional Court nevertheless decided to also review the alleged violation of the right to impartial proceedings before the Supreme Court, insofar as it concerns the participation of the President of the Supreme Court in the adjudication. Such concerns the highest court of regular jurisdiction in the state, and therefore ensuring the appearance of impartiality of its adjudication is of special importance.

## **B – VI**

### **The review from the perspective of the right to impartial adjudication before the Supreme Court**

46. The complainant also alleges a violation of the right to impartial proceedings determined by Article 23 of the Constitution at the Supreme Court as that court *inter alia* did not grant a request for the disqualification of its President, Branko Masleša.
47. It follows from the Order of the plenary session of the Supreme Court, dated 27 August 2014, that the Supreme Court Judges reviewed the complainant's request for the disqualification of Branko Masleša with regard to his previous actions in his role as the President of the Supreme Court as well as with regard to his potential participation in the panel that was to decide on the [complainant's] extraordinary legal remedy. They adopted the position that Branko Masleša's speech at the Days of the Slovene Judiciary on 6 June 2014 did not raise any doubts regarding his impartiality and that there existed no reasons that would indicate his subjective or objective partiality. In the assessment of the plenary session of the Supreme Court, Branko Masleša had to respond to the pressure that had been exerted on the judiciary. However, in doing so he allegedly was not acting in his capacity as a judge, as at that time the Supreme Court had not yet received the complainant's request for legal protection, but rather responded in his capacity as the President of the Supreme Court. Branko Masleša thus allegedly responded in the function that pertains to the president of the highest court in the state within the framework of the judicial administration and which allegedly cannot be equated with the function of a judge.
48. By an Order, dated 29 September 2014, the plenary session of the Supreme Court also rejected the complainant's second request for the disqualification of the president of the panel, Branko Masleša, wherein the complainant claimed that the impartiality of adjudication was affected not only by the speech of 6 June 2014 but also by the decision of Judge Branko Masleša to preside over all criminal law panels until the end of 2014, namely also in the complainant's case. The partiality of the president of the panel, Branko Masleša, was allegedly further proven by a statement he had made on the street and that is allegedly established through a notarised statement of the Marvins, a married couple. The Supreme Court adopted the position that it had already decided on the alleged partiality due to the speech by its Order of 27 August 2014, and with regard to the statement of the Marvins it deemed that Branko Masleša enjoys the trust of the Supreme Court Judges and that they do not believe the statement to be true. With regard to his decision to preside over all criminal law panels, the plenary session of the Supreme Court adopted the position that in light of all the

circumstances there existed no doubt regarding the impartiality of the president of the panel, Branko Masleša.

49. The right to judicial protection determined by the first paragraph of Article 23 of the Constitution entails the right of everyone to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent, impartial court constituted by law.<sup>39</sup> Impartiality entails that the one who is deciding is not interested in a particular outcome of the proceedings and that he or she is open to the parties' evidence and proposals. In order to be able to decide impartially, a judge must not have a preconceived opinion regarding the subject of the decision-making. The court's decision has to be adopted on the basis of the facts and arguments that the parties presented in the judicial proceedings, and not on the basis of information obtained outside of the proceedings.<sup>40</sup> In the exercise of the right to impartial adjudication it is not only important that the impartiality of adjudication is in fact ensured, but it must also be outwardly expressed. This concerns the so-called appearance of the impartiality of adjudication. It is thus important that in each concrete case the court creates and maintains the appearance of impartiality. Otherwise, the trust of the public in the impartiality of the courts in general as well as the trust of the parties in the impartiality of adjudication in concrete proceedings may be at risk.<sup>41</sup>
50. Furthermore, in accordance with the position of the ECtHR, the subjective criterion, which concerns the determination of the personal convictions of the judge deciding a case, as well as the objective criterion, which concerns the assessment of whether in the proceedings the judge ensured the implementation of procedural safeguards in such a manner that any legitimate doubt regarding his or her impartiality is excluded, are decisive for the impartiality of adjudication.<sup>42</sup> Thereby it is not only important whether the judge performed his or her function in the criminal proceedings in an impartial manner, i.e. whether the manner in which he or she performed his or her function could have influenced the outcome of the proceedings.<sup>43</sup> It is furthermore important that the impartiality of adjudication also has to be outwardly expressed.<sup>44</sup> Thereby the ECtHR verifies whether the judge provided sufficient safeguards to exclude all reasonable doubts regarding such. Such mainly concerns the confidence

39 Cf. Decision of the Constitutional Court No. U-I-65/05, dated 29 September 2005 (Official Gazette RS, No. 92/05, and OdlUS XIV, 72).

40 Cf. Decision of the Constitutional Court No. U-I-92/96, dated 21 March 2002 (Official Gazette RS, No. 32/02, and OdlUS XI, 45).

41 Cf. Decision of the Constitutional Court No. Up-365/05, dated 6 July 2006 (Official Gazette RS, No. 76/06, and OdlUS XV, 93).

42 Cf. the ECtHR Judgment in *Saraiva de Carvalho v. Portugal*, dated 22 April 1994, Para. 33.

43 Cf. the ECtHR Judgment in *De Cubber v. Belgium*, dated 26 October 1984.

44 Such concerns the requirement best illustrated by the English proverb: "Justice must not only be done, it must be seen to be done." Adapted from A. Galič, *Ustavno civilno procesno pravo* [Constitutional Civil Procedural Law], GV Založba, Ljubljana 2004, p. 413. See also L. E. Pettiti (Ed.), *La convention des droits de l'homme – commentaire article par article*, Second Edition, Economica, Paris 1999, pp. 260–261.

that courts in a democratic society must inspire in the public. The decisive factor is whether it can be established that a doubt is objectively justified.<sup>45</sup> It is therefore important that when acting in a particular case the court creates and maintains the appearance of impartiality.<sup>46</sup> At the statutory level, the right to impartial adjudication is implemented through the institution of the disqualification of judges.<sup>47</sup>

51. The position of the plenary session of the Supreme Court that there existed no subjective reasons that would indicate the partiality of President Branko Masleša does not raise any constitutional law considerations. However, the contrary is true with regard to its position that the objective reasons that could have affected the appearance of impartiality did not exist. In his speech of 6 June 2014, President of the Supreme Court Branko Masleša critically responded to destructive attacks aimed at judges, who may not respond to criticism due to their duty of secrecy. On that occasion he criticised the positions expressed by the complainant Ivan Janša regarding the court that, as the court of appeal, dismissed his appeal. Thereby he expressly emphasised that he did not wish to engage in an assessment of the correctness or legality of the Ljubljana Higher Court Judgment that was not in favour of the complainant.
52. The Constitutional Court already emphasised that it is not sufficient if in proceedings a court acts and decides in an impartial manner, it must furthermore be composed in such a manner that there exist no circumstances that would cast doubt on the appearance of the impartiality of the judges.<sup>48</sup> Such concerns the need to reinforce the confidence that courts in a democratic society must inspire in the public.
53. There is no dispute regarding the position that the President of the Supreme Court as the highest representative of the judicial branch of power and of all judges must have the possibility to respond when he deems that the judicial branch of power must be protected against attacks. However, if in doing so he critically responds to the conduct of a specific convicted person, his statements may cast doubt on the appearance of his impartiality that cannot as such be deemed to be objectively unjustified. Precisely due to the fact that as regards the composition of the court (or of its panels) it has to be ensured that there exist no circumstances that would cast doubt on the appearance of the judges' impartiality, and as a critical response to the complainant's publicly presented standpoints regarding the court that dismissed his appeal also constitutes such a circumstance, the President of the Supreme Court should not have participated in the panel that decided on the complainant's legal remedy against the final judgment of conviction as president of the panel. As has already been clarified, it is important to ensure the appearance of an impartial court. Therefore, it cannot

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45 Cf. the ECtHR Judgment in *Coëme and Others v. Belgium*, dated 22 June 2000, Paragraph 121.

46 These positions of the ECtHR are also expressly included in *Švarc and Kavnik v. Slovenia*, dated 8 February 2007.

47 See Article 39 of the Criminal Procedure Act (Official Gazette RS, Nos. 32/12 – official consolidated text, 47/13, and 87/14), which determines when, due to certain objective or subjective circumstances, a judge cannot be deemed to be impartial in a given case and therefore he or she has to be disqualified from performing the duties of a judge in that case.

48 Cf. Paragraph 7 of the reasoning of Decision of the Constitutional Court No. U-I-149/99, dated 3 April 2003 (Official Gazette RS, No. 44/03, and OdlUS XII, 25).

be of any importance that in the speech at issue the President of the Supreme Court expressly stated that he would not engage [in an assessment of] the correctness and legality of the final judgment. What is at issue is namely not the potential subjective impartiality of the President of the Supreme Court in his role as the president of the panel that decided on the [complainant's] request for the protection of legality, but rather maintaining the appearance of the impartiality of the court in an objective sense. Such is the foundation of the trust of the public in an independent judiciary that resolves disputes in an impartial manner. Without engaging in an assessment of the response of the President of the Supreme Court to the attacks on the authority of the judiciary, the Constitutional Court has to ensure the appearance of impartiality in adjudicating. If the President of the Supreme Court made such a response, then the Supreme Court should have taken that into account when deciding on his disqualification. Thereby it is irrelevant whether the President responded in his function [as the highest representative] of the judicial administration. What is important is whether such a response could cast doubt on the appearance of the impartiality of adjudication if the President of the [Supreme] Court subsequently participated as a judge in [subsequent] adjudication. From such perspective, the speech of the President of the Supreme Court constituted an objective circumstance that could have cast doubt on the appearance of the impartiality of decision-making if he participated in [subsequent] adjudication. As such, the plenary session of the Supreme Court should have considered this and disqualified the President of the Supreme Court from adjudicating in the complainant's case.

54. With regard to the above, the circumstance that President Branko Masleša participated in deciding on the complainant's request for the protection of legality against a Ljubljana Higher Court Judgment, after he had critically responded, in a speech of 6 June 2014, to the positions expressed by the complainant in connection with the Ljubljana Higher Court, cast doubt on the appearance of the impartiality of the Supreme Court. Consequently, the complainant's right to impartial proceedings determined by the first paragraph of Article 23 of the Constitution was violated.

### C

55. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA and the third indent of the third paragraph and the fifth paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, 54/10, and 56/11), composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, and Dr Jadranka Sovdat. Judge Jan Zobec was disqualified from deciding on the case. The decision was adopted unanimously. Judges Deisinger and Sovdat submitted concurring opinions.

*Mag. Miroslav Mozetič*  
President

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**CONCURRING OPINION OF JUDGE DR JADRANKA SOVDAT,  
JOINED BY JUDGE MAG. MIROSLAV MOZETIČ**

**I**

1. As the constitutional law consideration of the alleged violation of the first paragraph of Article 28 of the Constitution is in principle the same in all three Decisions by which the complainants' constitutional complaints were decided on, I am writing a common separate opinion to all three Decisions. It is, however, clear that the cases differ to a certain extent. Insofar as those differences are important (also from the perspective of constitutional law), I believe that such has been appropriately considered by the individual Decisions. I agree with the operative provisions as well as the reasoning of the Decisions. In this separate opinion I only wish to additionally clarify some of the arguments applied [by the Decisions] and thereby show that in the process of their drafting and the formulation of the constitutional law arguments substantiating the adopted Decisions also such arguments had been considered that could have led to different conclusions, however, in my opinion, they were justly outweighed by the selected constitutional law arguments. In order to ensure greater clarity, I am in principle writing a separate opinion to Decision No. Up-889/14, in which I was the judge rapporteur. However, it equally applies to the other two Decisions, even though I do not repeat such hereinafter, as from a reading of the Decisions<sup>1</sup> it clearly follows in which part they are comparable and in which part they are different.
2. Up to the present, the Constitutional Court has encountered alleged violations of the right determined by the first paragraph of Article 28 of the Constitution on a few occasions. It has already adopted certain positions with regard to the content of that right, performed certain assessments, and adopted some positions, with regard to which in some cases they were merely stated without being accompanied by constitutional law arguments in support thereof. In my opinion, all of this is sufficiently elaborated in the reasoning of the Decision. The majority of the more important hitherto positions referred to the review of the constitutionality of statutory provisions of substantive law, while fewer were adopted in constitutional complaint proceedings, whereby the proceedings in connection with such alleged violations most frequently ended with a rejection of their acceptance for consideration on the merits. The present Decision confirms the adopted positions and provides constitutional law arguments in support thereof. I believe that only a few points have to be additionally emphasised with regard to this argumentation.
3. The complainants also directed their allegations against the acts of indictment, which, however, cannot be the subject of a constitutional review by the Constitutional Court. I agree with the arguments set out in Paragraph 14 (19, 17) of the reasoning of the Decision. However, I would like to emphasise that it can by no means

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1 Whenever I refer to the text of the reasoning of the Decisions and I have all of the Decisions in mind, the relevant paragraphs of the reasoning of the other two Decisions are stated in brackets, namely, first that of Decision No. Up-879/14 and second that of Decision No. Up-883/14.

be understood as meaning that when exercising their function state prosecutors do not have to respect the Constitution. They are under an obligation to respect it directly on the basis of the Constitution. In a state governed by the rule of law (Article 2 of the Constitution), the Constitution is a mandatory source of law for every state authority and every bearer of power within that state authority, thus also including state prosecutors, who perform their work within the system of state prosecutors' offices. In addition, in accordance with the first paragraph of Article 15 of the Constitution, human rights and fundamental freedoms are exercised directly on the basis of the Constitution. The situation is only different when their nature is such that their exercise requires statutory regulation (the second paragraph of Article 15 of the Constitution). In such cases, state prosecutors are naturally bound by the Constitution by means of such statutory regulation. In any event, the exercise of the office of a state prosecutor in its entirety has to be based on law (the fourth paragraph of Article 153 of the Constitution). It falls within the competence of an independent criminal court to review whether state prosecutors have acted in accordance with the Constitution, whether in preparing acts of indictment, on the basis of which criminal proceedings against an individual are initiated, they have namely also respected (the law and) all of the individual's human rights and fundamental freedoms and in that framework also the constitutional law safeguard stemming from the first paragraph of Article 28 of the Constitution, as such is their constitutional duty. It is a competence of that court to review the act of indictment from such perspective, and it is in its competence to decide whether the charges against an individual are substantiated. All of this is constitutionally guaranteed also as the defendant's right to judicial protection against acts of a state prosecutor (the first paragraph of Article 23 of the Constitution, which expressly refers not only to rights and duties but to charges as well). As the Constitutional Court has stressed on numerous occasions, on the basis of Article 125 and the first paragraph of Article 15 of the Constitution also the courts have to apply the Constitution directly and protect human rights and fundamental freedoms. Therefore, it is completely clear that through their decision-making they have to "sanction" potential violations of human rights or fundamental freedoms that could be caused by a state prosecutor's act of indictment. In such cases, the court decision is the individual legal act by which the court decides on the (criminal) charges against an individual and by which, in the words of the first paragraph of Article 28 of the Constitution, he or she can be "punished for an act". Consequently, also from the perspective of the cited constitutional provision only a court decision can be the subject of a constitutional law review before the Constitutional Court.

4. From the perspective of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA), which regulates the procedure before the Constitutional Court, we arrive at the same result. The first paragraph of Article 50 of the CCA determines what the subject of review in a constitutional complaint can be. Even though it does not expressly specify that also individual acts by which charges against an individual are decided on can be challenged by a constitutional complaint, such is self-evident. Otherwise, the legis-

lature would have excluded constitutional complaints against criminal judgments (which would constitute a restriction of the sixth indent of the first paragraph of Article 160 of the Constitution), while court decisions in all other instances when courts decide on an individual's rights, obligations, or legal benefits could be a subject of review in proceedings before the Constitutional Court. Such would be an absurd interpretation of the first paragraph of Article 50 of the CCA. Therefore, (also) criminal judgments (court decisions) can be a subject of review in a constitutional complaint, which hitherto has never been disputed. However, a state prosecutor's act of indictment can certainly not be deemed to constitute an act in accordance with the first paragraph of Article 50 of the CCA. Namely, by means of such, charges are brought, but (as has long been established, since the establishment of the independent judicial power) the charges against the individual are not yet decided on, as only an independent criminal court may decide thereon.

### III

5. The next issue that requires additional clarification is the position that the question of the relationship between the operative provisions and the reasoning of a judgment and what belongs in the operative provisions and what in the reasoning of a judgment is not relevant to constitutional law, but a question of the correct interpretation of the law regulating the criminal procedure. The regular courts or the highest regular court have the last word regarding the interpretation of laws, unless it reaches the level of constitutional law (the first paragraph of Article 127 of the Constitution). A glance into history and across the borders of our state shows that the differentiation between what is to be included in the operative provisions and what belongs in the reasoning of a judgment in the law regulating the criminal procedure that is currently in force is evidently a consequence of the fact that in the past our territory belonged to the Austrian Empire. Also the current Austrian regulation of criminal procedure<sup>2</sup> is (still) the same as in our state. Even if we only take a look at German or French judgments, to remain on the Continent, it soon becomes clear that such a regulation is unknown to them, as the part of the judgment that, when compared to our system, would be called the operative provisions only contains a statement that a certain person is the perpetrator of a specific criminal offence for which a specific sentence is imposed on him or her.<sup>3</sup> Everything that constitutes "the description of

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2 In accordance with point 1 of the first paragraph of § 260 of the Austrian Criminal Procedure Act (*Strafprozessordnung* – hereinafter referred to as the Austrian StPO), the operative provisions of a judgment of conviction also have to include a statement regarding "welcher Tat der Angeklagte schuldig befunden worden ist, und zwar unter ausdrücklicher Bezeichnung der einen bestimmten Strafsatz bedingenden Tatumstände" ("the commission of which criminal offence the defendant was found guilty, namely by expressly stating the circumstances of the act that substantiate the application of a particular provision of criminal law" (translated by V. Božič). The text of the Austrian StPO is accessible at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326>).

3 See footnote 16 (24, 19) of the reasoning of the Decision. The French *Code de procédure pénal* thus determines in the third paragraph of Article 485 that the operative provisions (*dispositif*) of the judgment (*jugement*)

the criminal offence in the operative provisions” in our system is included in the reasoning of the judgment.<sup>4</sup> The comparative legal argument as such, of course, tells us nothing of constitutional law relevance. It only tells us that in some other countries the same statutory regulation of this issue as ours is in force, while others regulate it differently. Therefore, it also has to be examined from a constitutional perspective.

6. The Constitution does not expressly regulate this question. If the Constitutional Court elevated the statutory regulation of the relationship between the operative provisions and the reasoning of a judgment in criminal proceedings that is currently in force to a constitutional level, such would entail that in the future any other statutory regulation would be unconstitutional – such would be an obstacle to the legislature introducing, e.g., a statutory regulation following the German or French model. From the perspective of the scope of the freedom of the legislative power, such is anything but irrelevant. In accordance with the principle of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution), the legislature is that power that regulates social relations with legally binding effects, and in accordance with the system of checks and balances between the equal branches of power, it is the Constitutional Court that determines the legislature’s constitutional boundaries and that sanctions [i.e. penalises] its actions by abrogating a law if those boundaries are overstepped. It can only set its constitutional boundaries on the basis of (the interpretation of) the Constitution. In my opinion, the Constitution does not contain a basis that would require that the structure of the criminal judgment be regulated in one or another manner. If the Constitutional Court has no basis in the Constitution for setting constitutional limits on the legislature with regard to the statutory regulation of an issue, but nevertheless acted in such a manner, it would thereby act in contradiction to the principle of the separation of powers. I do not understand the position of the esteemed academician Prof. Dr Marijan Pavčnik, who stated that “[i]n criminal cases, the legally relevant facts of the case and the statutory definition of the criminal offence have to be included already in the operative part of the act of indictment and subsequently also in the operative provisions of the judgment. From the perspective of their meaning, the

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have to include a statement of the criminal offences of which the persons in question were found guilty or responsible for, as well as the penalty, the applied laws, and the potential civil conviction (resulting from a civil claim arising from the criminal offence) (“Le dispositif énonce les infractions dont les personnes citées sont déclarées coupables ou responsables ainsi que la peine, les textes de loi appliqués, et les condamnations civiles.”). When the jury court (*cour d’assises*) is deciding, a special transcript regarding the vote on the individual points of the judgment (*arrêt*) is prepared. The text of the Code of Criminal Procedure is accessible at: [http://legifrance.gouv.fr/affichCode.do;jsessionid=0E51A19E187E813125E9C52E81ED0706.tpdila24v\\_3?cid-Texte=LEGITEXT000006071154&dateTexte=20141209](http://legifrance.gouv.fr/affichCode.do;jsessionid=0E51A19E187E813125E9C52E81ED0706.tpdila24v_3?cid-Texte=LEGITEXT000006071154&dateTexte=20141209).

- 4 In accordance with the fourth paragraph of § 260 of the German *Strafprozeßordnung* (StPO), similarly, only the legal description of the act is included in the operative provisions, while in accordance with the first paragraph of § 267 of this Act, the reasoning has to contain the facts that the court deemed to have been proven and in which the elements of the criminal offence have been identified. The text of the Act is accessible at: <http://www.gesetze-im-internet.de/stpo/>.

operative provisions and the reasoning are a whole, but such does not entail that the content of the operative provisions may be transferred into the reasoning [...]”<sup>5</sup> as a line of constitutional law arguments that would dictate such. In my opinion, it remains at the level of the statutory regulation. It is possible that the Supreme Court erred in interpreting it in the manner it did. However, in light of what has been stated above, such is not a matter for constitutional review. In this regard, also the finality of judgments is not constitutionally relevant.<sup>6</sup> In legal theory, the question of whether finality extends (only) to the operative provisions of a court decision<sup>7</sup> is a welcome subject of legal scholars’ speculations, and not only in the area of criminal procedural law.<sup>8</sup> Not only is there no explicit constitutional regulation of the finality of operative provisions or the limits of finality in this respect, there is also no explicit statutory regulation of such.

7. In the light of all of the above with regard to the question of whether the delineation of the operative provisions and the reasoning of a judgment constitutes a constitutional law issue, I would like to apply the elegantly phrased warning that Uroš Ferjan, an advisor to the Constitutional Court, formulated during the internal constitutional law discussions of the cases, which in my opinion exposes the essence of what has been said: the Constitutional Court has to be careful not to turn the requirement that laws be interpreted in accordance with the Constitution into “the requirement that the Constitution be interpreted in accordance with laws”.

#### IV

8. The most important issue that deserves additional clarification and further illustration is the question of the limits of the constitutional review of a criminal judgment as they follow from the first paragraph of Article 28 of the Constitution.

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5 See M. Pavčnik, *Predpraznični dnevnik, Prvi del: od 24. novembra do 7. decembra 2014* [The Pre-Holiday Journal, Part One: from 24 November to 7 December 2014], *Pravna praksa*, No. 48 (2014), p. 28.

6 From a comparative law perspective, in spite of the different regulation, the same positions regarding the finality of the operative provisions of a judgment can be found in German criminal law doctrine and in Slovene. When considering the finality of a judgment (*Die Rechtskraft des Urteils*), with regard to substantive finality Beulke stated the following: “The finality only encompasses the operative provisions, and not also the reasoning.” (Translated by M. Hren), see W. Beulke, *Strafprozessrecht* [Criminal Procedural Law], 12<sup>th</sup> Edition, C. F. Müller, Munich 2012, p. 341; similarly also Laubenthal and Nestler: “Only the operative provisions of a judgment, and not its reasoning, become final.” (Translated by M. Hren), see K. Laubenthal, N. Nestler, *Strafvollstreckung* [Execution of Criminal Penalties], Springer, Berlin, Heidelberg 2010, p. 8.

7 The academician Prof. Dr Pavčnik added the following to the cited part: “Let us not forget that finality extends to the operative provisions.” M. Pavčnik, *op. cit.*, p. 28.

8 Particularly numerous debates have been held in the area of civil procedural law, wherein the former President of the Constitutional Court wrote extensively on these questions; see, e.g., D. Wedam-Lukić in: L. Ude, A. Galič (Eds.), *Pravdni postopek: zakon s komentarjem, 3. knjiga* [The Civil Procedure: The Act with Commentary, Book 3], Uradni list Republike Slovenije, GV Založba, Ljubljana 2009, esp. pp. 156–166. After stating that the operative provisions become final, with reference to Triva and Dika, she *inter alia* stated the following: “Nevertheless, the reasoning ‘participates’ in the finality of the operative provisions insofar as such is necessary for the identification of the content of the decision.”; *ibidem*, p. 156.

Those limits simultaneously establish the constitutional law criteria that courts have to observe in order to avoid violating the constitutional principle of legality in criminal law. An outline of the scope of the review is provided already in the general part of the reasoning regarding the content of that constitutional provision and the requirements stemming from it that is contained in part B – I of the reasoning of the Decision (such equally applies to all three Decisions). The scope of the review may only originate in the constitutionally determined relationship between the (regular) courts and the Constitutional Court. Over more than twenty years of deciding on constitutional complaints, the approach highlighted in Paragraph 13 (18, 16) of the reasoning of the Decision has undoubtedly become settled. The situation can be no different as far as the supervision exercised by the Constitutional Court over observance of the principle of legality in criminal law is concerned. The Constitutional Court can supervise the constitutional consistency of the interpretation of criminal substantive law from the perspective of all of the requirements stemming from this principle, which were presented in further detail in the Decision. We usually formulate a view regarding the constitutional level of an interpretation of statutory provisions (which by themselves are not unconstitutional) in a judgment with the help of the following approach: if [in a statutory provision] the legislature adopted the same position as the position that follows from the judgment at issue, would the Constitutional Court abrogate such a statutory provision due to its inconsistency with a human right – if such is the case, there also exists a violation of that human right by the judgment. However, even though we eventually arrive at such a conclusion, when deciding on a constitutional complaint the Constitutional Court is not in exactly the same position as when reviewing the constitutionality of a law. With regard to the latter, the minor and major premises of a constitutional review are always regulations – e.g. a law or the Constitution or the provisions they contain that have to be interpreted. The situation with regard to constitutional complaints is different. The subject of the review is a judgment. The legally relevant facts of a concrete case constitute the minor premise of a court's decision-making, while only the major premise is the statutory definition of the criminal offence that is extracted from a statutory provision through interpretation. As the Constitutional Court is not a trier of fact (*judex facti*), the question quickly arises as to how far it may go in its review when monitoring the constitutional consistency of the interpretation of the major premise of the adjudication. Should it completely exclude facts from its review and, if such is not possible, how far-reaching are its authorisations to review the constitutionality of the adjudication with regard to facts?

9. The answer to this question in the present Decisions is in reality no different than in decisions on constitutional complaints in general. The Constitutional Court is bound by the state of the facts as it was established by a court in its judgment. To date, the Constitutional Court in fact has only descended to the level of the state of the facts as an exception, and did so only in the framework of Article 22 of the Constitution when in addition to manifestly erroneous interpretations of laws it also allowed

[constitutional complaints alleging] manifestly erroneous findings of fact that had decisively affected a procedural right.<sup>9</sup> However, the Constitutional Court has consistently held that a review of the correctness of the established state of the facts, including the free assessment of evidence, is not a matter of constitutional review (unless it falls within the scope of Article 22 of the Constitution). Consequently, it could also review a potential violation of the *in dubio pro reo* principle in criminal proceedings only from the perspective of Article 22 of the Constitution, thereby descending entirely to the level of the factual – the level of the assessment of evidence, of course only if there exists a manifest error.<sup>10</sup> From the perspective of the first paragraph of Article 28 of the Constitution, anything similar is not even an option.

10. The answer to the question of where the limits of the constitutional review lie is in fact obtained together with the answer to the question of what requirements for the Constitutional Court stem from the constitutional substantive safeguard that is being discussed; firstly in general (part B – I of the reasoning of the Decisions), and subsequently as applied to the criminal offences and constitutional law questions that we were facing (part B – II of the reasoning of the Decisions). Such does not entail that the Constitutional Court would be lecturing the courts on the ABCs of legal argumentation that provides the tools for judicial decision-making. Nowadays these are well known to all thanks to the fundamental works of the academician Prof. Dr Pavčnik. They simply have to be applied if we wish to perform judicial work *lege artis*. In the present case, the Constitutional Court applied them to clarify what observance of the principle of legality in the interpretation of criminal substantive law concretely entails and how the Constitutional Court is going to supervise it. Before I confirm the answer that the Decision(s) provided to that question, I would like to devote some further attention to two previous decisions that may be very useful in illustrating in a simplified manner what is at issue.
11. The first example comes from the period of the first years following the state's independence when, before the introduction of the tolar as the Slovene currency, scrips were in circulation. The complainant was convicted of the criminal offence of counterfeiting money for counterfeiting scrips. In his constitutional complaint, he invoked a violation of the first paragraph of Article 28 of the Constitution, as allegedly by deeming that the scrips constituted money the court inadmissibly extended the scope of criminal liability. By Decision No. Up-40/94, dated 3 November 1995 (OdIUS IV, 136), the Constitutional Court decided that there had been no violation (let us disregard the question of whether the decision could also have been different<sup>11</sup>). That the pieces of paper produced by the complainant were scrips and not banknotes that are a form of money was a fact established in the court proceedings. The Constitutional Court did not assess whether that fact had been established correctly. It

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9 See Decision No. Up-347/96, dated 13 October 1999 (OdIUS VIII, 296), to be precise, the position that the erroneous finding of who had been the complainant's lawyer at the time the denationalisation decision was served entails the establishment of a fact that decisively affects the procedural position of the parties.

10 The Constitutional Court clarified that term in Order No. Up-62/96, dated 11 April 1996 (OdIUS V, 68).

11 See the Dissenting Opinion to the Decision of Judge Boštjan M. Zupančič.

reviewed the court's position that the scrip as a legally relevant fact extracted from the concrete case (according to the statutory element, the subject of counterfeiting was money, and according to the established state of the facts, the subject of the counterfeiting was a scrip – the established subject of the counterfeiting is a relevant fact) corresponded to the statutory element money. Money, in turn, had to be interpreted in light of what it represented in the economic and legal system of the state; in accordance with the constitutional requirements stemming from the principle of legality in criminal law, naturally strictly. Thereby the Constitutional Court in fact reviewed the observance of the principles of *lex certa* (was the courts' interpretation too loose with regard to the defined statutory element), *lex scripta* (did the court, by deeming that not only banknotes but also scrips constitute paper money, include something in the field of criminal liability for this criminal offence that had not been included by the legislature), and *lex stricta* (did the court with its interpretation in reality apply analogy to establish that (also) a scrip constitutes money).

12. The second case in which the Constitutional Court established a violation of the first paragraph of Article 28 of the Constitution (Decision No. Up-265/01, dated 26 October 2001, Official Gazette RS, No. 88/01, and OdlUS X, 228) provides an equally apt illustration. It concerned the criminal offence of unauthorised crossing of the state border. The regular court established that no crossing of the border had occurred, but nevertheless deemed that there existed reasonable suspicion that the criminal offence, of which the crossing of the border was (also) a statutory element, had been committed. Again, the Constitutional Court did not consider the question of whether the border had been crossed or not – such had been established by the court. The Constitutional Court only reviewed whether that legally relevant fact of the case at issue, corresponded to the statutory element of crossing the border of the criminal offence at issue, and found that it did not. With such a broad (even absurd) interpretation of the term crossing the border the court failed to include in the description of the decisive facts the statutory element of crossing the border, and at the same time it ventured into the legislature's field as it included in the scope of criminal liability also something that the legislature had completely clearly left outside of the scope of liability.
13. What do these two cases tell us? The Constitutional Court does not engage in an assessment of whether the court correctly established the state of the facts. It does not assess whether the court correctly extracted from all of the established facts of the real life case that happened as a past event the relevant facts that are to be compared with the appropriate statutory element of the statutory definition of the criminal offence. The Constitutional Court only verifies if the court interpreted a statutory element of the criminal offence – e.g. “money” – in accordance with the requirements of the principle of legality when through its interpretation it included in that term also the extracted legally relevant fact of the concrete case – e.g. “a scrip”. The Constitutional Court certainly assesses such an interpretation only from the constitutional perspectives that are precisely described in its decision, as otherwise it could not ensure the respect for that human right in individual criminal proceedings. However, it conducts such assessment as the last court, and not as the first. In order to interpret the

law in accordance with the Constitution, which is its constitutional duty, the criminal court must already itself include that part of the assessment in its adjudication. The criminal court of first instance is thus the first<sup>12</sup> court that has to conduct that assessment. The courts that decide on the legal remedies against the criminal judgment have to verify whether the assessment was performed correctly. In accordance with the constitutional (the third paragraph of Article 160 of the Constitution) and statutory (Article 51 of the CCA) conditions with regard to the exhaustion of legal remedies, only following such is it the turn of the Constitutional Court. In order for the Constitutional Court to be able to verify if in a criminal conviction the court observed the requirements of the principle of legality, it is thus necessary that we know first of all what facts the court extracted as the legally relevant facts of the concrete case, individually with regard to each statutory element of the criminal offence. Unless we know and until we know whether we are dealing with a “scrip”, “banknote”, “ticket or receipt”, or something else – i.e. the extracted subject of counterfeiting as the relevant fact – we cannot conduct a review from the perspective of the statutory element of the criminal offence at issue, i.e. “money”, which has to be interpreted in accordance with the *lex scripta*, *lex certa*, and *lex stricta* requirements. If a court does not keep such in mind, there might occur a violation of the first paragraph of Article 28 of the Constitution, which the court is bound to observe in accordance with a constitutionally consistent interpretation of the law.

14. Certainly, such is not particularly difficult when what we have before us is a case that can be said to be a textbook example, as we are speaking of something tangible that is always detectable in the external world and undoubtedly expressed in the physical form of an object – as applies to a banknote or a scrip (in a precisely defined form). However, in principle the situation must not be any different if we are faced with an essentially different term, such as the acceptance (of the promise of a reward) or the promise (of a reward). Those two elements are, just like money, objective statutory elements of criminal offences. If we allowed it to be different, i.e. that a different position was adopted due to the complexity and difficulties in identifying the legally relevant fact(s) of a concrete case that correspond to those two statutory elements of criminal offences, such would entail unequal treatment with regard to a human right. In my opinion, such would be inadmissible.
15. What kind of different position do I have in mind? Different in that in light of the nature of that statutory element and in particular because, as a general rule, the acceptance (of the promise of a reward)<sup>13</sup> will not be directly detected, we would have adopted the position that the realisation of that statutory element would fall only and exclusively in the scope of the review of the correctness of the established facts and the correctness of the assessment of evidence – namely in its entirety outside the scope of the review from the perspective of the first paragraph of Article 28 of the

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12 And of course, prior to that, the state prosecutor (and before that the police), but the Constitutional Court does not review such.

13 The same is naturally true as regards the promise of a reward.

Constitution. Thus, from the perspective of that constitutional safeguard, the position of the Supreme Court, which in reply to an objection stated that it suffices if a statutory element is concretised in the reasoning, but failed to clarify by means of what precisely the acceptance of the promise (as well as the giving of instructions to request its prepayment) and the promise of the reward were concretised, would be undisputable. Also in the case at issue such should have been substantiated *lege artis* in the reasoning, as it again certainly does not entail an aspect of the first paragraph of Article 28 of the Constitution. If we wanted to adopt such a position in the cases at issue, in my opinion, we could have done so only if we had previously changed our position from the two above-presented Decisions, as in such an event we would have had to change it with regard to all future cases. I am afraid that such a change of position would have entailed that the Constitutional Court would have had to retreat to the position that the subject of review from the perspective of that human right is in fact only the constitutionality of the statutory regulation as such. The manner in which the courts interpreted it in adjudicating would have become (or remained) only a matter of the correct application of substantive law in light of the established state of the facts. I cannot find any arguments in support of such a change of position. On the contrary, it would even go against the clearly presented constitutional law reasons that clarify the content of the requirements stemming from the principle of legality in criminal law in the Decision(s).

16. The above, however, does not entail that when conducting a review from the perspective of the first paragraph of Article 28 of the Constitution the Constitutional Court may even reach into the sphere of establishing the facts, the assessment of evidence, the correctness of the extraction of the relevant facts, i.e. the legally relevant facts of the concrete case. Although that part of adjudication is conducted “by looking at the statutory element of the criminal offence and back again”,<sup>14</sup> its essence lies only in the establishment of the factual – even if such is peeled down to the level of the legally relevant facts of the concrete case – that is the part that belongs to and has to remain with the judge, who is the trier of fact (*judex facti*). The Constitutional Court (outside of the few exceptions determined by Article 22 of the Constitution) is not and may not become such, as that would entail disregard for the constitutionally defined relationship between the (regular) courts and the Constitutional Court. Consequently, the latter may not consider that part of adjudication. When that part is concluded, when the result of that part has been finalised – when it becomes clear that what we have in front of us is a “scrip” – then the Constitutional Court reviews whether by including it in the statutory element of “money” the court respected the requirements stemming from the constitutional substantive safeguard. That is the answer to the question of how far towards [establishing] the factual the Constitutional Court may move when monitoring adjudication from the perspective of the first paragraph of Article 28 of the Constitution.

14 See M. Pavčnik, *Argumentacija v pravu (Od življenjskega primera do pravne odločitve)* [Legal Argumentation (From the Real Life Event to the Legal Decision)], Cankarjeva založba, Ljubljana 2002, pp. 106–108.

17. In the cases at issue, it was established that the courts failed to extract the legally relevant facts of the concrete case that correspond to the element of the acceptance of the promise of a reward or the promise of a reward (even if such was not directly detected, but is derived from other conduct that in accordance with its nature and content and in the circumstances of the case at issue allows the drawing of such a conclusion). They attempted to remedy that deficiency by reasoning based on the concretisation of the other statutory elements, which of course cannot be admissible if it leads to the merging of two or more statutory elements of a criminal offence.<sup>15</sup> When we are faced with such a situation, it becomes clear that the courts did not take into account the above-stated constitutional requirements stemming from the principle of legality in criminal law. However, at the same time, such also entails that that part of their task that pertains only to them (firstly to the court of first instance, whose mistakes can be remedied by the court of second instance) cannot be performed by the Constitutional Court in their stead. That would be precisely what the Constitutional Court would have done if on the basis of all of the facts established by the judgments it extracted the legally relevant facts of the case at issue that constituted the acceptance (of the promise of a reward) or the promise (of a reward) by itself, in order to even be able to conduct a review from the perspective of the human right determined by the first paragraph of Article 28 of the Constitution. It would have descended to the level of the trier of fact (*judex facti*). From the perspective of that human right, that path is closed. Therefore, also in my opinion, the decision to remand the case for new adjudication is correct, as not only are the conditions determined by the first paragraph of Article 60 of the CCA for the Constitutional Court to decide [cases on the merits] not fulfilled, but such is also subject to constitutional constraints.
18. In Paragraph 33 (44, 36) of the reasoning of the Decision the Constitutional Court concisely summarised the task that awaits the court in the new proceedings. As it decided that the case is to be remanded for new adjudication to a different judge, a judge who is not yet acquainted with the case will need a certain amount of time to study the case and that will surely contribute to the length of the new proceedings. Although the Constitutional Court did not dispute the constitutionality of the position of the plenary session of the Supreme Court that the period of limitations of criminal prosecution no longer applies once a judgment becomes final, it is not superfluous to draw attention to the respect for the right to a trial without undue delay determined by the first paragraph of Article 23 of the Constitution (see Decision of the Constitutional Court No. U-I-25/07,<sup>16</sup> dated 11 September 2008, Official Gazette RS, No. 89/08, and OdlUS XVII, 48).

Dr Jadranka Sovdat

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15 See Paragraph 30 (40, 33) of the reasoning of the Decision.

16 Thereby the Constitutional Court decided on the constitutionality of the statutory regulation in instances of new adjudication in criminal proceedings in which a final judgment was abrogated in a procedure with extraordinary legal remedies.

I voted for the Decision and I agree with all of its arguments. I further agree with the additional arguments from the concurring opinion of Judge Dr Jadranka Sovdat, which I have joined. I would merely like to add another emphasis:

I would particularly like to emphasise how important it is that in exercising their office state prosecutors consistently respect the laws and thereby do not act partially or arbitrarily. What I have in mind is particularly the content of the act of indictment, from which it must clearly follow that the defendant is charged with conduct (acts) that is incriminated by law and that such conduct (acts) of the defendant has to be concretely described (defined).

On the other hand, the responsibility of the court (the judge) to assess, as the law obliges it to, already at the beginning of proceedings, whether in formulating the act of indictment on the basis of which the criminal proceedings were initiated the state prosecutor observed the statutory provisions and the Constitution, especially human rights and in particular also the safeguard under the first paragraph of Article 28. The court of first instance is the court that is first and foremost responsible for ensuring that criminal proceedings are not even initiated if the act of indictment that it has before it does not in its entirety pass a review of its constitutionality and legality.

In accordance with my deep conviction, such a review is extremely important from the perspective of the protection of everyone's human rights and fundamental freedoms, as follows already from the Preamble of the Constitution. The aim of such is not only to prevent an individual from being convicted, but also from being charged for an act that had not been declared a criminal offence under law. Inconsistent or even discriminatory or arbitrary exercise of that competence opens the door to potential abuses of the system of the administration of justice and consequently also leads to the distrust of the general public in the system of the administration of justice (and the judiciary).

*Mag. Miroslav Mozetič*

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#### **CONCURRING OPINION OF JUDGE DR MITJA DEISINGER**

With this concurring opinion I wish to emphasise the importance of the unanimously adopted Decisions of the Constitutional Court as precedents regarding the principle of legality in criminal law (the first paragraph of Article 28 of the Constitution) and the significance of the abrogation of the judgments from the perspective of adjudicating in the new proceedings.

1. By the Decisions in question, the Constitutional Court held that the courts, from the Ljubljana Local Court to the Ljubljana Higher Court and the Supreme Court, violated the first paragraph of Article 28 of the Constitution and in violation of a human right convicted Janez Janša, Ivan Črnkovič, and Anton Krkovič. All three judgments

of those courts were abrogated. Such entails that Janez Janša, Ivan Črnkovič, and Anton Krkovič thereby became innocent (the presumption of innocence in accordance with Article 27 of the Constitution).

2. Along with the abrogation of the judgments, I also proposed that all of the constitutional complainants be acquitted of the charges, but the proposal did not gain the support of the majority. The decision is thus left to the court of first instance, which will have to take into account the reasons of the Constitutional Court decisions, and due to the violation of the first paragraph of Article 28 of the Constitution, or in other words the finding that the statutory elements of the acts of commission were not concretised in the descriptions of the offences, reject the act of indictment or acquit the constitutional complainants.
3. The precedential significance of the mentioned Decisions that exceeds the meaning of the consideration of the individual cases lies in the consistent observance of the constitutional principle of legality in criminal law, which is determined as a human right by the constitutional provision of the first paragraph of Article 28 of the Constitution. It entails that in our country no one can be convicted for an act unless the concretised statutory elements of a criminal offence follow therefrom. In accordance with the third paragraph of Article 1 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12), Constitutional Court decisions are binding. Such applies to the new proceedings in the cases at issue, namely as regards the court as well as the state prosecutor's office. In cases that are essentially the same, such applies also with regard to all other criminal proceedings.
4. By the Decisions the Constitutional Court held that the abstract elements of the criminal offences under the first paragraph of Article 269 and the first paragraph of Article 269a of the Criminal Code (Official Gazette RS, No. 95/04 – official consolidated text – hereinafter referred to as the CC), i.e. “accepts the promise of a reward” and “promises a reward”, respectively, as acts of commission and therefore necessary and decisive elements of those criminal offences, were not concretised at all in the descriptions of the criminal offences in the operative provisions, but they were merely stated or reiterated in general terms. The courts further failed to concretise the abstract elements of the criminal offences in the reasoning of the challenged judgments. The Constitutional Court thus rightly qualified such a failure to concretise the abstract elements of the criminal offences as a violation of the right determined by the first paragraph of Article 28 of the Constitution. Such a violation of the principle of legality simultaneously also entails a violation of Article 7 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).
5. In its review of the constitutionality of the challenged judgments, the Constitutional Court could not consider the issue of the regulation of the structure of a criminal judgment of conviction as such is a question of the correct interpretation of criminal procedural law and thus a matter for the competent [regular] court. In the new proceedings the court of first instance, as well as the state prosecutor's office, will thus have to consistently respect statutory law, namely the provisions of the CC and the

Criminal Procedure Act (Official Gazette RS, Nos. 32/12 – official consolidated text, 47/13, and 87/14 – hereinafter referred to as the CrPA), as well as the requirements stemming from the first paragraph of Article 28 of the Constitution.

6. The Constitutional Court returned the cases of all three constitutional complainants to the court of first instance for new adjudication and assignment to a new judge. The challenged judgments no longer exist, the cases have been remanded for new adjudication, whereby the previously lodged act of indictment remains their foundation. Such entails that the lodged act of indictment of the Office of the Supreme State Prosecutor of the Republic of Slovenia No. Ktr 169/10, dated 6 August 2010, corrected on 10 August 2010, amended on 30 January 2011, 17 December 2012, and 27 February 2013, and corrected on 5 March 2013, is once again to be assessed in the summary proceedings before the Ljubljana Local Court. In accordance with the first paragraph of Article 437 of the CrPA, the judge's assessment will contain a finding as to whether there exists any reason why the procedure should be stayed. In that assessment the first instance judge will have to take into account the reasons of the Decisions of the Constitutional Court by which the judgments were abrogated due to a violation of the complainant's human right determined by the first paragraph of Article 28 of the Constitution and assess whether the operative part of the act of indictment contains the concretised elements of the criminal offences. The reasons for staying proceedings are determined by Article 277 of the CrPA. If the operative part of the act of indictment does not contain the concretised elements of the criminal offence, there exists a legal basis to stay the criminal proceedings in accordance with point 1 of the first paragraph of Article 277 in conjunction with the first paragraph of Article 437 of the CrPA.
7. In assessing the operative part of the act of indictment, the judge will have to establish whether, in light of the reasons of the Decisions of the Constitutional Court, the description of the criminal offence in the act of indictment, which has to be the same in both summary and regular proceedings, satisfies all of the requirements stemming from point 2 of the first paragraph of Article 269 in conjunction with the first paragraph of Article 434 of the CrPA, namely if it contains the concrete statutory elements of the criminal offence.<sup>1</sup> In that assessment he or she will not be able to avoid the finding that the description of the act does not contain the concretised abstract statutory elements of the acts of commission, that, furthermore, the time and place of the commission of the criminal offences are not stated,<sup>2</sup> that point I of

1 M. Pavčnik in *Pravna praksa*, No. 48, 11 December 2014, under the heading "Law and Society": "In criminal cases, the legally relevant facts of the concrete case and the statutory definition of the offence have to be included already in the operative part of the act of indictment and subsequently in the operative provisions of the judgment. Although, from the perspective of their meaning, the operative provisions and the reasoning constitute a whole, such does not entail that the content of the operative provisions may be transferred into the reasoning. Let us not forget that finality extends to the operative provisions."

2 Š. Horvat, *Zakon o kazenskem postopku s komentarjem* [The Criminal Procedure Act with Commentary], GV Založba, Ljubljana 2004, p. 600, point 3: "However, it is important that the abstract statutory elements of the criminal offence and those provisions of the general part of the CC regarding criminal offences and criminal liability (Articles 7 through 32 of the CC) that are applied in the act of indictment follow from the

the operative provisions also does not contain a description of complicity, which is also conceptually impossible, and that there exists an unlawful contradiction as to the descriptions of the acts under points II and III of the operative part of the act of indictment. Above all, it is not possible to reiterate an abstract element of a criminal offence also as a concrete element of that same criminal offence. The subsumption of the abstract under the abstract entails a logical paradox as the same cannot be subsumed under the same, but they have to be equated (a tautology) and a syllogism simply is not a tautology.<sup>3</sup>

8. In the event that the main hearing is called immediately, following the reading of the act of indictment and the conclusion of the main hearing in accordance with the first paragraph of Article 443 of the CrPA, the judgment could be delivered and proclaimed immediately and without interruption in accordance with the second paragraph of the same Article of the CrPA. However, also in such a case the judge would firstly be obliged to assess the description of the acts in the operative part of the act of indictment on the basis of which the new proceedings were initiated. Due to the same reasons that were mentioned in the preceding paragraph of my Opinion and that are based on the reasoning of the Decisions of the Constitutional Court, the judge would only be able to establish that the conduct of the constitutional complainant, as included in the description of the acts, does not contain the concretised elements of the alleged criminal offences. The only possibility that follows from such a legal conclusion is the delivery of a judgment of acquittal in accordance with point 1 of Article 358 of the CrPA.
9. With the exception of the abrogated judgment in the case at issue, the case law of the Supreme Court also followed the correct position that non-concretised statutory elements require the defendant's acquittal. Such is, for example, evident from the Supreme Court Judgments of acquittal No. I Ips 25465/2011, dated 20 February 2014 (due to an inadequate description of the desecration of a grave), and No. I Ips 22697/2011, dated 29 May 2014 (the description did not contain a concretisation of the allegation of what [information] from the personal life of the private prosecutor the convicted person was allegedly distributing or claiming). By Judgment No. I Ips 153/2012, dated 1 March 2012, [the Supreme Court] acquitted the defendant, who had been convicted of the criminal offence under Articles 13 and 14 of the Regulation of Military Courts and sentenced to death by hanging, loss of all political and civil rights, and the confiscation of his entire movable and immovable property. It acquitted him as a result of the allegation contained in the description of the act in the operative provisions of the judgment that on an undetermined day he had committed the criminal offence of a war crime against unidentified persons and in

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concretised description of the defendant's conduct. Without such concretisation of the charges, the defendant is not ensured an effective defence." And *ibidem*, p. 742, point 7: "The act that a defendant is accused of does not constitute a criminal offence under law if any of the statutory elements of the criminal offence is missing from the description of the act or if in the description of the defendant's conduct those statutory elements are not stated in concrete terms."

3 J. Zobec in his Dissenting Opinion, dated 16 June 2014, in Case No. Up-373/14 (Official Gazette RS, No. 47/14).

an unspecified way. Even with regard to post-war proceedings, the Supreme Court thus required the standard determined by the current procedural laws, however it disregarded such in the judgment abrogated in the case at issue. Even with regard to minor offences the Supreme Court requires a concrete description of the act in the operative provisions of decisions, as otherwise proceedings are stayed (Decisions No. IV Ips 94/2014, No. IV Ips 47/2013, No. IV Ips 121/2012, No. IV Ips 73/2012, No. IV Ips 22/2012, No. IV Ips 21/2012, and numerous others).

10. With regard to the new proceedings, the Decisions of the Constitutional Court only refer to the decision of the first instance judge, however the precedential position determined by the Decisions indirectly also applies to the state prosecutor. As in any criminal proceedings, the decision whether to insist on the lodged act of indictment or to withdraw such lies in his or her independent competence. Neither the state prosecutor nor the court may interfere with the description of the acts contained in the act of indictment because they are bound by the strict and explicit prohibition of *reformatio in peius*, i.e. no amendment that would worsen the position of the constitutional complainants is possible. [A violation of] the prohibition of *reformatio in peius* is an essential violation of criminal procedure and applies to all stages of proceedings (see Articles 371, 385, 397, 415, 424, 428, and 429 of the CrPA). Such a prohibition also entails the conscious denial of the principle of material truth because such entails the establishment of a less favourable state of the facts and therefore a worsening of the defendant's positions.<sup>4</sup> From such it follows that only new evidence that is favourable to the defendant is possible. Consequently, the court will, *inter alia*, have to take into account the evidence contained in "the report of Pieter Westerhof", which the state prosecutor did not present, decide on the search of the office located at the address Brodišče 5 in Trzin, which was conducted without a court order, and the searches conducted in Finland on the basis of police measures. Such an interpretation is consistent with the purpose of the institution of the prohibition of *reformatio in peius* and is also accepted by recent case law.<sup>5</sup> The Constitutional Court deemed that the prohibition of amending a decision to the detriment [of the defendant], i.e. the prohibition of *reformatio in peius*, is a part of the concept of a fair trial in criminal proceedings from the perspective of Article 23 and the first paragraph of Article 29 of the Constitution.<sup>6</sup>
11. The case at issue further raises the question of whether the criminal prosecution will become time-barred during the new proceedings. It follows from Decision of the Constitutional Court No. U-I-25/07, dated 11 September 2008 (Official Gazette RS, No. 89/08, and OdlUS XVII, 48), that the CrPA is inconsistent [with the Constitution] because it does not determine a time limit in which the new proceedings have to be concluded. At the same time, the Constitutional Court determined the manner

4 Ž. Zobec, *Komentar Zakona o kazenskem postopku s sodno prakso* [Commentary on the Criminal Procedure Act with Case Law], *Gospodarski vestnik*, Ljubljana 1985, p. 781.

5 Š. Horvat, *op. cit.*, p. 832, point 7.

6 Decisions of the Constitutional Court No. Up-49/97, dated 29 November 2001 (Official Gazette RS, No. 101/01, and OdlUS X, 232), and No. Up-2442/06, dated 4 December 2008 (Official Gazette RS, No. 119/08, and OdlUS XVII, 95).

of implementation of that Decision by determining that until the entry into force of the [new] Criminal Code (Official Gazette RS, No. 55/08 and 66/08 – corr. – hereinafter referred to as the CC-1), the new proceedings have to be concluded no later than within two years following the abrogation of a final judgment. The new CC-1 has been in force since 1 November 2008 and on that date the mentioned manner of implementation, which was transitional, ceased to have effect. The second paragraph of Article 91 of the CC-1 precisely determines the conditions for the beginning of the limitation periods and when prosecution becomes time-barred in the event of the abrogation of a final judgment. That limitation period can only be applied in the new adjudication within the framework of procedures with extraordinary legal remedies before the regular courts, namely in the procedure for the protection of legality before the Supreme Court when that court abrogates a final judgment due to essential violations of criminal procedure or violations that affected the legality of the judicial decision and remands the case for new adjudication. If it establishes a violation of substantive criminal law (such as a violation of the principle of legality that is reviewed as a violation of Article 28 of the Constitution by the Constitutional Court), the Supreme Court cannot abrogate a final judgment, but has to amend it by itself by a judgment of acquittal. Therefore, in the case at issue, the abrogation of the final judgments due to a substantive constitutional violation of the first paragraph of Article 28 of the Constitution cannot serve as a legal basis for the application of the second paragraph of Article 91 of the CC-1. The Constitutional Court is further not a court of fourth instance in the case at issue and the constitutional complaint is not an extraordinary legal remedy in accordance with the second paragraph of Article 91 of the CC-1. Thereby attention has to be drawn to the legislature's intent in enacting the two-year limitation period by the second paragraph of Article 91 of the CC-1. In the absence of that provision, no limitation period applied after a final judgment had been abrogated in a procedure for the protection of legality due to procedural violations. In the event of the abrogation of a criminal judgment, even if criminal prosecution had been time barred, the mentioned provision now provides a defendant who has succeeded with his or her request the possibility of rehabilitation in new proceedings and in a reasonable time with regard to limitation periods.

12. In addition, in the new proceedings the court may not apply the provisions regarding limitation periods contained in the second paragraph of Article 91 of the CC-1, as these criminal proceedings are conducted regarding criminal offences that are defined in accordance with the CC previously in force (CC – official consolidated text No. 1). The new CC-1 could only be applied if also the legal definition of the criminal offences were changed and defined in accordance with the new CC-1. However, such an amendment of the legal qualification of the criminal offences is only possible in accordance with the condition determined by the second paragraph of Article 3 of the CC and the second paragraph of Article 28 of the Constitution. The new CC-1 is not more lenient with regard to the complainants and therefore it may not be applied. A direct combination of both laws, i.e. the CC and the CC-1, is of course

not possible, as the new law can only be applied in its entirety.<sup>7</sup> Nevertheless, the enactment of the limitation period by the new CC-1 indirectly also applies to cases adjudicated under the CC, namely in the sense that in the event of abrogation, at least the limitation period that has not yet expired has to be considered for criminal prosecution in accordance with the rules of the general part of the CC.

13. The judge of the court of first instance will thus also have to take into account the rules on limitation periods or the absolute limitation periods in accordance with the sixth paragraph of Article 112 in conjunction with point 4 of the first paragraph of Article 111 of the CC in his or her decisions. Also with regard to the co-defendants in the criminal case at issue, whose cases were considered separately, the absolute limitation period will be taken into account, which, due to the principle of equal rights, will have to apply also to the other constitutional complainants. The time left before the expiry of the absolute limitation period will enable the court to adopt a decision in accordance with the Decisions of the Constitutional Court.

*Dr Mitja Deisinger*

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<sup>7</sup> I. Bele, *Kazenski zakonik s komentarjem, Splošni del* [The Criminal Procedure with Commentary, General Part], GV Založba, Ljubljana 2001, p. 41.

**DECISION**

At a session held on 8 June 1995, in proceedings to decide upon the constitutional complaint of A.A. from [...], the Constitutional Court

*decided as follows:*

The constitutional complaint, in so far as it relates to the Order of the Ljubljana Higher Court No. Kp 533/93, dated 9 June 1993, and the Order of the Ljubljana Basic Court, Ljubljana Unit, No. Ks 248/93, dated 12 March 1993, is dismissed.

The Judgment of the Supreme Court No. I Ips 233/92, dated 13 January 1993, the Judgment of the Ljubljana Higher Court No. Kp 776/92, dated 22 September 1992, and the Judgment of the Ljubljana Basic Court, Ljubljana Unit, No. III K 387/91, dated 14 April 1992, are abrogated.

The case has been remanded to the Ljubljana Local Court for new adjudication.

*Reasoning*

**A**

1. In his constitutional complaint, which was lodged on 9 July 1993, the complainant stated that he was found guilty of the criminal offence of concealment on the basis of Article 176 of the Criminal Code of the Republic of Slovenia (1977) and sentenced to three months in prison by way of a Judgment of the Ljubljana Basic Court, Ljubljana Unit, No. III K 387/91, dated 14 April 1992, in conjunction with the Judgment of the Ljubljana Higher Court No. Kp 776/92, dated 22 September 1992. The Supreme Court rejected the request for the extraordinary examination of the final judgment; the request to reopen proceedings (Order of the Ljubljana Basic Court, Ljubljana Unit, No. Ks 248/93, dated 12 March 1993) and the appeal against this order (Order of the Ljubljana Higher Court, No. Kp 533/93, dated 9 June 1993) were also rejected. The court decisions allegedly deprived him of his right to use all the evidence available and prove his innocence. The court allegedly failed to hear the evidence in criminal proceedings by not examining the proposed witnesses who are purported to have

confirmed his alleged alibi. On 10 June 1990, the date on which the criminal offence was allegedly committed by the complainant, he was allegedly sorting through bricks for his own personal needs at the company he works for. It is alleged that the court again failed to hear the evidence provided by the expert graphologist regarding the entire purchase contract and did not accurately assess the discrepancies in the testimonies taken from the injured parties. The complainant urges the Constitutional Court to ensure that the court reopens proceedings, examine the witnesses proposed, and order a graphological assessment of the entire contract and the hand-writing of the defendant and the injured parties.

2. The complainant was found guilty of committing the criminal offence of concealment, since he allegedly introduced himself as D.D. to B.B. and C.C. on 10 June 1990 and to whom he sold a Yugo 60 vehicle, which he is alleged to have known was stolen on 31 May 1990 by D. in Z. The court of first instance heard evidence from the injured party, the complainant's wife E.E., and F.F., before appointing an expert graphologist. The complainant further proposed that evidence be heard from the witnesses G.G., H.H., I.I., and J.J. He stated that witness G. could corroborate that he did in fact unload bricks at the company on 10 June 1990. The witnesses H., I., and J. were also said to be able to confirm that he was allowed to collect bricks outside working hours. The court rejected the evidence proposed by the defendant as unfounded. Its grounds for doing so were based on the fact that these "circumstances were explained to the court on the basis of the inquiries made at the defendant's employer company V.v., and, even without this explanation, the facts were sufficiently clarified through the evidence presented ". The court of first instance summarises its evaluation of the evidence as follows: "Based on all the aforementioned, especially the convincing testimony of the injured parties C.C. and B.B., the fact that the senior management of the part of the defendant's employer company V.v. cannot corroborate that the defendant was in fact sorting through roof tiles at the company on the day in question (10 June 1990), and the fact that the expert graphologist had not ruled out the defendant as a potential signatory of the purchase contract but instead revealed that there was a greater likelihood that the purchase contract had in fact been signed by the defendant, the court concludes with certainty that the defendant [...]" (followed by a summary of the charge).
3. The Higher Court confirmed the evidence assessment made by the court of first instance and concluded its own evidence assessment with the statement that "the position of the court of first instance on the fourth page of the challenged judgment also serves as a convincing explanation as to why there is no need to further verify the defendant's alibi, resulting in the court deeming the extended taking of evidence with the same evidence as proposed in the appeal to be inadmissible".
4. The Supreme Court rejected the request for the extraordinary examination of the final judgment, explaining that the alleged violation of the criminal code was non-existent. The assertions listed in the request are said to only challenge the facts, which constitute inadmissible grounds for lodging such request.
5. The request to reopen proceedings was dismissed by the court of first instance on the grounds that no new evidence had been produced, as the court had already assessed

this evidence during the initial proceedings. The court of second instance confirmed the first instance judgment on the grounds that the evidence proposed did not undermine the orders of the court of first instance and the findings in the final judgment of the court of second instance.

6. In response to the constitutional complaint, the Ljubljana Higher Court referred to the reasons listed in the challenged court order.
7. In response to the assertions of the Ljubljana Higher Court, the complainant repeated the allegations from his constitutional complaint. He stated explicitly that he is challenging “all the decisions of the panel of judges, from the Basic Court to the Supreme Court”.

## **B**

8. Above all, the complainant is challenging the Orders of the Basic and Higher courts regarding the request to reopen proceedings, without alleging that any of his constitutional rights were violated by these Orders specifically. The Constitutional Court also could not establish any such violations. As a result, the Constitutional Court dismissed this part of the constitutional complaint as unfounded (first paragraph of Article 59 of the Constitutional Court Act, Official Gazette RS, No. 15/94 - hereinafter referred to as the CCA).
9. Pursuant to the provision of Article 82 of the CCA, the constitutional complaint is deemed to have been lodged in time (as it was lodged 9 July 1993 – before the entry into force of the CCA) and is admissible (all the decisions from the initial proceedings were issued after the entry into force of the Constitution) even against the decisions of the court issued in the initial proceedings. In this case, the Constitutional Court therefore in its decision focused primarily on the issue of whether the complainant’s constitutional rights had been violated by the judicial decisions during the initial proceedings.
10. The constitutional complaint indicates that the complainant’s right to present evidence to his benefit (third indent of Article 29 of the Constitution) was allegedly violated on account of the court rejecting to hear evidence from the witnesses G., H., I., and J. and to appoint a new expert graphologist.
11. With regard to the principle of the free assessment of evidence, the court decides independently in criminal proceedings as to the evidence presented and how its credibility will be assessed. To that end, according to the inquisitorial principle, it must ensure the case is comprehensively resolved in order to determine the whole truth of the matter. However, it may deny motions that delay proceedings and do not help clarify the matter at hand (second paragraph of Article 299 of the Criminal Procedure Act, Official Gazette RS, No. 63/94 - hereinafter referred to as the CrPA; the same rule was also included in the second paragraph of Article 292 of the previous Criminal Procedure Act, Official Gazette SFRY, Nos. 4/77, 14/85, 26/86, 57/89, and 3/90 - hereinafter referred to as the 1977 CrPA).
12. However, the efforts made by the court to conduct proceedings without unnecessary delay may not lead to a violation of the defendant’s constitutional right to present

evidence to his benefit (third indent of Article 29 of the Constitution). The following wording of the Constitution: “Anyone charged with a criminal offence must be guaranteed the right to present all evidence to his benefit” cannot be interpreted such that the court is obligated to hear all the evidence proposed by the defence which could, merely by its content, benefit the defendant. The wording instead implies criteria regarding the relevance of the evidence in terms of the substantive law: evidence which is irrelevant in terms of substantive law is deemed inconsequential and so cannot be considered “to the benefit of the defendant”. However, if evidence is associated with a defendant’s alibi, there is certainly no doubt of its legal relevance (and that, in this sense, it is to the benefit of the defendant).

13. The court is also not obliged to hear endlessly all the evidence proposed by the defendant, and is only required to hear evidence for which the burden of proof is satisfied by the defence, and in which the existence and legal relevance of the proposed evidence is substantiated with the required degree of probability. This is also a question which, in terms of constitutional law, depends on whether the evidence is deemed to be to the benefit of the defendant. Evidence proposed only for the purpose of creating a delay cannot benefit the defence in a substantive sense. The constitutional wording is not directed at the benefits that would be gained by the defence from delaying criminal proceedings.
14. The position of the Constitutional Court is that the cited third indent of Article 29 of the Constitution imposes the presumption that, in the event of doubt, all the evidence proposed by the defence is to the benefit of the defendant. The deciding court must take it into consideration, unless it is manifestly clear that the evidence cannot corroborate the line of defence.
15. This conclusion also stems from the logic behind the Criminal Procedure Act, according to which a criminal conviction requires that the facts are established completely and accurately (*argumentum a contrario* with respect to first paragraph of Article 373 of the CrPA and the equally worded provision of the first paragraph of Article 366 of the 1977 CrPA). This standard of proof is the highest possible standard of proof there is. This entails logically that a significantly lower standard than certainty, and a higher standard than the basic burden of allegation (*onus proferendi*), is required for the evidence proposed by parties. In other words, as soon as it is demonstrated that doubt could arise from certain evidence, which owing to the presumption of innocence would result in a judgment of acquittal, the court is obligated to accept such proposed evidence and ensure that this aspect of the criminal case has been fully investigated. Since the probability regarding a party’s proposed evidence is actually the likelihood of a probability (of the evidence), it would make no sense to prescribe abstract rules regarding the level of this probability, in order to force the court to accept the proposed evidence. This must be subject of the diligent and specific consideration of evidence by the court deciding on the matter. In any case, it is clear already at first glance that proposed evidence regarding an alibi is decisive in most criminal proceedings. The court is therefore required to fully verify the existence of an alibi if the defence demonstrates at least its likelihood in its motion for adducing the evidence.

16. In the case at issue, by simply rejecting the evidence to be heard from witnesses H., I. and J. and not appointing a new graphologist, the court would not be in breach of the threshold of the principle of the free assessment of evidence. The appointment of another expert is subject to the court's assessment of the evidence. Furthermore, the fact the proposed witnesses could corroborate according to the complainant's assertions has already been established through enquiries made at the complainant's employer company.
17. According to the Constitutional Court's assessment, the court violated the complainant's right to the presentation of evidence to his benefit by rejecting the submitted evidence to examine witness G. As is evident from the criminal case file, the complainant throughout the proceedings – in his defence against the charge (doc. No. 38), as well as at the main hearing (doc. Nos. 59 and 85) and in his appeal (doc. No. 104) – proposed the taking of evidence regarding his alibi to examine multiple witnesses. In the proposal to examine witness G., the defendant also claimed that this witness could corroborate that the defendant was in fact unloading bricks (doc. No. 59) at the company on the day in question (10 June 1990). The court of first instance rejected the proposed evidence to examine the witness, providing the following explanation: "The defendant proposed that the court hear his neighbour G.G. as a witness, who would be able to corroborate that the defendant was unloading bricks at the company on 10 June 1990, and hear evidence from H.H., I.I., and J.J. who would confirm that the defendant was allowed to unload and collect bricks outside working hours. However, the court rejected this evidence proposed by the defendant as unfounded, given that these circumstances surrounding the case were explained to the court through enquiries made at the defendant's employer, company V.v. The facts of the case were sufficiently clarified by the evidence presented, even without this evidence." The complainant therefore explicitly stated that the witness G.G. could confirm that he, the defendant, was not at the location where the criminal offence was committed on 10 June 1990. During the taking of evidence, the disputed fact was addressed only by both injured parties, who confirmed the assertions of the charge and the complainant's wife, who denied them. In no way was the disputed fact clarified by the enquiries made at the complainant's employer company, which the court provided as an additional argument for rejecting the proposed evidence in the reasoning of the judgment. Despite the fact that only evidence supporting the charge was presented regarding the disputed fact (the credibility of the testimony of the complainant's wife was denied by the court in general), the court dismissed the complainant's proposed evidence as unfounded. Such decision by the court entails a violation of the defendant's right to the presentation of evidence to his benefit (third indent of Article 29 of the Constitution).
18. The orders of the court deciding on the matter regarding the acceptance or rejection of the evidence proposed by the parties are procedural in nature. It is altogether usual that there is no appeal against such orders, as this would delay the course of the main hearing. On the other hand, this means that the appellate court, in instances where the defence challenges a judgment of conviction on the grounds of the er-

roneous or incomplete determination of facts, must be even more wary of the first instance reasoning for rejecting the evidence proposed by the defence during a main hearing. For this reason, in this case the decision of the court of second instance also violates the defendant's constitutional right to present evidence to his benefit. Despite the repeated proposal of evidence, the court of second instance rejected this proposal, simply by making reference to the part of the reasoning of the first instance judgment where the court of first instance rejected the persuasiveness of the testimony of the witnesses favouring the complainant on account of the persuasiveness of the testimony of the injured parties. In its reasoning, its explanation was brief: "On the fourth page of the challenged judgment, the court of first instance has explained convincingly why there was no need to further verify the defendant's alibi, owing to which the proposed additional examination of evidence in the appeal proceedings with the same means of evidence cannot be accepted". Since the second instance judgment failed to redress the violations of the defendant's constitutional right, despite the scope of the assessment provided by the CrPA making such possible, the Constitutional Court finds that the defendant's constitutional right to present evidence to his benefit was also violated by this decision.

19. Furthermore, the violations of these constitutional rights were not remedied by the court even when deciding on the request for the extraordinary examination of the final judgment. The complainant, in fact, only put forward the violation of the criminal code and the existence of considerable doubt regarding the veracity of the decisive facts, but included the following, *inter alia*, in his explanation: "The court also failed to hear all the required evidence (especially regarding the fact that the convicted person was actually at V.v. and not the automotive fair on the day in question). The accuracy of this fact follows from the statement submitted by H.H. who, together with the convicted person, carried out work at the V.v. on 9 and 10 June 1990 between 9.00 am and 6.00 pm." The Supreme Court rejected this assertion by establishing that "by displaying, [...] that doubt exists as to whether the convicted person was selling this vehicle, which is also evident from the testimony of H.H., [...] the defence counsel in his application argues that the facts were erroneously and incompletely determined. However, this is not an admissible ground for lodging this extraordinary legal remedy."

As already explained, on account of failing to verify the alleged alibi, the courts of first instance and second instance violated the complainant's constitutional right to present evidence to his benefit as a defendant. The cited assertions of the complainant mean exactly the same in terms of their content: through these assertions, the complainant repeated his proposal for his alibi to be checked. In the context of the correct legal qualification, the Supreme Court should have taken these assertions into account, not merely as an alleged erroneous determination of facts, but also as an alleged violation of the right to a defence, which is also an admissible reason for lodging a request for the extraordinary examination of final judgments (Point 3 of Article 427 of the 1977 CrPA), and found in favour of the request. Since it failed to do so, the Constitutional Court finds that the complainant's right referred to in the

third indent of Article 29 of the Constitution was also violated by the decision of the Supreme Court.

20. If the constitutional complaint is granted, the Constitutional Court abrogates the decision and remands the case to the authority competent to decide thereon (first paragraph of Article 59 of the CCA). After determining the violation of the complainant's right referred to in the third indent of Article 29 of the Constitution, the Constitutional Court abrogated the decisions of the courts of first, second, and third instance, which were issued during the initial proceedings, and remanded the case for re-adjudication to the court that decided on the case at the first instance (Article 427 of the CrPA in conjunction with Article 6 of the CCA).
21. The Constitutional Court granted the constitutional complaint, since, by rejecting the proposed evidence to examine witness G., who is alleged to have been able to corroborate the alibi of the defendant, the court violated the defendant's constitutional right to present evidence to his benefit. The court shall therefore also be required to hear this evidence in the new proceedings.
22. Despite the Constitutional Court not granting the constitutional complaint in the part that relates to the rejection of the proposed evidence to examine the other witnesses and to appoint a new expert graphologist, the complainant can again propose that such evidence be taken in the new proceedings (third paragraph of Article 428 of the CrPA in conjunction with Article 6 of the CCA).
23. The other provisions of Article 428 of the CrPA shall also apply for the new proceedings.

### C

24. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the Constitutional Court Act, composed of: Dr Tone Jerovšek, President, and Judges Dr Peter Jambrek, Mag. Matevž Krivic, Mag. Janez Snoj, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. Decision was reached unanimously.

*Dr Tone Jerovšek*  
*President*

Decision No. **U-I-271/08**, dated 24 March 2011

### DECISION

At a session held on 24 March 2011 in proceedings to review constitutionality initiated at the request of the Supreme Court of the Republic of Slovenia, the Constitutional Court

*decided as follows:*

1. The third paragraph of Article 56 of the Police Act (Official Gazette RS, No. 107/06 – official consolidated text) was inconsistent with the Constitution.
2. The fourth paragraph of Article 56 of the Police Act (Official Gazette RS, Nos. 66/09 – official consolidated text, and 22/10) is abrogated to the extent that it refers to the conditions and decision-making procedure for relieving individuals of the duty to maintain the confidentiality of information with regard to the taking of evidence by means of the examination of a police employee in criminal proceedings.
3. Until such time as the statutory regulation thereof changes, the Minister in charge of internal affairs can, [at the request of the competent authority,] relieve a police employee of the duty to maintain the confidentiality of the information determined by the first paragraph of Article 56 of the Police Act. In the event the Minister deems that there are reasons why a police employee cannot be partially or entirely relieved of the duty to maintain the confidentiality of information, he shall inform the president of the competent Higher Court thereof and of the reasons for such opinion within eight days of receiving the request. After examining the criminal file and the confidential information which the Minister deems cannot be disclosed, the president of the Higher Court may order that the confidential information be disclosed, determine the scope and conditions of the disclosure thereof, and determine the use of protective measures, if applicable, under the terms and in the manner determined in paragraphs 34-36 of the reasoning of this Decision. The police must enable the president of the Higher Court to have access to the confidential information that is the subject of the court order.

**A**

1. Pursuant to Article 156 of the Constitution and the first paragraph of Article 23 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text; hereinafter referred to as the CCA), the Supreme Court stayed the proceedings following a request for the protection of legality by order No. I Ips 187/2007, dated 8 October 2008, and requested that the Constitutional Court review the constitutionality of Article 56 of the Police Act (hereinafter referred to as the PA-OCT6). The provision thereunder regulates the conditions and procedure for the Minister to decide to relieve a police officer or an individual who has helped the police conduct their tasks determined by an act of their duty to maintain the confidentiality of information. In the opinion of the applicant, this provision determines in an unconstitutional manner the conditions under which a defendant is provided information relevant to his defence.
2. The applicant alleges that the third paragraph of Article 56 of the PA-OCT6 is inconsistent with the first indent of Article 29 of the Constitution and point (b) of the third paragraph of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, Nos. 33/94, MP, and 7/94 - hereinafter referred to as the ECHR), which guarantee everyone charged with a criminal offence the right to have adequate time and facilities to prepare his defence; the third indent of Article 29 of the Constitution and point (d) of the third paragraph of Article 6 of the ECHR, which guarantee the right to present evidence to the benefit of the defendant and the right to obtain the examination of witnesses on his behalf; Article 23 and the fourth paragraph of Article 15 of the Constitution, and the first paragraph of Article 6 of the ECHR, which guarantee the right to the judicial protection of human rights; and Article 2 of the Constitution. The applicant alleges that the challenged provision does not precisely determine the substance of the conditions under which it is admissible to interfere with the mentioned guarantees, that it interferes disproportionately with the mentioned guarantees by not providing for the application of more lenient measures for achieving the aims pursued by the Act, and that the Minister (not a court) is competent to decide on the interference with the mentioned guarantees at his discretion, whereby protection from arbitrary decisions by the competent authority is not ensured.
3. The National Assembly of the Republic of Slovenia did not reply to the request. The Government of the Republic of Slovenia submitted an opinion, rejecting the applicant's allegations as unfounded. It states that the Minister's right to not relieve a police officer of the duty to maintain the confidentiality of the identity of an individual who provides the police information about a criminal offence is of key importance in that the safety of the anonymous source could otherwise be jeopardised. Individuals who provide information to the police are allegedly often afraid for their life and health, and concerned about potential threats to those close to them. These individuals allegedly have a trust relationship with the police, the abuse of which would allegedly be inadmissible. This would make it more difficult for the police to investigate criminal offences. In weighing the right of a defendant to a defence against the right

to safety of an individual who provides incriminating evidence, the right of the latter allegedly prevails. The Government furthermore points to the practice developed with regard to undercover agents. In such cases, the Minister relieves the undercover agent of the duty to maintain confidentiality to the extent that it refers to the substance of the measure (collected evidence), but he does not relieve him of the duty to maintain confidentiality to the extent that it refers to the tactics and methods of police work, including regarding his true identity. Such decisions by the Minister are allegedly directly connected to the implementation of the third paragraph of Article 240 and Article 240.a of the Criminal Procedure Act (Official Gazette RS, Nos. 32/07 – official consolidated text, 68/08, and 77/09 – hereinafter referred to as the CrPA). The Government states that the legislature in fact did not define the substance of the conditions for relieving one of the duty to maintain confidentiality in Article 56 of the PA-OCT6, however, the hitherto practice shows that decisions on relieving individuals of the duty to maintain confidentiality are made selectively and only in the event specific conditions are fulfilled. The challenged provision is allegedly the only safeguard in cases involving protection of the confidentiality of police work. As the person authorised to relieve individuals of the duty to maintain confidentiality, the Minister is allegedly independent of the pre-trial procedure carried out by the police and directed by the competent state prosecutor. His competence is allegedly circumscribed by the need to protect the lives of individuals, not the substance of specific criminal proceedings. The Minister allegedly does not have discretion in his decisions, as claimed by the applicant, as the conditions that he needs to take into account are allegedly determined. His competence with regard to the decision-making at issue is allegedly not inconsistent with the Constitution. That the court would have competence is allegedly possible in principle, however, due to practical reasons it is less appropriate. The Government furthermore calls attention to the second paragraph of Article 33 of the Classified Information Act (Official Gazette RS, Nos. 50/06 – official consolidated text, and 9/10 – hereinafter referred to as the CIA), whose substance is identical to that of the third paragraph of Article 56 of the PA-OCT6.

4. The Constitutional Court obtained explanations with regard to the legal regime for classifying information from the Ministry of the Interior (hereinafter referred to as the Ministry). Regarding confidentiality in handling information, the Ministry states that sources of reports, information, and complaints are subject to the legal regime as provided by the CIA, whereby Article 56 of the PA-OCT6 additionally determines the duty to protect professional secrecy. In accordance with and under the conditions arising from the CIA, the police as a general rule allegedly classify the identity of individuals collaborating with the police as sources of reports, information, and complaints; less frequently is classification applied to data obtained from such sources. Confidential information is allegedly deemed to mean information whose disclosure to unauthorised persons could have implications for the security activities of the state authorities of the Republic of Slovenia. The Ministry explains that the second paragraph of Article 33 of the CIA contains the same provision in terms of substance as the third paragraph of Article 56 of the PA-OCT6, in which the scope and the

purpose of relieving someone of the duty to maintain the confidentiality of information are crucial. The PA-OCT6 allegedly determines the mentioned substance in narrower terms to the extent that it refers to jeopardising the lives or personal safety of individuals, which, in the case under consideration, allegedly entails the source of the report, information, and complaint. Confidentiality conditions on the basis of the provisions of the CIA allegedly apply with regard to the identity of persons carrying out undercover investigation measures, who perform tasks exclusively on the basis of permission granted by the competent state prosecutor.

### **B – I**

5. If a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court in accordance with Article 156 of the Constitution and the first paragraph of Article 23 of the CCA. It follows from the reasoning of the Supreme Court's decision to stay the proceedings that the Supreme Court should have applied the third paragraph of Article 56 of the PA-OCT6, as it regulates the conditions and competences to decide to relieve individuals of the duty to maintain confidentiality, thereby determining the conditions under which a police officer may be examined as a witness with respect to data classified as confidential (Article 235 of the CrPA), and the conditions under which he may decline to testify (the fifth item of the first paragraph of Article 236 of the CrPA). It furthermore follows from the decision that the defendant's attorney, in the request for the protection of legality, alleges a violation to the right to a defence under Article 29 of the Constitution and point (d) of the third paragraph of Article 6 of the ECHR, in that the defence was not allowed to examine a witness on his behalf, i.e. the person with whom the police officer conducted an informal interview in the pre-trial procedure, and summarised the contents thereof in an official note (which is a part of the case file).
6. As is evident from the first-instance judgment, the court rejected the defence's proposal of evidence and its proposal to apply measures under Article 240.a of the CrPA. It stated that due to objective reasons it did not have at its disposal information about the identity of the person whose examination the defence proposes. In Judgment No. I Kp 1240/2005, dated 10 February 2006, the Higher Court adopted the position that legal and formal reasons rendered it impossible to present evidence by means of the examination of the person who provided the police officer the information in the official note; the evidence was not available because the Minister of the Interior did not enable the disclosure of the identity of the person. With regard to the allegation that the defendant's rights were violated, it adopted the position that in such circumstances the court cannot violate the provisions of laws, the Constitution, or the Convention. In the appeals procedure against the judgment of the court of second instance, the Supreme Court upheld the positions of the lower courts. In Decision No. Kp 6/2006, dated 15 November 2006, it stated that the court unsuccessfully demanded three times that the Minister relieve the criminal detective of the duty to protect the identity of his source of information about the criminal offence as without the Minister's approval the criminal detective was not at liberty to reveal the

identity even to the court. According to the position of the Supreme Court, the court of first instance was unable to examine as a witness a person whose identity it did not know and, therefore, could not violate the defendant's right to examine witnesses.

7. During the course of proceedings before the Constitutional Court, the challenged third paragraph of Article 56 of the PA-OCT6 was amended by the Act Amending the Police Act (Official Gazette RS, No. 42/09 – hereinafter referred to as the PA-G). By the amendment, the third paragraph of Article 56 of the PA-OCT6 became the fourth paragraph of Article 56 of the Police Act (hereinafter referred to as the PA), whose substance differs only marginally from the previous third paragraph of Article 56 of the PA-OCT6.
8. If during proceedings before the Constitutional Court a regulation ceased to be in force in the challenged part or was amended, the Constitutional Court decides on its constitutionality or legality if the applicant or petitioner demonstrates that the consequences of its unconstitutionality or unlawfulness were not remedied (the second paragraph of Article 47 of the CCA). In the case under consideration, the request for a review of constitutionality was made by the Supreme Court. After the Constitutional Court reaches its decision, the Supreme Court will have to decide in the procedure for the extraordinary legal remedy on the correctness and legality of the positions of lower courts which were adopted on the basis of the challenged legal provision that is no longer in force, hence the third paragraph of Article 56 of the PA-OCT6 is still relevant to decisions by the Supreme Court. Therefore, the Constitutional Court deemed that the conditions determined in Article 47 of the CCA are fulfilled and reviewed the challenged provision.
9. The Constitutional Court conducted the review of the conditions and decision-making procedure for relieving individuals of the duty to maintain the confidentiality of information with respect to the taking of evidence by means of examining a police employee in criminal proceedings. It furthermore took into account that the challenged third paragraph of Article 56 of the PA-OCT6 was replaced with the fourth paragraph of Article 56 of the PA during the course of proceedings before the Constitutional Court. Since the provisions are identical in substance, the Constitutional Court expanded the procedure for the review of constitutionality to the fourth paragraph of Article 56 of the PA pursuant to Article 30 of the CCA. It assessed that this is necessary for a comprehensive resolution of the constitutional issues raised by the case under consideration.

## B – II

10. Article 56 of the PA-OCT6 stated:

“A police officer must maintain the confidentiality of state, official, or other secrets encountered while performing his duties. The duty to maintain the confidentiality of state, official, and other secrets remains in effect after the police officer's employment terminates. Police officers shall be obliged to maintain the confidentiality of a source that has filed a report, provided information, or filed a complaint. The Minister<sup>1</sup> may,

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1 Under Article 2.a of the PA-OCT6, it is the Minister in charge of internal affairs.

in substantiated cases when this is in the interest of the criminal proceedings and does not jeopardise the life or personal safety of an individual, relieve a police officer or an individual who has helped the police to conduct their tasks determined by an act of the duty to maintain confidentiality, at the request of the competent authorities.”

11. The above-mentioned article regulated the duty to maintain the confidentiality of information<sup>2</sup> which police officers become acquainted with in the course of the performance of their tasks, and the procedure for relieving police officers of the duty to maintain confidentiality. To the extent that it referred to classified information, it was a *lex specialis* in relation to the CIA, i.e. to the general regulation on classified information.<sup>3</sup> The challenged provision limited the possibility of relieving individuals of the duty to maintain the confidentiality of information only to cases where this was required in the interest of the criminal proceedings and did not jeopardise an individual’s life and personal safety. Only the Minister was able to relieve individuals of the duty to maintain confidentiality.<sup>4</sup>
12. The challenged regulation is connected to some of the basic responsibilities of the police: to prevent, detect, and investigate criminal offences, and to detect and arrest perpetrators of criminal offences (Article 3 of the PA-OCT6). In carrying out this task, the police use various operational methods and measures. Individuals (citizens, registered informers) privy to information about the commission of a criminal offence or preparations therefor, often play a key role in the detection and investigation of criminal offences. Such information may constitute a significant clue regarding criminal activity and its scope, and cause the police to collect information, secure evidence, initiate appropriate proceedings in conjunction with the state prosecutor, etc. In the investigation of complex forms of criminal offences and organised crime, effective police tactics are particularly important. Individuals who provide information about perpetrators of criminal offences may be directly jeopardised were their identity to be disclosed. Trust as a key assumption in the cooperation of individuals with the police is also jeopardised. The regulation of the protection of the confidentiality of sources of reports, information, or complaints, thereby guaranteeing anonymity to individuals who voluntarily collaborate with the police based on a relationship of trust and in secrecy, is, therefore, important for ensuring justice in society.<sup>5</sup> It encourages active

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2 The term confidential means all information subject to the duty to maintain confidentiality or classified as secret (i.e. classified information, protected information, and personal information).

3 The CIA determines the basic principles of the uniform system for the determination of, safeguarding of, and access to classified information in the sphere of activity of government authorities of the Republic of Slovenia relating to public security, defence, foreign affairs, or the intelligence and security activities of the country, and for the declassification of such information (the first paragraph of Article 1).

4 Cf. the second paragraph of Article 33 of the CIA, which stipulates that the head of an authority may, at the request of the competent authorities, relieve a person of the duty to maintain the confidentiality of information solely for the purposes of and to the extent specified in the request of the competent authority.

5 In common law systems, informer privilege is recognised as a mechanism which plays a crucial role in implementing the law. It is based on the understanding that protecting the identity of informers is important for the safety of these persons and for encouraging citizens to disclose information about criminal offences and

citizenship. It is furthermore important to ensure the confidentiality of the identity of persons carrying out undercover investigative measures in pre-trial procedures,<sup>6</sup> and of other sensitive information whose disclosure might facilitate the perpetration of a criminal offence or make the detection or investigation thereof more difficult.<sup>7</sup>

13. In criminal proceedings, the duty of police officers to maintain the confidentiality of the information referred to in the first and second paragraphs of Article 56 of the PA-OCT6 is multi-faceted. Police officers may not disclose confidential information in a criminal complaint or in annexes thereto.<sup>8</sup> A criminal complaint becomes a part of the case file when the state prosecutor sends it to the investigating judge (the fourth paragraph of Article 168 of the CrPA) or when he brings an indictment or charge (Article 170 and the second paragraph of Article 430 of the CrPA), with the defendant having the right to learn of the criminal complaint when he asserts the right to examine the case file (the fifth paragraph of Article 128 of the CrPA). Non-disclosure of confidential information in a criminal complaint entails that the court and the parties to the proceedings are not informed thereof.
14. It is particularly important for the protection of confidential information under what conditions a police officer (or an individual who helps the police carry out

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perpetrators. According to the standpoints of the Canadian Supreme Court, informer privilege is of such fundamental importance to the working of the criminal justice system that it cannot be balanced against other interests relating to the administration of justice. Neither the police nor the court is allowed to make decisions that would relativise its scope. The privilege may be claimed by the prosecution, which cannot make an exception without the consent of the informer. In this sense, the privilege is also a right that the informer has. The privilege prevents not only the disclosure of the informer's name, it also prevents the disclosure of any information that may indirectly reveal his identity. The only admissible exception is the innocence at stake exception. See the decision in the case *R. v. Leipert*, 1997, 1 S. C. R. 281.

- 6 These include police officers, undercover agents, or agents carrying out measures pursuant to Articles 149.a, 150, 151, 155, and 155.a of the CrPA. Since these persons help the police or cooperate with the police in the collection of evidence and the detection of serious criminal offences, it is in the interest of the police and in the public interest to keep them anonymous and, consequently, make it possible for them to continue to cooperate on similar tasks.
- 7 In addition to information that makes it possible to identify human sources of information, information crucial to police work includes information facilitating the identification of individuals who are being investigated by the police; information potentially disclosing operational measures, actions, and methods carried out by the police to prevent criminal offences and to detect or apprehend perpetrators of criminal offences; and intelligence obtained from foreign police forces, security and intelligence services, and international police and security organisations.
- 8 In executing their tasks on the basis of Article 148 of the CrPA, the police must collect all information that may be useful in the successful conduct of criminal procedures (the first paragraph of Article 148 of the CrPA). On the basis of the collected information, the police put together a criminal complaint in which they state the evidence found in the course of the collection of information. The criminal charge does not include statements made by individual persons in the information gathering process. Items, sketches, photographs, reports, records of the measures and actions undertaken, official annotations, statements, and other material which may be useful for the successful conduct of criminal proceedings are enclosed with the criminal charge (the ninth paragraph of Article 148 of the CrPA).

their tasks) may be examined as a witness with respect to information whose confidentiality he must maintain. Pursuant to the first point of Article 235 of the CrPA, it is impossible to examine as a witness “a person who by giving testimony would violate the obligation to maintain the confidentiality of an official or military secret, until the competent authority relieves him of that duty”. Pursuant to the fifth point of the first paragraph of Article 236 of the CrPA, “a counsel, doctor, social worker, psychologist, or other person [is exempt from the duty to testify] on facts he came to know in carrying out his profession if he is bound by the duty to maintain the confidentiality of information he learns of in carrying out his profession, except [...] if statutory conditions are fulfilled under which such persons are relieved of the duty to maintain confidentiality or are bound to disclose confidential information to competent authorities”. The challenged provision determined the conditions under which a police officer or an individual who has helped the police carry out their tasks determined by an act may be examined as a witness with respect to confidential information. A person’s identity may be considered confidential information. It is classified as such if it is so important that its disclosure to unauthorised persons could or might obviously prejudice the security activities of government authorities (Article 5 of the CIA). According to the Ministry, as a general rule the police classify the identity of sources of reports, information, and complaints pursuant to the provisions of the CIA when such sources are individuals who cooperate with the police. In the event that their incriminating statements are directly or indirectly part of the evidence in criminal proceedings, or when the statements are so important for the defence that their effective presentation would require the disclosure of such persons, the protection of the confidential information may trigger a conflict of constitutional values, which the applicant calls attention to.

### **B – III**

#### **Starting points of the review**

15. In Article 23, the Constitution guarantees the right to judicial protection. Pursuant to the first paragraph of Article 23 of the Constitution, everyone has the right to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent, impartial court constituted by law. Accordingly, any charge against an individual must be decided by a court, i.e. a state authority which fulfils the criteria of impartiality. At the same time, the first paragraph of Article 6 of the ECHR stipulates that everyone is entitled to have criminal charges against him examined by an independent and impartial tribunal established by law. With regard to violations of human rights and fundamental freedoms, judicial protection is also provided in the fourth paragraph of Article 15 of the Constitution. What is also important for the case under consideration is the minimum procedural guarantees in criminal proceedings, which include the following rights to the same extent for everyone charged with a criminal offence: the right to have adequate time and facilities to prepare his defence, and the right to present all evidence to his benefit (the first and third indents of Article 29 of the Constitution). Points (b) and (d)

of the third paragraph of Article 6 of the ECHR guarantee the defendant the following minimum rights: to have adequate time and facilities for the preparation of his defence, and to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

16. With regard to the third indent of Article 29 of the Constitution, the Constitutional Court adopted the following positions in Decision No. Up-34/93, dated 8 June 1995 (OdlUS IV, 129): (1) under the principle of the free assessment of evidence, a court decides itself which evidence it will take and how it will adjudge the credibility thereof; (2) a court is not bound to take every item of evidence proposed by the defence; (3) a proposed item of evidence must be legally relevant; (4) the defence must substantiate the existence and legal relevance of proposed evidence with the requisite degree of probability; (5) when there are doubts, any proposal of evidence is to be considered to the benefit of the defendant and the court must take it unless it is obvious that the evidence would not be beneficial. A court is, therefore, obliged to take evidence to the benefit of the defendant if the defence (explicitly) proposes the taking of evidence and satisfies the burden of proof with respect to the existence and substantive relevance of the evidence. As soon as it is demonstrated that a piece of evidence raises doubts that, in view of the presumption of innocence, would result in an acquittal, the court must take such proposal of evidence and ensure that this aspect of the criminal case is fully investigated. The court takes the decision on the proposal of evidence on the basis of diligent, specific, and concrete consideration of the evidence.<sup>9</sup>
17. In Decision No. Up-207/99, dated 4 July 2002 (Official Gazette RS, No. 65/02, and OdlUS XI, 266), the Constitutional Court, referring to point (d) of the third paragraph of Article 6 of the ECHR, stated that the defendant must be allowed to challenge incriminating statements, either in the investigation phase or at the main hearing, and to examine the author thereof with respect to such statements. In that case, it decided that the right to examine witnesses against the defendant was not violated, as the defendant had the opportunity to examine the injured party in the phase of investigation but did not use the opportunity due to reasons he was responsible for.<sup>10</sup> In Decision No. Up-518/03, dated 19 January 2006 (Official Gazette RS, No. 11/06, and OdlUS XV, 37), the Constitutional Court found that the court used the incriminating statements

9 Cf. Constitutional Court Decision No. Up-34/93, Paragraph 15. See also Constitutional Court Decision No. Up-13/94, dated 8 June 1995 (OdlUS IV, 128).

10 In this decision, the Constitutional Court took into account the positions of the European Court of Human Rights (hereinafter referred to as the ECtHR) in *Kostovski v. The Netherlands* (judgment dated 20 November 1989), in which the ECtHR explained the substance of the right to examine witnesses against the defendant. It stressed that, in principle, all the evidence must be presented in the presence of the defendant at a public hearing with a view to adversarial argument. This does not entail, however, that in order to be used as evidence, statements of witnesses should always be made at a public hearing in court. Using as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with the first paragraph and point (d) of the third paragraph of Article 6 of the ECHR, provided the rights of the defence have been respected.

of police informers and admitted them as evidence in the proceedings without allowing the defence to examine the author thereof with respect to these statements. It stated that the burden of substantiating evidence may be imposed on the defence only in the event the defence demands the examination of witnesses to the benefit of the defendant or the taking of other evidence to the benefit of the defendant.<sup>11</sup> In Decision No. Up-719/03, dated 9 March 2006 (Official Gazette RS, No. 30/06, and OdlUS XV, 41), the Constitutional Court adopted the position that, in the event a defendant is unable to exercise his right to examine witnesses against him, a guilty verdict may not be exclusively or to a decisive degree based on the statements of such witnesses. An item of evidence is also deemed to be, to a significant degree, the basis of conviction when the court which handed down the verdict reviewed the remaining evidence primarily in terms of whether they confirm the controversial statements of the witnesses against the defendant.<sup>12</sup> In that decision, the Constitutional Court decided that inability to exercise this legal guarantee, which is ensured by the ECHR, at the same time constitutes a violation of the right to a defence guaranteed by Article 29 of the Constitution.<sup>13</sup>

18. In accordance with the positions of the ECtHR, the right to a fair trial is expressed in adversarial proceedings and in the equality of arms between the prosecution and the defence<sup>14</sup>. It follows from the right to adversarial proceedings that the defence and the prosecution are given the opportunity to be informed about, and make statements with regard to, allegations and evidence put forward by the opposing party. Furthermore, what follows from the first paragraph of Article 6 of the ECHR is the requirement that prosecuting authorities disclose to the defence essential evidence for the benefit of or against the defendant which they possess.<sup>15</sup> However, the ECtHR emphasises that the right to the disclosure of relevant evidence is not absolute; in a criminal procedure it must be weighed against competing relevant interests such as national security, the protection of witnesses from reprisals, and maintaining the secrecy of methods of police investigation.<sup>16</sup> In *Lüdi v. Switzerland*, it recognised as legitimate the interest of the police to preserve the anonymity of their undercover agent so that they could protect him and make use of him again in the future.<sup>17</sup> However,

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11 In addition to *Kostovski v. the Netherlands*, the Constitutional Court in this decision also referred to *Lüdi v. Switzerland* (judgment dated 15 June 1992).

12 In this decision, the Constitutional Court *inter alia* referred to the judgments in the case of *Lucif v. Italy*, dated 27 February 2001, and *Mild and Virtanen v. Finland*, dated 26 October 2005. See also the judgment in the case *Krasniki v. the Czech Republic*, dated 28 May 2006.

13 See also Constitutional Court Decisions Nos. Up-849/05, dated 18 October 2007 (Official Gazette RS, No. 102/07, and OdlUS XVI, 110), Up-487/04, dated 22 June 2006 (Official Gazette RS, No. 69/06, and OdlUS XV, 91), Up-754/04, dated 14 September 2006 (Official Gazette RS, No. 101/06, and OdlUS XV, 94), and Up-483/05, dated 3 July 2008 (Official Gazette RS, No. 76/08, and OdlUS XVII, 78).

14 Judgment in the case *Brandstetter v. Austria*, dated 28 August 1991, Paras. 66, 67.

15 Judgments in the cases *Jasper v. the United Kingdom*, dated 16 February 2000, Para. 51, and *Rowe and Davis v. the United Kingdom*, dated 16 February 2000, Para. 60.

16 Judgments in the cases *Jasper v. the United Kingdom*, Para. 52, and *Rowe and Davis v. the United Kingdom*, Para. 61.

17 Judgment dated 15 June 1992, Para. 49.

according to the positions of the ECtHR, withholding evidence from a defendant is admissible only if it is strictly necessary. Moreover, any limitation on the rights of the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities.<sup>18</sup> The decision-making procedure must, therefore, as far as possible comply with the requirements to ensure adversarial proceedings and the equality of arms and incorporate adequate safeguards to protect the interests of the defendant.<sup>19</sup>

19. In view of the above, the Constitutional Court must decide whether the third paragraph of Article 56 of the PA-OCT6 was inconsistent with any of the fundamental guarantees that the defendant has in criminal proceedings stated in the request, namely the first indent of Article 29 of the Constitution and point (b) of the third paragraph of Article 6 of the ECHR (the right to have adequate time and facilities to prepare a defence), the third indent of Article 29 of the Constitution and point (d) of the third paragraph of Article 6 of the ECHR (the right to present evidence on his behalf and examine witnesses on his behalf and against him), and the first paragraph of Article 23 of the Constitution in conjunction with the fourth paragraph of Article 15 of the Constitution and the first paragraph of Article 6 of the ECHR (the right to judicial protection). In view of the interconnectedness of these fundamental human rights, and taking into account the case law of the Constitutional Court and the ECtHR, the Constitutional Court must decide whether the challenged provision, in accordance with the first paragraph of Article 23 of the Constitution, guaranteed the defendant the right to have charges against him examined by an impartial court and the right to a defence, i.e. the guarantee of fair criminal proceedings. The Constitutional Court review does not refer to the question of in which cases the police should keep information confidential, but rather it refers to the question of whether the statutory regulation of the confidentiality thereof was in conformity with the Constitution.

18 Judgments in the cases *Jasper v. the United Kingdom*, Para. 52, and *Rowe and Davis v. the United Kingdom*, Para. 61.

19 Judgments in the cases *Jasper v. the United Kingdom*, Para. 53, and *Rowe and Davis v. the United Kingdom*, Para. 62. In *Jasper v. the United Kingdom*, the ECtHR did not establish a violation of the first paragraph of Article 6 of the ECHR, whereby it was crucial that it was a court which decided on the withholding of evidence, i.e. weighed the interests of the defence against other interests. The court decided on the withholding of evidence on the proposal of the prosecution in an *ex parte* procedure; the defence was notified thereof and allowed to take part in the proceedings with its proposals to disclose the evidence. In the case of *Rowe and Davis v. the United Kingdom*, however, the ECtHR established that limiting the rights of the defence was not sufficiently balanced by an appropriate procedure before the court because the prosecution decided to withhold evidence without notifying the court thereof. The ECtHR adopted the position that a procedure in which the prosecution itself decides on the relevance of information withheld from the defence and weighs it against the public interest in secrecy does not satisfy the requirements of the first paragraph of Article 6 of the ECHR. Since the prosecution did not submit evidence to the court, i.e. allow it to decide on disclosure, the defendant was not guaranteed the right to a fair trial. See also the cases *Dowsett v. the United Kingdom* (judgment dated 24 June 2003) and *Edwards and Lewis v. the United Kingdom* (judgment dated 27 October 2004).

### **Reasons the challenged regulation is not in conformity with the Constitution**

20. When a court assesses that evidence must be taken by means of the direct examination of a witness – either a witness against the defendant whose statement is the main or essential evidence, or a witness on his behalf – while taking into account Articles 235 and 236 of the CrPA, it cannot disregard the third paragraph of Article 56 of the PA-OCT6 in the event a witness would have to testify on information whose confidentiality he is obliged to maintain (the first and second paragraphs of Article 56 of the PA-OCT6).
21. A court can take evidence by examining a witness if it possesses information that enables the identification thereof (his first name, surname, and possibly his address and occupation),<sup>20</sup> and if the witness is not unreachable for reasons that cannot be influenced. When the identity of a witness is known only to the police, it is evident that, due to the third paragraph of Article 56 of the PA-OCT6, the examination of such a witness used to depend on a decision by the Minister. In his decision-making, the Minister could choose between two options – either to relieve an individual of the duty to maintain confidentiality or to not relieve him of such, while taking into consideration the public benefit (decision-making at the Minister's discretion). Such an interpretation is called for by the word “may” [in the third paragraph of Article 56] and the fact that in order to decline disclosure it sufficed to make a general reference to the interests of the criminal proceedings or to a witness being put in jeopardy thereby. The scope of the phrase “the interests of the criminal proceedings” is not clear. Even if it is interpreted as encompassing the interest of a defendant to confront a witness against him or to obtain the examination of witnesses on his behalf, the regulation did not require an appropriate assessment of such interest in cases when the witness or other interests were not in serious danger.<sup>21</sup> The regulation even went so far as to require that it is not allowed to disclose confidential information even to a court.<sup>22</sup>
22. The statutory regulation under which the right of a defendant to examine a witness against him or on his behalf depends on a decision made at the discretion of the Minister entails an interference with the guarantees under point (d) of the third paragraph of Article 6 of the ECHR, and the right to a defence under Article 29 of the Constitution. In addition to the above-mentioned, another aspect related to a defendant's right to have adequate facilities to prepare his defence is also important. Effective exercise of this right depends on the possibilities of a defendant to have access to the evidence (sources and items of evidence). As the applicant states with good grounds, according to the conception of the criminal procedure in force, state authorities are competent to collect evidence (against or on behalf of a defendant). Individuals do

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20 Cf. the first paragraph of Article 239 of the CrPA.

21 Compare the criterion of a risk to the life or personal safety of an individual under the third paragraph of Article 56 of the PA-OCT6 to the criterion of a serious danger to life or person under the first paragraph of Article 240a of the CrPA.

22 The judge can access classified information on the basis of Article 3 of the CIA but he cannot obtain information that only a police officer is familiar with due to his participation in a police action. Even if he could obtain the information in question, he could under no circumstances decide on its disclosure to parties to proceedings since he would be obliged to maintain its confidentiality under the provisions of the CrPA.

not have formal competence to carry out investigations, they can only obtain documents and information that citizens may obtain anyway, and file judicial petitions and proposals, but nothing more than that. Thus, the collection and selection of materials is entrusted to the police and the state prosecutor, which raises the issue of the disclosure of potentially relevant material to a defendant. If a defendant does not have access to the information important for his defence, since such is in the possession of state authorities and the duty to maintain confidentiality applies to it, he is not able to include such in the preparation of his defence. Therefore, the challenged regulation entails an interference with the right of a defendant under the first indent of Article 29 of the Constitution and point (b) of the third paragraph of Article 6 of the ECHR.

23. At the same time, the fact that the decision of a court regarding the taking of evidence (or regarding the scope of such) depends on a prior decision of the Minister, entails an interference with the right to judicial protection. Deciding on criminal responsibility and pronouncing criminal sanctions belong among the classic competences of courts. “Deciding on charges” or a “trial” is interpreted also (or primarily) as deciding which decisive facts need to be established with regard to the criminal offence alleged, what evidence should be taken for such purpose, and careful, diligent, and above all unbiased consideration of such evidence (each piece separately and all together, in accordance with the principle of the free assessment of evidence). The challenged third paragraph of Article 56 of the PA-OCT6 allowed for the Minister to prevent the taking of evidence in criminal proceedings and thus to interfere with decision-making which, under the Constitution, is reserved for the courts. Since the Minister actually made decisions regarding the implementation of the guarantees under Article 29 of the Constitution and since no judicial protection was ensured against his decisions, the challenged regulation also entailed an interference with the fourth paragraph of Article 15 of the Constitution, which ensures judicial protection of human rights.
24. Human rights may be limited only in cases explicitly provided for by the Constitution and in order to protect the human rights of others (the third paragraph of Article 15 of the Constitution). In accordance with the established case law of the Constitutional Court, it is possible to limit a human right if the legislature pursues a constitutionally admissible aim and if such a limitation is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), namely with the principle that prohibits excessive interference by the state (the general principle of proportionality).<sup>23</sup>
25. Non-disclosure of certain information related to police work is undoubtedly legitimate. Such a conclusion follows not only from a careful evaluation of the societal reality we live in, but also from important constitutional law values (while respecting the fundamental principles of a democratic state governed by the rule of law and the protection of human rights and fundamental freedoms).<sup>24</sup> The legislature must deter-

23 Cf. Constitutional Court Decision No. U-I-18/02, dated 24 October 2003 (Official Gazette RS No. 108/03, and OdlUS XII, 86).

24 The fact that other legal orders know the regime of protecting confidential information (in relation to police work) is also not unimportant. Cf., for example, Article 203 of the Italian Code of Penal Procedure (*Codice di procedura penale*), Article 44 of the Finnish Police Act (No. 493/1995), and Article 96 of the German Code of

mine the conditions under which it is admissible to interfere with a defendant's right to confront, directly at the main hearing (or prior to that, even before an investigating judge), witnesses against him or the rights to examine witnesses on his behalf, and/or to obtain, by means of such evidence, information that is important for his defence. With regard to such, it can take into consideration those interests that stem from important constitutional law values, such as the following: state security, the protection of individuals from interferences with their life or person, the protection of the tactics and methods of police work (e.g. the interest that the identity of undercover agents remain concealed so that they can be used in the future). The legislature specifically determined only one aim on which an interference with procedural guarantees regarding criminal procedure is based, i.e. the protection of individuals; however, practice has shown that also other aims are taken into consideration (e.g. the protection of the tactics and methods of police work),<sup>25</sup> which the legislature did not specifically define in an act, although they at the same time entail the substance of the criteria for the permissibility of an interference with the right to a defence. Each interference with human rights or fundamental freedoms must be regulated precisely and unambiguously. Any possible arbitrary decision-making by a state authority must be excluded.<sup>26</sup> The requirement that acts be precise is more emphasised the higher the disputed subject is valued. In criminal procedure, this subject (human freedom) is set the highest.<sup>27</sup>

26. The duty to maintain the confidentiality of sources and undercover agents, and withholding such from the defence (and consequently the public) is an appropriate measure for achieving the aim – i.e. the protection of a witness if his life or safety could be jeopardised. The measure of not disclosing someone's identity is necessary and proportionate if serious danger to his life or person exists or there are other substantial reasons in the public interest, while at the same time the possibility to examine such a witness upon applying protective measures is ensured.<sup>28</sup> Proportionality does not exist when, upon weighing opposing interests (the right to a defence, on one hand, against the right to safety and the interests of public order, on the other), it turns out that the negative consequences that a defendant could experience due to the non-disclosure of the identity of a witness and thus the impossibility of effective cross-examination, could be more severe than those that the witness could experience (e.g. if the level of threat to the witness or the interests of public order is relatively low).<sup>29</sup>

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Penal Procedure (*Strafprozessordnung*).

- 25 It, *inter alia*, follows from the opinion of the Government that the Minister may not relieve a police employee of the duty to maintain confidentiality to the extent that it refers to the tactics and methods of police work.
- 26 Cf. Constitutional Court Decision No. U-I-25/95, dated 27 November 1997 (Official Gazette RS No. 5/98, and OdlUS VI, 158), Paragraph 42.
- 27 Cf. Constitutional Court Decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS No. 25/96, and OdlUS V, 40), Paragraph 38.
- 28 If, due to protective measures, the possibilities of the defence to examine the credibility of a witness are decreased, the court takes such into consideration in evaluating such evidence.
- 29 A defendant must be given the possibility to examine the credibility of a witness against him by cross-examination. In some cases an examination is effective only if the defendant has knowledge of the identity of the

27. When the examination of an anonymous witness suffices for the exercise of the right to a defence, the challenged measure (refusing to disclose the identity of a witness to the court) will not be necessary in such cases. Namely, in some cases it is possible to balance the interest of protecting witnesses and the interest of a defendant to confront them and to contest their statements, or to obtain the examination of witnesses on his behalf. The identity of a witness can be withheld from a defendant and the public while at the same time giving the defence an opportunity to examine the witness. In order to ensure balance between the psychological and physical protection of witnesses, on one hand, and the rights of the defendant, on the other, measures have been enacted by means of which it is possible to maintain the anonymity and thus the security of individuals (informers, undercover agents). Article 240a of the CrPA ensures anonymity to those witnesses for whom testifying and disclosing their identity could result in serious danger to their life or person or that of other persons. This especially concerns testimony related to serious offences or offences concerning organised crime. When in such cases a court considers whether the use of protective measures is justified, it assesses whether disclosing a witness's identity could seriously jeopardise the life or health of the witness or someone close to him. If it establishes such, the information related to identity should not be disclosed.<sup>30</sup> Under the challenged regulation it was possible for such consideration to not even occur. When the identity of a witness remains unknown to the court, it cannot apply the measures provided for in Article 240a of the CrPA and ensure balance between opposing interests. The above-mentioned is substantiated by the conclusion that the challenged regulation interfered in an inadmissible manner with the right of the defendant to a defence provided for in Article 29 of the Constitution and the guarantee under point (d) of the third paragraph of Article 6 of the ECHR.

28. With regard to a witness against a defendant, the state has the following two options: either choose to not use such evidence against the defendant and thus ensure the complete anonymity of the source or the withholding of such information, or to insist on using such evidence and thus risk that certain confidential information will be disclosed.<sup>31</sup> In the event a piece of information whose confidentiality must be maintained would be beneficial to the defendant (which is especially evident when it is possible to

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witness. Special attention is required in cases when a person (an informer) is a witness to a criminal offence committed or when he acted as an *agent provocateur* when the defence claims that the criminal activity was incited. Cf. the decision of the Supreme Court of Canada in *R. v. Scott*, 1990, 3 S.C.R. 979.

30 Such an order can be issued by the investigating judge or the head of a judicial panel after a special hearing has been held at which the defence is not allowed to be present (the fourth and fifth paragraphs of Article 240a of the CrPA). If measures under the first paragraph of Article 240a of the CrPA do not suffice, the fifth paragraph of this Article calls for the application of the Witness Protection Act (Official Gazette RS Nos. 81/06 – official consolidated text, and 110/07), which envisages also other measures.

31 The state prosecutor must pay attention to such when he indicates in the request for an investigation that particular acts be performed, or when he proposes in an indictment which evidence should be taken. With regard to the circumstances of the case, he is obliged to consult the police about issues regarding the use of information obtained from informers and undercover agents.

exculpate the defendant by means of such, e.g. when the evidence provides an alibi), classifying such information as confidential and refusing to disclose it is a barrier to effective implementation of the right to a defence. It is the duty of state authorities who ensure the efficiency of prosecution and of the courts, who must ensure the fairness of proceedings, to assess threats that would follow from different choices and to decide to apply the measure which, upon weighing the legitimate interests and values, is shown to be the least burdensome. This issue requires careful weighing of the interests of public order and/or individuals' personal safety against the right of the defendant to a defence. Whether it is demonstrated, upon appropriate weighing, that such disclosure is well-founded, depends on the circumstances in the individual case, taking into consideration the criminal offence with which the defendant is charged, possible manners of defence, the importance of testifying, and other important elements.<sup>32</sup>

29. The challenged regulation did not ensure such handling of this type of matter, especially since the criteria for decision-making were insufficiently determined and since a final decision regarding the disclosure of information was reserved for the Minister, who does not enjoy the same level of independence and impartiality as the judicial branch of power. In the system of the separation of powers as established by the Constitution the judicial branch has a special status. The reason for such is primarily in that from the range of constitutional provisions that entail a certain derivation from the principle of the separation of powers, including the system of checks and balances, it is evident that the very emphasised role of the judiciary is that of exercising supervision, especially over the executive branch of power.<sup>33</sup> Since the Minister could at his discretion refuse the request of a court to relieve an individual of the duty to maintain the confidentiality of information related to the identity of a witness, or of other important information necessary for the criminal proceedings, and it was not up to the court to carry out the final consideration of whether the reasons for the non-disclosure of certain information are justified, defendants were deprived of judicial protection (in nonconformity with the first paragraph of Article 23 in reference to the fourth paragraph of Article 15 of the Constitution) and of the right to an effective defence (Article 29 of the Constitution). The challenged regulation was imbalanced since it enabled other interests to prevail over constitutionally ensured guarantees that defendants have in criminal proceedings, even when the necessity to disclose information for the needs of the defence was demonstrated; therefore, it was inconsistent with the rights under the first and third indents of Article 29 of the Constitution and the guarantees of fair criminal proceedings under the first paragraph, and points (b) and (d) of the third paragraph of Article 6 of the ECHR. The Constitutional Court did not address the allegations regarding the nonconformity with Article 2 of the Constitution separately since the relevant aspects that the applicant claimed in relation to the alleged nonconformity with Article 2 of the

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32 Cf. U.S. Supreme Court Judgment in the case *Roviaro v. United States*, 1957, 353 U. S. 62.

33 As the Constitutional Court stated in Decision No. U-I-159/08, dated 11 December 2008 (Official Gazette RS No. 120/08, and OdlUS XVII, 71), Paragraph 25.

Constitution were important for the consideration of the nonconformity with the above-mentioned provisions of the Constitution.

30. In light of the above-mentioned, the Constitutional Court found that the third paragraph of Article 56 of the PA-OCT6 was inconsistent with the Constitution (Point 1 of the operative provisions).

#### **B – IV**

31. The text of Article 56 of the PA-OCT6 was amended by the PA-G such that it now reads as follows:

“Police employees must maintain the confidentiality of classified information, personal information, and protected information encountered while performing their duties. The duty to maintain the confidentiality of such information remains in effect after such employment terminates.

Protected information of the police is information whose handling requires the implementation of certain safety measures and procedures.

Police employees shall be obliged to maintain the confidentiality of a source that has filed a report, provided information, or filed a complaint.

The Minister may, in substantiated cases when this is in the interest of the criminal proceedings and does not jeopardise the life or personal safety of an individual, relieve a police employee of the duty to maintain confidentiality provided for by the first paragraph of this Article, at the request of the competent authorities.

32. Since the fourth paragraph of Article 56 of the PA does not deviate, in its essence, from the prior regulation, the nonconformity with the Constitution is demonstrated on the same grounds as with regard to the third paragraph of Article 56 of the PA-OCT6. In light of the above-mentioned, the Constitutional Court abrogated the fourth paragraph of Article 56 of the PA to the extent that it refers to the conditions and decision-making procedure for relieving individuals of the duty to maintain the confidentiality of information in criminal proceedings (Point 2 of the operative provisions). The abrogation refers to relieving individuals of the duty to maintain confidentiality in criminal proceedings with regard to the taking of evidence by means of the examination of police employees in order to decide on criminal responsibility or in relation to possible other important issue.

#### **B – V**

33. The Constitutional Court partially abrogated the fourth paragraph of Article 56 of the PA. The abrogation of the challenged provision to the extent mentioned above does not remedy the unconstitutional situation in its entirety since the decision-making procedure for disclosing confidential information that a police employee has encountered and that is necessary for carrying out criminal proceedings is not regulated. Since due to the abrogation of the special provision, the general provision under the second paragraph of Article 33 of the CIA would subsequently apply, the Constitutional Court determined, on the basis of the second paragraph of Article 40 of the CCA, the manner of the implementation of this decision. By adopting such an approach the Court on

one hand protected the constitutionally admissible aim that the legislature pursued by the challenged regulation, and on the other hand it ensured that in the period prior to the adoption of the new regulation, no inadmissible interference with the human rights and fundamental freedoms of defendants would occur. And by determining the manner of implementation it also determined the procedural rules.

34. When a judge in criminal proceedings (either during an investigation or at the main hearing) finds that it is necessary to take evidence by means of examining a police employee and the taking of evidence refers to confidential information,<sup>34</sup> he requires that the Minister in charge of internal affairs relieve the police employee of the duty to maintain the confidentiality of such information.<sup>35</sup> In the event the Minister finds that there are reasons why the police employee cannot be partially or entirely relieved of the duty to maintain the confidentiality of information (e.g. for reasons of state security, the protection of the tactics and methods of police work, the personal safety of an individual), he shall inform the president of the competent Higher Court which the court that filed the request is within the jurisdiction of, of his standpoint and of the reasons for such opinion, and at the same time submit the request of the court. He shall do so within eight days of receiving the request. The president of the Higher Court then initiates the so-called *ex parte* procedure, the subject of which is deciding on the possible disclosure of confidential information to the defence. The police must enable the president of the Higher Court to have access to the confidential information, i.e. they must enable him to access it for the purpose of deciding whether it is admissible to disclose such in the criminal proceedings. If the police cite special reasons for maintaining confidentiality, they provide the president of the Higher Court the opportunity to access the confidential information at a location and in a manner that they determine. The request for the disclosure of information becomes void if it is related to incriminating evidence obtained by the examination of a witness which is subsequently withdrawn by the state prosecutor.
35. The president of the Higher Court may obtain explanations and opinions necessary for his decision from state authorities. In his decision-making he is not bound by the reasons stated by the Minister, and must *ex officio* also establish other important reasons that require the non-disclosure of the confidential information. Prior to final consideration of whether the reasons for the disclosure of certain confidential information are justified, the president of the Higher Court notifies the defendant and his attorney of the initiation of an *ex parte* procedure and the standpoint of the Minister, and thus enables them to state in a written submission whether the reasons for maintaining the confidentiality of certain information are justified. An adversarial aspect is ensured only to the extent possible while taking into account the nature of the matter. After examining the criminal file<sup>36</sup> and the

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34 An analogous situation occurs when the issue of maintaining confidentiality is raised during the examination of a witness.

35 The request of the court must contain a statement of reasons.

36 When necessary, he may obtain an explanation from the judge who filed the request.

confidential information, the president of the Higher Court may order that the confidential information be disclosed and determine the scope of the disclosure thereof, all in such a manner that the confidentiality of the information is maintained.<sup>37</sup> He adopts the decision upon carefully considering the needs regarding the taking of evidence and the level of the sensitivity of the information and by weighing the conflicting constitutional law values. If the president of the Higher Court assesses that the disclosure of individual personal information or the entire identity of a source of information is not admissible, he adopts a decision regarding the possible measures provided for in the first paragraph of Article 240a of the CrPA, or submits to the state prosecutor a motion in accordance with the fifth paragraph of Article 240a of the CrPA. Disclosure of personal information or the identity of a source of information is not admissible if the safety of the witness or someone close to him is in evident and serious danger.

36. He may adopt the decision after a special hearing has been held at which he examines *in camera* persons who could provide information important for his decision, upon *mutatis mutandis* application of the fifth paragraph of Article 240a of the CrPA. He must ensure all conditions for the safe handling of confidential information while deciding on disclosure and after such. Appeal is not allowed against the order by which he decides on the requested disclosure of certain confidential information. He sends the order to the Court that filed the request, which serves it on the Minister, the state prosecutor, the defence attorney, and the defendant. If a witness has to be examined in criminal proceedings with regard to whom a protective measure has been ordered, the investigating judge or the head of the judicial panel obtains the essential information related to the identity of the witness by examining the case file held by the president of the Higher Court, or he confirms his identity with the assistance of the president of the Higher Court. During the examination of the witness the judge prohibits questions the answers to which could disclose confidential information to a greater extent than allowed.
37. The manner of implementation that the Constitutional Court established regarding the present decision does not entail that this is the only possibility consistent with the Constitution. Therefore, it does not limit the legislature in that, with regard to police employees, it should not regulate in a different manner, yet consistently with the Constitution, the issue of relieving a police employee of the duty to maintain the confidentiality of information or the issue of disclosing such information to the extent to which such is essential in order to carry out criminal proceedings. Within this framework, the legislature may also consider the option of introducing a mechanism that would, in exceptional cases, enable the state prosecutor to decide to terminate the proceedings when there is a risk of the disclosure of confidential information due to a court order. Such a mechanism could entail a special guarantee for the protection of confidential information in exceptional cases.

37 Cf. the second sentence of the second paragraph of Article 240a of the CrPA: "The decision may not contain information that could lead to the disclosure of information that is the subject of the protective measure."

**C**

38. The Constitutional Court reached this Decision on the basis of Article 21, the second paragraph of Article 47, Article 43, and the second paragraph of Article 40 of the CCA, composed of: Dr Ernest Petrič, President, and Judges Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, and Mag. Jadranka Sovdat. Judges Dr Mitja Deisinger, Jože Tratnik, and Jan Zobec were disqualified from deciding on the case. The decision was adopted unanimously.

*Dr Ernest Petrič*  
*President*

Decision No. **U-I-60/98**, dated 16 July 1998

### DECISION

At a session held on 16 July 1998 in proceedings to review constitutionality, initiated upon the petitions of Janez Rozman, Ljubljana, and Dr Ksenija Rozman, Ljubljana, represented by the authorised representative Janez Rozman, Dr Rajko Turk, Dr Josip Turk, and Milica Abram, all Ljubljana, represented by Igor Dernovšek, attorney in Ljubljana, Dr Johannes Attems, Vienna, represented by Rok Fink, attorney in Celje, Cecilija Pavlin, Amalija Murn, and Hinko Kirn, Ljubljana, represented by Irena Polak-Remškar, attorney in Ljubljana, Amalija Likar and Peter Bedjanič, Ljubljana represented by their authorised representative Novica Novaković, Ljubljana, Franc Gerden, Trebnje, represented by Hranislav S. Đurković, attorney in Koper, and Stanko Prijatelj, attorney in Ljubljana, Julija Zaletel, Olga Zaletel and Magdalena Betetto, Ljubljana, represented by Irena Polak-Remškar, attorney in Ljubljana, Tom Knez, Ljubljana, represented by Nataša Vidovič, attorney in Ljubljana, Dr Aleksander Majdič, Bled, represented by Nataša Vidovič, attorney in Ljubljana, Dr Ljubo Sirc, Kranj, represented by Nataša Vidovič, attorney in Ljubljana, Dr Igor Levstek, Ljubljana, represented by Nataša Vidovič, attorney in Ljubljana, Jure Filipčič and Mladen Terčelj, Ljubljana, Miha Jemec, Zug, Switzerland, represented by Aleš Rojs, attorney in Ljubljana, Alojzija Farič, Anica Cimperc, Alojzija Osvald and Mirko Lemež Jr., all Maribor, represented by their authorised representative Igor Osvald, Maribor, and Franc Zdolšek, Maribor, Milan Zdolšek, Dobje pri Planini, Marko Zdolšek, Šentjur, Terezija Zdolšek, Šentjur, Marija Rep, Maribor, and Emilija Zdolšek, Šentjur, all represented by Dušan Pungartnik, attorney in Šentjur, the Constitutional Court

*decided as follows:*

1. Articles 145. a and 145. c of the Enforcement of Criminal Sanctions Act (Official Gazette SRS, Nos. 17/87, 23/82, 41/87, 32/89 and 8/90 and Official Gazette RS, Nos. 12/92, 58/93, 71/94, 29/95 and 10/98) are not inconsistent with the Constitution.
2. Point 5 of Article 145. b of the same Act is not consistent with the Constitution to the extent it fails to set a deadline by which a special Act regulating the issuance of bonds should be adopted.
3. Article 3 of the Act Amending the Enforcement of Criminal Sanctions Act (Official Gazette RS, No. 10/98) is not consistent with the Constitution in so far as it

fails to stipulate that unjustly convicted persons, or their heirs, who have initiated proceedings for the restitution of assets or the payment of compensation prior to its entry into force shall also have the right to the reimbursement of the costs of proceedings with respect to that part of the claim with which they will not succeed with regard to Article 3 of this Act.

4. The legislature must remedy the inconsistencies established in Points 2 and 3 of the operative provisions of this Decision by no later than six months from the day of the publication of this Decision in the Official Gazette of the Republic of Slovenia.
5. The petition to review the constitutionality of the third paragraph of Article 145 and Article 145. č of the Enforcement of Criminal Sanctions Act is dismissed.

### *Reasoning*

#### **A**

1. The petitioners who are listed in the introductory part of this Decision challenge the Act Amending the Enforcement of Criminal Sanctions Act (Official Gazette RS, No. 10/98 - hereinafter referred to as the ECSA Amendment) in its entirety or just specific provisions thereof (Janez Rozman and Dr Ksenija Rozman, Dr Rajko Turk, Dr Josip Turk and Milica Abram, Cecilija Pavlin, Amalija Murn, and Hinko Kirn). The petitioners claim that the provisions of Articles 2, 3, 8, 14, 15, 22, 26, 30, 33, 153, and 155 of the Constitution were violated. All the petitioners claim that the principle of equality was violated and point out that it is clear that the challenged amendments to the Enforcement of Criminal Sanctions Act (hereinafter referred to as the ECSA) do not treat citizens that were unjustly convicted prior to 1958 equally as those convicted at a later date, and differently again to those to whom financial compensation for confiscated assets was awarded by way of final judgment even though they were convicted prior to 1958.
2. All the petitioners also propose that the Constitutional Court suspend the implementation of the challenged provisions. They justify such by stating the following harmful consequences that are difficult to remedy could occur:
  - unnecessary work for the courts, which are already dealing with an increased workload and additional financial costs – on the basis of the amended substantive law, the courts would allegedly begin issuing decisions dismissing the claims and appointing new experts to evaluate the property on the basis of the Denationalisation Act [(hereinafter referred to as the DenA)] and other regulations;
  - the petitioners and other beneficiaries would allegedly incur great costs by filing their claims and actions for which no reimbursement is provided by the challenged act, and beneficiaries would even have to pay the costs of litigation to the Republic of Slovenia acting as the defendant if their claims were dismissed;
  - assuming that the Constitutional Court would abrogate the retroactive effect (Article 3), the dismissal of claims would allegedly imply further delays in solving these cases in the courts and thus constitute a violation of the right to judicial

protection referred to in Article 23 of the Constitution, which has already been violated by lengthy procedures and moratoriums;

- in case of abrogation of the challenged provisions, even greater confusion, additional costs and problems in the proceedings would ostensibly arise in the courts.

**3. Individual petitioners also assert the following in their claims:**

- The petitioners Janez and Dr Ksenija Rozman consider that the ECSA is a law which has been in force since 1978 and guarantees the constitutional right to rehabilitation of unjustly convicted persons. In the opinion of the petitioners, any association between the ECSA and the DenA is impermissible and without a legal basis because each regulates its own area of law.

They further state that the National Assembly intentionally violated the Constitution, because by the challenged act it reintroduced a system which the Constitutional Court already abrogated by its Decision No. U-I-10/92. The reasons for adopting the challenged act are, in the opinion of the petitioners, in conflict with the principle of the state governed by the rule of law, because it is allegedly evident from the legislative materials that, for the legislature, anticipated revenue is of greater value than respect for the Constitution.

- The petitioners Dr Rajko Turk, Dr Josip Turk, and Milica Abram state that in the non-litigious civil proceedings No. Nz 394/94 it was already decided that Ljubljana Municipality was obliged to pay compensation to the petitioners in the amount of SIT 5,225,035 for confiscated assets. The aforementioned Decision, however, is not yet final, because the opposing party filed an appeal which has not yet been decided. On the basis of Article 3 of the ECSA Amendment, these proceedings, which were brought to an end at the first instance court two years ago, should be remitted to the first instance, and their request would allegedly be considered in accordance with the DenA, granting fewer rights to the petitioners. In the opinion of the petitioners, the conditions determined in the second paragraph of Article 155 of the Constitution concerning the retroactive effect of legal acts are not met and that is why, by determining that the ECSA Amendment should be applied to all the proceedings where a final decision has not yet been adopted, the legislature interfered retroactively with existing relations and thereby infringed Article 155 of the Constitution.

- The petitioner Dr Johannes Attems states that the amendment to the ECSA is contrary to the principle of the state governed by the rule of law because the state cannot change a law to its advantage after many parties have already been successful in their claims and the confiscated assets was already restituted. A total of 1400 hectares of forests were restituted to the petitioner based on the denationalisation proceedings, but he withdrew his claim and requested that the restitution be carried out in accordance with the then applicable ECSA. The petitioner wishes to know who will reimburse the huge costs of experts that must be covered by the body that is obliged to restitute the assets in the denationalisation proceedings and by a claimant himself in non-litigious civil proceedings. In the supplement to his petition, the petitioner considers that, by adopting the chal-

lenged act, the state has again imposed upon him the sanction of confiscation of assets that is not determined by any law.

- The petitioners Cecilija Pavlin, Amalija Murn, and Hinko Kirn state that they filed an action on 27 March 1997 in which they requested that they be paid compensation for the loss of profit incurred as the result of confiscation of assets of their legal ancestor. They claim that the legislature denied the right to compensation for damage, without an objective and reasonable ground to do so, precisely to those persons who were convicted and sentenced most severely during the period of the greatest revolutionary euphoria, and for acts which they never committed. They draw attention to the very high costs which beneficiaries have already incurred by filing their actions (court fees and legal costs).
- The petitioners Anamarija Likar and Peter Bedjanič, as legal successors to the late Dr Hermina Bedjanič, state that the redress of injustices done to unjustly convicted persons should not be based on the DenA, since the unjust conviction was a violation of fundamental human rights resulting in great emotional distress, humiliation and social degradation. They claim that Article 3 of the challenged act is contrary to Articles 28 and 155 of the Constitution, since it determines a new procedure, manner, and scope for returning unjustly confiscated assets with retroactive effect.
- The petitioner Franc Gerden filed two petitions, in which he states that the right to compensation for damage arose at the moment when the sentence of confiscation of assets was overturned by way of a final decision and that, based on the Criminal Procedure Act [(hereinafter referred to as the CrPA)], at that time he was entitled to full compensation for damage and loss of profit.
- The petitioners Julija Zaletel, Olga Zaletel, and Magdalena Betetto state that by way of its Decision dated 15 May 1995, the competent court had already decided that the Republic of Slovenia should pay compensation amounting to SIT 54,768,160 to the heirs to Franc Zaletel, and that the decision is not yet final. They are of the view that, owing to the adoption of the challenged amendments, they are no longer entitled to the reimbursement of the actual value of the confiscated assets; in fact, that they are no longer entitled to anything whatsoever, because the challenged provisions only provide for the adoption of a special law regulating the issuance of bonds for the payment of compensation. Such regulation of recognised rights allegedly causes legal uncertainty, because nobody knows when the aforementioned special law will in fact be adopted, and it is also an unconstitutional method of regulation, which the legislature is using increasingly frequently. In the opinion of the petitioners, the burden on the national economy does not justify the violation of the rights guaranteed by the Constitution. They point out that, taking into consideration the legal system in force and Decision of the Constitutional Court No. U-I-10/92, they decided to enforce their claims on the basis of the ECSA and thus assumed the high court costs for experts and the lawyer.
- In his petition, the petitioner Tomo Knez states that the challenged amendments entail a return to the time prior to the adoption of the constitutional amend-

ment XCVI and abandoning the principles of Article 29 of the Universal Declaration of Human Rights. He points out that the challenged provisions interfere with final court decisions and the acquired rights, and that they cause unjustly convicted persons to be treated unequally.

- In his petition, Dr Aleksander Majdič states that the challenged provisions of the ECSA alter his position in these proceedings. He points out that amendment XCVI to the Constitution of the Socialist Republic of Slovenia established equality of treatment for unjustly convicted persons, thereby eliminating the ideological barrier for redressing the injustices done to victims of post-war circumstances.
- The petitioner Dr Ljubo Sirc also alleges a violation of the European Convention on Human Rights in conjunction with the Resolution 1096 dated 27 June 1996 of the Parliamentary Assembly of the Council of Europe. He takes the view that the right to compensation for damage arises at the moment when an unjust conviction is overturned and not as late as on the occasion of a final judgment on the restitution of assets, as stated in the reasons for the draft of the challenged law. In the opinion of the petitioner, the assertions in the reasons for the draft of the challenged law to the effect that “injustices cannot be remedied entirely, that the burdening of economy would be too great, that Slovenia is a social state, that new injustices are not supposed to be committed” do not excuse the legislature from restituting the confiscated assets in their entirety or from giving a “fair financial compensation” in return. The petitioner further points out that, with regard to the retroactive effect of the challenged provisions, the legislature has no grounds to invoke public interest. In the opinion of the petitioner, it is precisely public interest and the principle of a social state that require the assets to be restituted as soon as possible to those who are capable of managing it and producing better results. He draws attention to the fact that the purpose of confiscation in criminal proceedings was not solely to take away assets but also to bring shame on entrepreneurs, and that those proceedings cannot be compared to nationalisation proceedings. However, he considers that it would nevertheless be necessary for the restitution of assets to the beneficiaries to be equal for everyone. It would be necessary to apply the principles of tort law, and the confiscated assets should be restituted at the market value and not a value determined on the basis of laws and regulations. This is why the petitioner also filed the petition for the constitutional review of the DenA. The Constitutional Court separated this petition and will consider it as an independent case under No. U-I-137/98.
- The petitioner Dr Igor Levstek states that the challenged amendments to the ECSA apply to the time prior to the adoption of the constitutional amendment XCVI and represent a departure from the principles of Article 26 of the Universal Declaration of Human Rights. As the challenged provisions no longer recognise the right to compensation for the loss of profits, they allegedly re-establish the inequality which the Constitutional Court already remedied by abrogating Article 92 of the DenA.
- The petitioners Jure Filipič and Mladen Terčelj state that the challenged law

re-establishes the system that was applicable prior to the adoption of the constitutional amendment XCVI. This allegedly constitutes a departure from the principles contained in Article 29 of the Universal Declaration of Human Rights, and is justified by the simple conclusion that we are in a transitional phase, which allegedly allows less rigorous adherence to constitutional and statutory provisions. They are of the opinion that the ECSA, as a regulation governing the enforcement of criminal sanctions and a “specialised” law of a kind, cannot interfere with the provisions of Article 13, the second paragraph of Article 539 or Article 540 of the CrPA.

- The petitioner Miha Jemec challenges Article 145. c, since it no longer recognises full compensation for confiscated assets as determined by the Criminal Proceedings Act and the Obligations Act. He takes the view that the amendment is contrary to Article 30 of the Constitution and that, because of the budgetary problems and the principle of a social state, the legislature should not interfere with the right of unjustly convicted persons to full compensation as recognised by all civilised nations.
- In addition to Articles 145. a and 145. c, the petitioners Alojzija Farič, Anica Cimperc, Alojzija Osvald, and Mirko Lemež Jr. also challenge the third paragraph of Article 145 and Article 145. č. In their petition they also invoke Article 15 of the Constitution. They believe that the challenged provisions impede the exercising of the rights granted in Articles 26 and 30 of the Constitution and deny the right to obtain redress for the violation of human rights and fundamental freedoms (first and fourth paragraphs of Article 15 of the Constitution). They take the view that the legislature had no grounds to limit the rights granted by Articles 26 and 30 of the Constitution in accordance with the third paragraph of Article 15 of the Constitution and the positions of the Constitutional Court. The rights of others, which the challenged provisions allegedly protect (the right of citizens to a certain service from the state financed from the budget or any other right), are not “of the same rank” as the rights referred to in Articles 26 and 30 of the Constitution. They point out that interference with the rights referred to in Articles 26 and 30 is neither necessary nor appropriate. The state should cover the increase in the costs resulting from the payment of compensation by other measures, in particular by reducing its expenditure and improving the efficiency of control.
- Franc Zdolšek, Milan Zdolšek, Marko Zdolšek, Terezija Zdolšek, Marija Rep, and Emilija Zdolšek claim that the provision of Article 145. a is in fact the provision of Article 92 of the DenA that was abrogated by the Constitutional Court, and that the legislature does not have any grounds for making their position equal to the position of denationalisation beneficiaries. The petitioners stress that their claim is exclusively a claim under civil tort law and that it is in no way connected with the nationalisation of private property and the subsequent denationalisation. Unlawful confiscation based on criminal proceedings involves unlawful acts on the part of a state authority or specific judge, for which the responsibility in relation to the injured party lies with the state. They propose that the challenged provisions be abrogated.

4. The National Assembly (reply of the Secretariat for Legislative and Legal Matters of 21 May 1998, following the discussion at the Committee for Internal Policy and Justice) considers that the challenged regulation does not constitute a violation of the Constitution. With regard to the challenged regulation, the legislature took into account the principle of the social state and the principle of equality of all persons whose assets were confiscated or nationalised after the Second World War, and the capacity of the community to fulfil all the obligations arising from the restitution of confiscated assets. During the review, the Constitutional Court should take into account, as a first pertinent reason, that the legislature established equality between all the injured parties regarding the challenged amendments relating to the restitution of confiscated assets. The legislature took into account that, if there was no criminal conviction, the assets of the injured parties would become state property on the basis of some other legal title. The second pertinent reason, which allegedly justifies the challenged regulation, is the principle of the social state demanding that the general financial situation in the state be taken into consideration. The state must act in this way so that the public interest will not be affected because of individual interests, and must consequently regulate the compensation of special damage according to the principle of the proportional balancing of burdens, as is appropriate for a social state, between the state and tax-payers. Special regulation is also justified by the fact that over 40 years have passed since the events that caused the damage and that the confiscated assets were subject to many changes and interventions during that period. Moreover, the explanation in the reply includes information about the number and amount of claims which, although incomplete, point to the risk of state insolvency. The exclusion of claims for compensation for the loss of profits was also dictated by the nature of this tort law instrument which stipulates that the benefits the injured party would enjoy in normal circumstances and on the basis of reasonable and justifiable expectations should be repaid. Since it is not possible to speak of normal circumstances during the 1945-1958 period or of reasonably expected benefits for the injured party, the amount of lost profit comes into question, since this is compensation for damage caused in quite specific circumstances. The petitioners' assertions that the challenged provisions interfere with acquired rights are, in the opinion of the opposing party, unfounded. The legal basis for a claim for damages is established only after the sentence of confiscation of assets is overturned; this, however, does not imply that the right to a certain amount of compensation is acquired in this way. This right is acquired only on the basis of a final court decision, and this is why the challenged amendments do not interfere with the already acquired rights of the injured parties.
5. The Constitutional Court sent the explanations of the opposing party to the petitioners, who filed their petitions for the review of the challenged law until 7 May 1998. In their replies, the petitioners insist with their petitions; they repeat and supplement their statements in their petitions and reply to the positions and grounds provided by the opposing party. The Constitutional Court summarises only those statements made by the petitioners in which they respond to the positions and grounds provided by the opposing party. The replies show that the positions of the opposing party are unaccepta-

ble for the petitioners or they consider them to be contrary to the principle of the state governed by the rule of law. With regard to the position that the challenged amendments put the position of all the persons whose assets were confiscated after the Second World War on an equal footing, they point out that it is unacceptable to ignore the fact that the state considered the injured parties to be criminals and confiscated their entire property, all of which took place prior to agrarian reforms or nationalisation. With regard to the position that the assets of the injured persons would be nationalised, even in the absence of criminal conviction, and they would be entitled to request restitution on the basis of the DenA, the petitioners stress that such a finding is not true in many cases, particularly for those who owned small workshops, since these could not be nationalised on the basis of the Private Industrial Enterprises Nationalisation Act (Julijana Zaletel, Olga Zaletel, and Magdalena Betetto, as well as Cecilija Pavlin, Amalija Murn, and Hinko Kirn). They consider that the opposing party cannot invoke the principle of equality since the amendments themselves created inequality between those to whom confiscated assets have already been restituted on the basis of the ECSA and those to whom they have not been yet restituted. The petitioners also argue that invoking the principle of the social state is also unfounded. The National Assembly took into consideration incorrect data, since the amounts actually requested were not that high, and the difference between the compensation for damages paid on the basis of the ECSA and the DenA was not very clear. The amounts requested in actions (for damages), which are the reason invoked by the opposing party for the failure to pay, do not imply that such damages will also be awarded, and it is inadmissible to use them as justification for concern for the social state. The consequences of restituting the confiscated assets should be dealt with by the state using different legal solutions, and not by abolishing the right to full compensation (Dr Igor Levstek, Tomo Knez, Dr Aleksander Majdič, and Dr Ljubo Sirc). With regard to the position that the challenged provisions do not have retroactive effect, the petitioners insist in their replies that they acquired the right to compensation for damage on the basis of the laws in force at the moment when they filed their actions for damages and petitions in the framework of non-litigious proceedings against the state, and that the challenged provision of Article 3 interferes with their acquired rights. They point out that any amendment to the ECSA and attempt to make it equal to the DenA is a violation of Article 155 of the Constitution, since the rights of the unjustly convicted persons are being reduced as a result.

## **B – I**

6. In addition to the data specified in the legislative materials, the Constitutional Court also took into consideration the data provided by the Supreme Court and the Ministry of Justice.
7. From the report of the Supreme Court the following is evident:
  - that the Supreme Court does not keep special records concerning the reopening of criminal proceedings which were decided by final decisions prior to 31 December 1958 and in which the sentence of confiscation of assets was imposed and the information could only be collected by examining more than 1000 files;

- that during the period 1989–1994 (since 1 January 1995, the Supreme Court has no longer been competent to decide on the reopening of proceedings – Article 557 of the CrPA), it decided in 9 cases concerning a request to reopen criminal proceedings and allowed the reopening in favour of 29 convicted persons (in 7 cases, assets confiscation was imposed as a sentence);
  - that during the period 1990–1996 regarding requests for the protection of legality (383 were filed during that period), it decided in favour of 774 convicted persons and that, taking into account the legislation then in force, pursuant to which a sentence of the confiscation of assets was mandatory, it is reasonable to conclude that the sentence of confiscation of assets was also imposed on a large number of convicted persons who were acquitted of all charges by the Supreme Court or where the same overturned the challenged sentence, and so it did not decide separately on the sentence of the confiscation of assets;
  - that only three requests for the protection of legality were filed in 1997 against sentences that became final prior to 31 December 1958 in which the confiscation of assets was imposed. All the requests were filed by the Office of the State Prosecutor of the Republic of Slovenia, and the deadline for filing such requests by convicted persons and their relatives had already expired (Article 559 of the CrPA);
  - that, in 1997, it granted requests for the protection of legality in 18 cases, in which the confiscation of assets was imposed – in 5 cases it overturned the challenged sentences, in 10 cases a judgment of acquittal was pronounced, in 2 cases the sentence was changed, and in one case the criminal proceedings were discontinued; among these cases there were also some that related to several convicted persons.
8. The Ministry of Justice reports that no data exist about the number of criminal sentences in which confiscation of assets was imposed in 1945 and 1946. The data for subsequent years is as follows: 1947 - 870, 1948 - 496, 1949 - 730, 1950 - 351, 1951 - 90, 1952 - 19, 1953 - 3, 1954 - 0, 1955 - 8, 1956 - 0, 1957 - 2, 1958 - 0. The Ministry further reports that the courts should examine all the files in order to determine the number of cases in which proceedings were reopened and were decided by first instance courts in which the sentence of confiscation of assets was imposed. By way of example, the Ministry reports that, during the period between 1 January 1990 and 31 December 1997, a total of 214 requests were filed at the Ljubljana District Court for the reopening of proceedings and that 111 requests were granted. The Ministry furthermore states that, at the end of 1997, approximately 387 non-litigious proceedings concerning the restitution of confiscated assets were pending and that claims for compensation in individual cases were extremely high. With regard to the claims for compensation for the loss of profit, the Ministry also reports that the sum of all the claims sought by action, which amounted to SIT 31 billion during the legislative procedure, increased even further because an action for the loss of profit in the amount of over SIT 11 billion was also filed.
9. For the purpose of joint consideration and adjudication, the Constitutional Court joined the petitions referred to under section A of the reasoning. All the petitioners have a legal interest to challenge the ECSA Amendment. It is evident from the peti-

tions and appendices thereto that all the petitioners demand before the competent courts the restitution of confiscated assets or the payment of compensation, and that the court proceedings have not yet concluded. In the case of the petitioner Dr Aleksander Majdič, the Constitutional Court found that he has a legal interest to dispute the ECSA Amendment since, on the basis of Decision of the Constitutional Court No. U-I-249/96, dated 12 March 1998 (Official Gazette RS, No. 29/98), those whose assets were confiscated on the basis of Article 28 of the Asset Confiscation and Confiscation Enforcement Act (Official Gazette [of the Democratic Federal Yugoslavia], No. 40/45) shall also be entitled to lodge a request for the reopening of proceedings in accordance with the provision of Article 416 of the CrPA and, if successful in the aforementioned proceedings, will be entitled to request the restitution of assets in accordance with the provisions of the ECSA.

10. Given that the conditions specified in the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA) are met, the Constitutional Court accepted the petitions and immediately proceeded to decide on the merits of the case. However, it dismissed the petitions of Alojzija Farič, Anica Cimperc, Alojzija Osvald, and Mirko Lemež Jr. in so far as they challenge the provisions of the third paragraph of Article 145 and Article 145. č of the ECSA.
11. Considering that the restitution of confiscated assets has already been suspended twice by law, and that these issues should be resolved as soon as possible, the Constitutional Court resolved at a session held on 12 March 1998 not to decide separately on a motion for suspension and to instead consider the case as a matter of priority.

## B – II

### *Review of Articles 145. a and 145. c of the ECSA*

12. Article 30 of the Constitution provides that any person unjustly convicted of a criminal offence or deprived of his liberty without due cause has the right to rehabilitation and compensation, and other rights provided by law. This constitutional provision determines the strict liability of the state for damage in cases where, for any reason whatsoever (for fault or no fault, lawful or unlawful reason), a person is unjustly convicted or deprived of liberty without due cause. The right to restitution of assets which were confiscated by imposing the sentence of confiscation of assets is not a special right but constitutes a part of a single constitutional right referred to in Article 30 of the Constitution. Although the restitution of confiscated assets pursuant to Article 145 of the ECSA does not in substantive terms constitute “compensation for damage” in the sense of rules governing tort law but instead represents a special manner of regulating the institute of unjust enrichment,<sup>1</sup> this right is constitutionally protected by Article 30 of the Constitution which grants to those persons who have been unjustly convicted of a criminal offence a universal right to compensation. The aforementioned assumption was also used as the starting point by the legislature, which is evident from the reasons given for the draft of the ECSA Amendment, as

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1 Position of the Supreme Court in Decision No. II Ips 27/93.

well as from the provisions of the fourth paragraph of Article 145, which mentions “compensation” in cases where it is no longer possible to reconstitute the confiscated assets or individual parts thereof in kind or if this is legally not possible.

13. The right to compensation resulting from unjust conviction is the constitutional right of a person who sustains damage as a result of an unjust criminal conviction. It involves a special personality right, which can only be exercised by the unjustly convicted person. If after his death a person is found to have been unjustly convicted, his heirs shall succeed to the right to compensation in accordance with the provisions of the CrPA and the general principles of tort law.<sup>2</sup> The right of the heirs to compensation due to the unjust conviction of their ancestor does not arise from Article 30 of the Constitution but is constitutionally protected in Articles 33 and 67 of the Constitution.
14. The sentences of confiscation of assets were already being imposed by military courts during the war on the basis of decrees and instructions issued by military authorities and, subsequently, on the basis of the Military Courts Decree dated 24 May 1944 (Gazette of the Headquarters of the National Liberation Army and Partisan Detachments of Slovenia, No. 6/44). Confiscation of assets was defined as a so-called security measure (Article 16 of the Decree) and used to be imposed in addition to the sentence. With the Types of Sentences Act (Official Gazette DFY, No. 48/45, and Official Gazette FPRY [Federal People's Republic of Yugoslavia], No. 66/46), the confiscation of assets was defined as one of the sentences which could be imposed by military and civil courts (Article 1). It could be pronounced as the main sentence or as ancillary sentence, and in only those cases in which it was expressly prescribed by the law. The court was obliged to impose the sentence of confiscation of “all assets” if it imposed a sentence of revoking the citizenship. It implied the compulsory seizure of all the assets, or a part thereof, from a person for the benefit of the state and without the possibility of restitution. It was expressly provided that the sentence of confiscation of assets could be imposed against natural and legal persons (Article 14 of the Decree). The sentence of confiscation of assets was prescribed by the substantive criminal law as an ancillary sentence until the adoption of the Criminal Code of the Republic of Slovenia (Official Gazette RS, No. 63/94), which no longer contains the sentence of confiscation of assets.
15. The right to the restitution of confiscated assets if the sentence of confiscation of assets was overturned was already recognised in the former legal system before the recognition of the special right to the rehabilitation and compensation of the unjustly convicted persons (Paragraph 25 of this reasoning), i.e. in the Execution of Sentences, Security Measures and Educational and Correctional Measures Act (Official Gazette FPRY, No. 47/51). Article 91 of this act contained the same provision in terms of its content as the still applicable Article 145 of the ECSA and, in accordance with the latest amendments of the ECSA, it applies for the purpose of restituting the confiscated assets, if the (overturned) sentence of confiscation of assets was imposed after 31 December 1958. In their transitional provisions, neither the aforementioned act

<sup>2</sup> Article 204 of the Obligations Act provides that a claim for compensation of non pecuniary damage shall only be inherited by the heirs if it was awarded by a final decision or written agreement.

nor the subsequent Enforcement of Criminal Sanctions Act (Official Gazette [of the Socialist Federal Republic of Yugoslavia], No. 3/70 – consolidated text – entered into force on 1 July 1968) excluded the restitution of confiscated assets, if the sentence of confiscation of assets was imposed by a final criminal sentence prior to 1 July 1954 that was subsequently annulled.

16. In terms of its content, Article 145 of the ECSA is a provision of substantive law which provides that confiscated assets shall be restituted to the convicted person or his heirs; if the restitution of confiscated assets or individual parts thereof in kind is no longer possible or is not legally possible, the beneficiaries shall be entitled to “compensation”<sup>3</sup>, which shall represent the actual value of the confiscated assets at the time when the decision on the restitution of assets is issued and in the condition they were in at the time of confiscation. The provision of Article 145 of the ECSA therefore excludes the application of the provisions of the Obligations Act (hereinafter referred to as the OA) regarding unjust enrichment, which in case the restitution is no longer possible provide only for the possibility of compensation to the value of the benefit achieved, and it independently regulates the scope and manner of the restitution of confiscated assets after the sentence of confiscation of assets was annulled by a final decision.
17. The challenged Article 145. a provides that, in cases where the sentence of confiscation of assets imposed prior to 31 December 1958 was overturned on the basis of extraordinary legal remedies, the general provisions of Article 145 of the ECSA on the restitution of confiscated assets shall not apply with regard to the forms and scope of the restitution, the restrictions relating to the restitution or the valuation of the assets, but that the provisions of Chapter III of the DenA, which contain special criteria regarding the valuation of the assets (Article 44), restrictions regarding the restitution in kind (Articles 19 and 27) and exclusion (as a rule) of the payment of damages – financial compensation (Articles 42, 43, 45, 46, 47, 48 and 50) shall apply *mutatis mutandis*.
18. The challenged Article 145. c excludes the recognition of “claims for damages arising from the impossibility of using or managing assets and arising from the maintenance of real estate, as well as any other claims relating to the loss of profit in accordance with the rules of tort law”, and thus excludes the application of general rules of tort law, which also grant, within the scope of compensation for pecuniary damage, in addition to the right to compensation for ordinary damage, the right to compensation for the loss of profit. The claims arising therefrom are based on the provisions of Chapter XXXII of the CrPA, which, with regard to compensation for damage due to unjust conviction, does not contain any special provisions, so that the general rules of tort law on compensation for damage apply. This means that the unjustly convicted person is entitled to request the payment of the entire pecuniary damage – the ordinary damage and the loss of profit. A similar provision to that of Article 145. c of the ECSA is also contained in the second paragraph of Article 72 of the DenA, which also does not admit claims for damages arising from the impossibility to use

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3 In conformity with the provisions of the Obligations Act on unjust enrichment, it would be appropriate from a terminological perspective to use “reimbursement” instead of “compensation”.

or manage assets and those arising from the maintenance of real estate during the period between nationalisation and the moment the DenA entered into force. The challenged Article 145. c, therefore represents a special regulation for compensation for pecuniary damage regarding the restitution of confiscated assets (an exception), meaning that the general provisions concerning the compensation for damage due to an unjust conviction as determined in the CrPA and the OA are not applied.

19. As both challenged provisions entail an independent and special regulation of the issue regarding the restitution of the assets unjustly confiscated until 1 December 1958, the assertions made by the petitioners to the effect that they are not consistent with the CrPA and that the ECSA as an “implementing law” should not regulate the restitution of confiscated assets are unfounded in relation to the constitutional review and were not taken into consideration by the Constitutional Court.
20. As is evident, the challenged provisions interfere to a certain extent with the constitutionally protected right to compensation for damage sustained due to unjust conviction (Article 30 of the Constitution); regarding the cases where the heirs to the unjustly convicted person invoke the restitution of confiscated assets and compensation for pecuniary damage in the form of the loss of profit in relation to the confiscated assets, the challenged provisions interfere with the right to private property and inheritance (Articles 33 and 67 of the Constitution).
21. The right to compensation for damage referred to in Article 30 of the Constitution is a right determined by the Constitution without any statutory reservation. On the basis of the third paragraph of Article 15 of the Constitution, it may only be limited when this is necessary for the protection of the rights of others. The right to private property and inheritance is in principle guaranteed in Article 33; additionally, the first paragraph of Article 67 provides that the manner in which property is acquired and enjoyed shall be established by law so as to ensure its economic, social, and environmental function, and it is further determined in the second paragraph of the same article that the manner and conditions of inheritance shall be established by law.
22. The constitutionally guaranteed right to private property as a human right grants an individual liberty with regard to property. Property is a basic human right, which is closely linked to the protection of personal liberty. Its function is to protect the individual’s freedom of activity with regard to property, thereby enabling everyone to freely and responsibly shape their own lives. As such it is a constituent part of the constitutions of democratic countries. According to the United Nations Universal Declaration of Human Rights, as the first international codification of human rights, everyone has the right to their own property alone as well as in association with others. The Convention on the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, International Treaties, No. 7/94 – hereinafter referred to as the ECHR), which determines a minimum common denominator for the protection of human rights in Europe, guarantees to every natural and legal person the peaceful enjoyment of their property (Article 1 of the Protocol No. 1).
23. The constitutional guarantee of property presupposes the existence of property as a legal concept. The object of private property and the protected rights to dispose of the

property are determined by the legal system, taking into consideration economic and social relations in general. In this regard, the system must respect the purpose of the constitutional protection of property, i.e. guaranteeing and exercising personal liberty. The European Court of Human Rights (Judgment *Marckx v. Belgium*, dated 13 June 1979, Publications, A.31, p. 27) already decided that disposing of things and rights associated with property is an essential constituent of such liberty. At the same time, the content of the property as a legal concept depends on the functions assigned to it by the legal system. The fact that an individual is not unrestricted in his exercise of his rights to dispose of the property, but must also take into consideration the interests of other members of the community, and the community as a whole, already fell under the concept of property rights in the Roman law.<sup>4</sup> According to the Slovene Constitution, the definition of property includes its social, economic and environmental functions (the first paragraph of Article 67). In determining the manner of acquisition and enjoyment of the property and the conditions for inheriting such, the legislature is thus obliged to balance the individual and community aspects of property.

24. In several decisions, the Constitutional Court has already adopted the position that interference with constitutional rights is subject to rigorous constitutional review in accordance with the so-called proportionality test, in which interference is permissible only if it is necessary (unavoidable) for the protection of other human rights; such interference also should not be excessive, meaning that only the mildest of the possible forms of interference required to ensure the constitutionally permissible and desired aim, i.e. the protection of the equally important rights of others, is permissible. The legislature must prove that it cannot fully protect this right because, by doing so, it would interfere with other human rights. Even in cases where the Constitution leaves it to the law to determine the manner of regulating a specific constitutional right (within the meaning of the provision of the second paragraph of Article 15 of the Constitution, or on the basis of the constitutional provision that specifically provides that the law shall determine the manner of exercising a right), this does not entail that the legislature is not restricted in this regard. The principle of the state governed by the rule of law (Article 2 of the Constitution) requires that the legislature acts in accordance with the principle of proportionality. The legislature, in particular, is obliged to act in such a manner where it restricts human rights and fundamental freedoms in order to protect other rights. Furthermore, the legislature must always observe the principle of equality referred to in Article 14 of the Constitution and should not act in discriminatory manner when determining the manner of exercising, or when restricting individual human rights and freedoms.
25. In the case under consideration, the Constitutional Court first had to review whether there were necessary (unavoidable) reasons to limit the right to compensation for damage and to exclude compensation for the loss of profit having occurred as a result

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4 Kranjc, *Začetki in razvoj lastnine v antičnih pravih* [The Beginnings and Development of Property in Antique Legal Orders], in Šturm et al., *Varstvo lastninske pravice kot temeljne človekove pravice* [Protection of Right of Property as a Fundamental Human Right], Inštitut za javno upravo, Ljubljana 1997, p. 62.

of confiscation of assets, and with regard to the limiting of the right to the reimbursement of the actual value of confiscated assets. For this review, it took into consideration the reasons stated in the legislative materials, and it also based its review on other reasons based on specific historic sources and data from the Supreme Court and the Ministry of Justice.

26. It is evident from legislative materials (EPA 367 - II - fast-track procedure, Gazette of the National Assembly, No. 5, dated 20 January 1998) that the legislature interfered with the aforementioned constitutional rights due to the fact that full compensation in relation to the confiscated assets “is unacceptable in view of the burden it would put on the national economy”, because of the large number of overturned sentences of confiscation of assets imposed in the early post-war years, and that the principle of the social state dictates that a balance be struck between beneficiaries that have the right to the restitution of confiscated assets or payment of compensation and those who will have to fulfil the obligations arising from the right to the restitution of confiscated assets or the payment of compensation. The legislature started from the assumption that the court proceedings, which were based on the criminal legislation and sentencing policy in force at the time, were means for nationalising the means of production. In order to redress the injustices it is therefore unclear whether the assets were nationalised on the basis of administrative or court (criminal) proceedings. The injustices caused by unjust confiscations should thus be redressed in the context of redressing the injustices of the past period, and with identical criteria applying to all to whom the state confiscated assets in any way. For this reason, assets should be returned to all those who were sentenced to confiscation by a final judgment pronounced up until 1958 which was subsequently overturned, and pursuant to the provisions of the DenA, which uniformly regulates the redress of injustices from the past. The legislative materials also provide data from the State Attorney’s Office concerning the total to which the claims resulting from the impossibility of the restitution in kind amounted (253 cases in total, amounting to approx. SIT 37 billion), as well as concerning the total to which the claims arising from the loss of profit amounted (in 253 cases in total amounting to approx. SIT 31 billion). Further, the legislative materials also draw attention to the large number of pronounced sentences of confiscation of assets, particularly in the early post-war years (1947 - 870, 1949 - 731), that confiscations included around 200 larger and smaller companies and that confiscations resulted in the nationalisation of approx. 41,000 hectares of agricultural land, 51,000 hectares of forest, 5,837 residential buildings and 874 business premises. It is also pointed out that former criminal legislation did not recognise the right to compensation for damage to persons unjustly convicted prior to 1 January 1954. Those persons only acquired this right on the basis of constitutional amendment XCVI to the Constitution of the [Socialist] Republic of Slovenia.
27. The Constitutional Court finds that the in the past right to compensation for damage used to be regulated differently and that the right to full compensation for damage in accordance with the rules of tort law was not recognised until the basic principles of criminal law guaranteeing the legality of criminal proceedings (principle of

legality, presumption of innocence) and preventing the abuse of human rights and fundamental freedoms were included in the criminal legislation.<sup>5</sup>

28. The right to compensation for damage was granted to unjustly convicted persons by the Criminal Procedure Code adopted on 10 September 1953 (Official Gazette FPRY, No. 40/53 – hereinafter referred to as the CPC/54). The unjustly convicted persons had the right to compensation for pecuniary damage only. After the death of the beneficiary, the compensation for damage could only be requested by his/her spouse and relatives, whom the unjustly convicted person was obliged to support, but only to the extent they were deprived of maintenance because of the unjust conviction. In Article 7 of the Introductory Act to the CPC/54, the right to compensation for damage was recognised only to those who were unjustly convicted prior to 1 January 1954. Pursuant to Article 6 of the Introductory Act, the provisions of CrPA/48 were applied to the reopening of proceedings that ended by final judgment prior to 1 January 1954; these provisions, however, allowed the reopening of proceedings only

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5 German law still does not recognise full compensation to heirs but only to the extent to which the person was under a statutory obligation to support them (the first paragraph of Article 11 of the Act on compensation for criminal prosecution measures - *Gesetz über die Entschädigung für Strafverfolgungsmassnahmen*). Germany also adopted a special law on rehabilitation and compensation for victims of criminal persecution measures implemented in violation of the principles of the state governed by the rule of law in the annexed territory (*Gesetz über die Rehabilitierung und Entschädigung von Opfern rechtsstaatswidriger Strafverfolgungsmassnahmen im Beitrittsgebiet*). The law encompassed criminal sentences passed by German courts in the annexed territory during the period between 8 May 1945 and 2 October 1990, if they were passed in violation of the fundamental principles of the free state governed by the rule of law. The provisions of this law also apply to measures under the criminal law that were not imposed by court decision. The law restricts the number of persons who can file a request for compensation for damage. It may be filed by the injured person and, after his/her death, by his/her spouse, lineal descendants, brothers and sisters or other persons with a justified interest in the rehabilitation of the injured person. A request may also be filed by state prosecutor's office if the injured person consents to this. With regard to the restitution of assets confiscated by a criminal sentence, the law refers to the application of a special Property Act (*Vermögensgesetz*) and Investment Act (*Investitionsgesetz*) as general laws dealing with the restitution of assets. In the event that the assets cannot be returned in kind, they provide special rules for the determination of financial compensation and thereby exclude the general rules of civil law applying to compensation for damage and the loss of profit. Compensation does not amount to the present sales value of the confiscated assets, even in cases where a deduction based on a digressive scale is the lowest. Other claims (e.g. property damage, decrease in value, inability to use) are excluded (taken from: Tappert, *Die Wiedergutmachung von Staatsunrecht der SBZ/DDR durch die Bundesrepublik Deutschland nach der Wiedervereinigung*, Arno Spitz, Berlin, 1995, p. 221). - In the United States of America, the strict liability of the state arising from unjust conviction does not exist. In the case of *Korematsu v. United States* (323 U.S. 214; 65Ct. 193; 89 L.Ed.194 - 1944), the Supreme Court confirmed the executive order of President Roosevelt of February 1942 on the forced evacuation of inhabitants of Japanese descent from the entire West Coast into the so-called "detention centres". By 1948 Congress had adopted a law on the basis of which beneficiaries received over USD 37 million in compensation. In 1980, Congress appointed a special body (U.S. Internment Commission) to investigate violations against Japanese Americans that were interned, and, on the basis of its proposal, further compensations were paid in cases that were deemed appropriate (American Constitutional Law, Ralph A. Rossum and G. Alan Tarr, St. Martin Press, New York).

if proposed by the public prosecutor of the Republic or federal public prosecutor.<sup>6</sup> The Constitution of FPRY of 1963 (Official Gazette SFRY, No. 14/63) defined the rights to rehabilitation and compensation for damage as human rights. In the sixth paragraph of Article 50, it provided that a person who is unjustly convicted for a criminal offence or who is deprived of his liberty without due cause has the right to obtain compensation from public funds for the damage sustained.

29. The right to compensation for damage to the extent as determined by the present provisions - the return of pecuniary and non-pecuniary damage - was conferred by the Constitution of SFRY of 1974 to the unjustly convicted persons as well as to those who were deprived of their liberty without due cause. In the fourth paragraph of Article 181, it provided that unjustly convicted persons and those who were deprived of their liberty without due cause shall have the right to rehabilitation and compensation for damage from public funds and other rights provided by law.
30. This constitutional provision was followed by the Criminal Procedure Act of 1977 (Official Gazette SFRY, Nos. 4/77, 14/85, 74/87, 57/89, and 3/90 – hereinafter referred to as the CrPA-77) which, in the provisions regarding the compensation for damage for unjustly convicted persons, extended this right also to non-pecuniary damage as well as the right of heirs. Inheritability of the right to compensation for pecuniary damage was no longer limited only to spouses and relatives whom the person was obliged to support and to the extent they were deprived of such maintenance as a result of the unjust conviction. As an obligational right, it was inherited by all the heirs without any restrictions after the death of the injured party. The CrPA-77 still did not confer the right to compensation for damage to persons unjustly convicted prior to 1 January 1954, and the reopening of proceedings that ended by way of a final judgment prior to 1954 was only possible on the basis of a motion by the public prosecutor of the Republic or federal public prosecutor. In Articles 561 and 562, it extended the validity of Articles 6 and 7 of the Introductory Act to the CPC/54.
31. These two provisions (the exclusion of the right to compensation for damage and the prohibition from reopening proceedings) were in force until the adoption of the

6 Tomo Grgič, *Varstvo človekovih pravic v kazenskem procesnem pravu* [Protection of Human Rights in Criminal Procedural Law], pp. 177-188, *Slovenija in Evropska konvencija o človekovih pravicah* [Slovenia and the European Convention on Human Rights], Zbornik razprav, Svet za varstvo človekovih pravic in temeljnih svoboščin. Page 182: "The public prosecutor of the Republic has filed requests in previous years to reopen proceedings in connection with the so-called political processes and they were granted, but such requests were not really frequent, for his decisions in this regard were based on his discretion. [...] in the criminal cases that ended by final decision prior to 1 January 1954, neither the public prosecutor of the Republic (of Slovenia) nor the federal public prosecutor filed any requests for the protection of legality, clearly adopting the position that the request for the protection of legality was not possible in such cases. That such position is not correct [...] since the extraordinary application of the provisions of the CrPA/48 was expressly restricted to the reopening of criminal proceedings that had ended by final decision prior to 1 January 1954, was also clearly stated by a chamber of the Supreme Court of the Republic of Slovenia when it decided on requests made by the public prosecutor of the Republic to reopen two proceedings [...] This position of the chamber of the Supreme Court was also followed by the practice of the Public prosecutor of the Republic of Slovenia in the mid-1990s."

constitutional amendment XCVI to the Constitution of the SR of Slovenia, dated 4 October 1990 (Official Gazette RS, No. 37/90), which provided that in the Republic of Slovenia the provisions of Articles 561 and 562 of the CrPA-77 shall no longer be applied. In this manner, all the unjustly convicted persons acquired the right to compensation for damage, regardless of the date of their unjust conviction, and the right to demand the reopening of proceedings was no longer within the exclusive competence of the public prosecutor, but could also be proposed by the convicted person, his counsel, and after the death of the convicted person also his close relatives.

32. After the Constitution was adopted, CrPA-77 still applied in the Republic of Slovenia in so far as it was not contrary to the legal system of the Republic of Slovenia and in so far as not determined otherwise by the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia – until the Criminal Procedure Act (Official Gazette RS, No. 63/94, hereinafter referred to as the CrPA) was adopted. The provisions on compensation for damage awarded to unjustly convicted persons were not changed by the CrPA, and they remained the same as former provisions. By extending the right to file a request for the protection of legality also to the convicted person and his counsel, and after the convicted person's death also to his close relatives (Article 421 of the CrPA), it indirectly also extended the circle of persons who have the right to use extraordinary remedies in order to achieve that a particular conviction issued prior to 1 January 1954 be found unjust. On the basis of the transitional provision of Article 559, a special deadline was set, within which these persons could file the request for the protection of legality against a decision that became final before the CrPA entered into force, and against any court proceedings pending prior to such final decision, i.e. two years after the CrPA entered into force. The CrPA also granted the right to request compensation for damage to all those persons who were unjustly convicted prior to 1 January 1954 and who, owing to the expiration of the limitation period of three years, could no longer enforce their right to compensation for damage. In Article 562 it provided that the deadline for filing a claim shall begin to run on the date the CrPA enters into force, i.e. 1 January 1995.
33. It is evident from the foregoing that the CrPA guarantees the best possibilities for all the persons unjustly convicted in the post-war period to be (morally) rehabilitated and, due to unjust conviction, to also demand compensation for pecuniary and non pecuniary damages, and for their heirs to demand compensation for pecuniary damages if the conditions determined in Articles 538 to 541 of the CrPA are met.
34. Regarding the restitution of confiscated assets, or with compensation, if restitution of the confiscated assets in kind is no longer possible, the legislature already took the view when adopting the DenA that, with regard to the restitution of assets confiscated through criminal proceedings that ended by final sentence before 31 December 1958, the provisions of the DenA (Article 92) should be applied. From the legislative materials – proposal for the adoption of the Denationalisation Act, together with draft law - ESA 299, Gazette of the National Assembly, No. 7/91, dated 19 February 1991, it is evident that, even at the time, the legislature considered that confiscations

of assets, regardless of the authority that imposed them (courts in criminal and non-litigious proceedings, special commissions of People's Committees) were the primary method of nationalising the assets and that other measures – nationalisation, agrarian reform – were no less repressive, despite their different denomination. It follows from these materials that the legislature did not have the data at its disposal regarding the number of confiscations of assets and, in particular, did not have data regarding the confiscation of assets in criminal proceedings. With its Decision No. U-I-10/92, dated 5 November 1992, the Constitutional Court abrogated Article 92 of the DenA due to violations of the right determined in Article 30 of the Constitution and the prohibition of the retroactive effect of the legal acts referred to in Article 155 of the Constitution. Since the grounds that led the Constitutional Court to reach such a conclusion are not clearly stated in the reasoning of the aforementioned decision, on the basis of the data contained in the file, the Constitutional Court finds that both at the time of the adoption of the DenA and when the Constitutional Court made its decision, the full scope of confiscations pronounced in criminal proceedings that ended with the rehabilitation as a result of extraordinary legal remedies, and thus the scope of financial liability of the state, were not yet known. The Constitutional Court also obtained data in those proceedings from the Supreme Court and the Ministry of Justice from which it was evident that only a minor number of confiscations were based on criminal proceedings. Thus, the Ministry of Justice reported that only 29 judgments that imposed confiscation of assets were overturned on the basis of the reopening of criminal proceedings. The Supreme Court pointed out *inter alia* the inconsistency of Article 92 of the DenA, which provided for the restitution of confiscated assets pursuant to the provisions of the DenA only in cases where the sentence of confiscation of assets was overturned on the basis of the reopening of criminal proceedings, but not also on the basis of a request for the protection of legality, which created inequality between the beneficiaries. Moreover, in the opinion of the then Legislative and Legal Commission of the Assembly of the Republic of Slovenia (No. 720 -01/91 - 3/37 -1, dated 30 June 1992), the provision of Article 92 of the DenA (concerning the scope and form of compensation for damage) did not correspond to the right to compensation for damage guaranteed by Article 30 of the Constitution to the unjustly convicted person. The Decision of the Constitutional Court, to which the petitioners also make reference in their petitions, was the result of the knowledge of the circumstances and information at the time when the beneficiaries had not yet filed their requests for the payment of compensation for confiscated assets and for the reimbursement of the loss of profit before the courts. In its Decision No. U-I-107/96, dated 4 December 1996, in which it reviewed the Temporary, Partial Suspension of Assets Restitution Act, the Constitutional Court advised the legislature to re-examine the restitution of assets on the basis of Article 145 of the ECSA and that, in the context of a most strict constitutional review, a different manner of regulating the state's liability to pay damages might be taken into consideration. It invited the legislature to assess whether differentiation between the redress of the consequences due to the confiscation of assets by courts and the redress of the consequences due

to the confiscation of assets by administrative authorities was well founded. At the same time, it also drew the legislature's attention to an evaluation of the financial capabilities of the Republic of Slovenia regarding full redress or injustices, which also includes the return of the loss of profit due to the confiscation of assets.

35. The challenged provisions thus represent a new regulation of this matter which should, based on new data concerning the number and scope of confiscations of assets and a re-examination of the question of the restitution of confiscated assets, ensure fair redress for post-war injustices, and simultaneously reduce the significant financial obligations of the state regarding redress for all post-war injustices. In this way, a certain balance would be achieved: the past injustices would be redressed without endangering or injuring the rights of others which have their basis in the constitutional definition of Slovenia as a social state (Article 2 of the Constitution).
36. The Constitutional Court considers that the reasons that dictated the challenged new regulation of the restitution of assets confiscated until 31 December 1958 are absolutely necessary. In addition to the available data on the number of confiscations based on criminal proceedings and actions filed in relation to the claims for the loss of profit, the Constitutional Court took into account as a determining reason the data which unequivocally demonstrates that the sentence of confiscation of assets was widespread until 1954 and that confiscation as a sentence used to be a primary method of nationalising, which is referred to in historic literature as "patriotic nationalisation". It is widely accepted that the authorities of that time used the judiciary for their own political objectives.<sup>7</sup> Only the adoption of the CrPA in 1954, which

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7 *Ključne značilnosti slovenske politike v letih 1929-1955* [Essential Characteristics of Slovene Politics in the Years 1929-1955], *znanstveno poročilo* [Scientific Report] Inštituta za novejšo zgodovino, Ljubljana, September 1995. Page 89: A political system based on attracting the masses into political life via the Liberation Front (the so-called people's democracy) was used by the communist party to settle accounts with the bourgeois opposition and subdue wartime political allies. The authorities used judicial proceedings to act against potential opposition. The basic aim of the processes with political background was "to expose the activities directed against the people" by the former Yugoslav regime, to settle accounts with class enemies (merchants, industrialists and kulaks), as well as with the Church and members of German minority, and to confiscate their assets." Page 90: "Among the most characteristic post-war processes were the processes before courts of national honour, the purpose of which was to enforce the moral principles of the National Liberation War (in addition to being sentenced to prison, convicted persons were also deprived of their assets and their citizenship), processes against Nazi war criminals, against collaborators of occupying forces, terrorist groups, spies, saboteurs and organizers of the "King's" Army in their home country, processes against merchants and industrialists and the so-called kulak processes. Among the political processes, the most prominent are the Nagode process (July 1947), partly processes against priests (they fall under various categories) and the Dachau processes (1948-1949). In the latter, there was a political settling of accounts within the Communist Party of Slovenia, and the processes displayed typical features of Stalinist political processes (fabricated or invented charges, trials against members of the same party and people of the same ideological views). Political background also characterised some other judicial processes. The judiciary became a means of class struggle and was based on politically reliable but professionally unqualified staff. According to data from the public prosecutor of the People's Republic of Slovenia, 124 persons were sentenced to death in the period 1947-49 before ordinary courts in Slovenia, of which only 8 were for criminal offences (murders, organised crime, etc.). During the period 1948-1950 there

enacted basic legal institutions of criminal procedural law to ensure greater legality of criminal proceedings, marked the end of the criminal proceedings conducted on the basis of revolutionary laws and regulations which were passed during and after the war and on the basis of which a great number of criminal sentences were passed until 1954, and the fundamental principles of substantive and procedural criminal law were violated on a large scale, as evidenced by the number of persons who were unjustly convicted. The Constitution and the Criminal Code (general part) of 1947 did not contain the principle of legality, and the criminal procedure was not regulated until 1948, with the exception of individual organisational regulations. The numerous violations on the part of criminal courts at that time are also corroborated by the number of motions for reopening granted in recent years and the number of proceedings initiated based on requests for the protection of legality.

37. The described political situation and the data that more than 70% of the capital invested in industry was transferred to state ownership through confiscations and that 50% of all land had already been transferred to land reserves<sup>8</sup> by the end of 1946, imply that confiscations of assets based on criminal proceedings, together with agrarian reform and nationalisation, represented a process of property acquisition by the state. It is precisely the described extensive scope, where due to confiscations more than half of nationalised property became the property of the state, which serves as the aforementioned reason for the state to restrict its own strict responsibility for unjust confiscations of assets. The Constitutional Court also took into account that the provisions on compensation for damage due to unjust conviction, ensuring compensation for damage on the

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were approximately 1000 people sentenced each year in political trials and 91 people in 1952 and 1953. The exact number of persons sentenced in political trials until 1948 has not yet been established.”

8. *Ključne značilnosti - znanstveno poročilo* [Essential Characteristics - Scientific Report] (see note 7). Page 92: “In the early post-war years, the new authorities first nationalised the so-called “enemy’s” property (German property and property belonging to those collaborating with occupying forces), which is termed “patriotic nationalisation”. ... Most of the property seized to the benefit of the state was seized based on confiscations. In the criminal system, these took the form of ancillary penalties for various offences. Most of the confiscations were pronounced by the courts in Slovenia in 1945. By the end of 1946, around 70% of the capital invested in industry had become state property. The authorities also used confiscation thereafter as an ancillary penalty for those sentenced for a violation of the obligation to hand over crops and for other violations of the law.” Zdenko Čepič: *Agrarna reforma in kolonizacija v Sloveniji (1945–1948)* [Agrarian Reform and Colonisation in Slovenia (1945–1948)], Page 126: “Confiscations represented a supplemental source for land reserves, while the major single share of land was created on the basis of the Avnoj (Antifascist Council of National Liberation of Yugoslavia) Decree on the confiscation and transfer of German property and the property of opponents of the national liberation movement to state property and on the basis of court confiscations. ...In this way, the land also passed to the land reserves in subsequent periods, when agrarian reform had almost been completed. For example, assets were confiscated wholly or in part from those farmers who did not deliver a certain part of their crops in the period when obligatory buying was in force. ... The ratio between expropriated and confiscated land in the land reserves shows the nature of agrarian reform in Slovenia, which, in addition to social liberation, also had a distinct purpose of national liberation. In this way, the agrarian reform in Slovenia was also a form of “patriotic nationalisation”. Of all the land in the land reserves, 50% came from confiscations (134,117 hectares). Also the number of confiscated estates (8447) was the highest in land reserves.”

basis of the strict responsibility of the state to the widest possible extent, were adopted at the same time as the exclusion of restitution in the event that any criminal sentences pronounced prior to 1 January 1954 were overturned. The realisation that massive injustices caused by the political regime of that time by confiscations of assets based on criminal proceedings cannot be redressed by measures provided for cases where unjust criminal convictions rarely occur is now, with the entire scope of this issue coming to light, quite understandable. This fact was not taken into account by the legislature when adopting the constitutional amendment in 1990, and neither was the Constitutional Court aware of this fact at the time of abrogating Article 92 of the DenA, as has already been explained in Paragraph 34 of this reasoning. The majority of former communist countries also adopted special statutory measures to redress the massive injustices and restricted the payment of compensation for nationalised property.<sup>9</sup>

38. With the challenged provisions of Articles 145. a and 145. c, the legislature interfered to a certain extent with the constitutional rights of unjustly convicted persons and with the constitutional rights of their legal successors. The Constitutional Court estimates that in order to make the position of unjustly convicted persons equal to the position of all persons entitled to redress of post-war injustices is an appropriate method, and that the legislature could not achieve its purpose by imposing a milder measure. In this case, the Constitutional Court finds that the principle of the social state gives the legislature the right, with due consideration paid to the right of all citizens to social security, to attend to financial capabilities of the state and, in cases which are constitutionally admissible, also to limit the rights for this reason. This limitation is also required by the principle of equality. For it is evident from the petitions themselves and from the appendices thereto that, owing to the considerable length of time that passed since the confiscations based on criminal proceedings, the restitution of confiscated assets and compensation for damage due to the loss of profit in connection with confiscated assets is demanded mainly by relatives of the unjustly convicted persons, who were not directly affected by the unjust criminal conviction and whose position is not in any way different from the position of the persons whose assets were dispossessed through another form of nationalisation.
39. The process of nationalisation, which was carried out through the imposition of the sentence of confiscation of assets in criminal proceedings, was in many cases undoubtedly more brutal than the nationalisation and agrarian reforms and administrative confiscations, because in addition to pecuniary damage, the injured persons could also sustain even greater non-pecuniary damage and suffering, which is quite rightly pointed out by many of the petitioners. Having regard of the petitioners' statements regarding the harm, fear and other consequences suffered by them as the result of unjust conviction, the Constitutional Court stresses that the challenged provisions do not interfere with other rights guaranteed by the CrPA on the basis of Articles 30 and 33 of the Constitution to those persons who were affected by unjust criminal conviction.

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9 Annex to the 9<sup>th</sup> report on implementation of the Denationalisation Act, Gazette of the National Assembly, No. 27/95.

tion – the right to rehabilitation, compensation for any other pecuniary damage and to compensation for non-pecuniary damage, if the person is still alive or if the compensation was awarded to him when he was still alive. This is because the challenged provision of Article 145. c only excludes compensation for the loss of profit as a result of pronouncement of the criminal sentence of confiscation of assets.

40. On the basis of the foregoing reasons, the Constitutional Court concludes that, by adopting Articles 145. a and 145. c of the ECSA, the legislature restricted the right to compensation for damage and the right to the restitution of confiscated assets in accordance with the principle of proportionality and that Articles 2, 3, 14, 15, 30, and 33 of the Constitution were not violated. Furthermore the international acts were not violated either. The sixth paragraph of Article 14 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/91, and Official Gazette RS, No. 35/92) only imposes compensation for damage in cases where a person has served a sentence on the basis of unjust conviction. Article 3 of Protocol No. 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94) also guarantees the right to compensation for unjust convictions in accordance with the law or practice of the country. Furthermore the Resolution 1096, dated 27 June 1996, on measures to dismantle the heritage of former communist totalitarian systems, which was adopted by the Parliamentary Assembly of the Council of Europe, contains merely a recommendation that victims of totalitarian violence should be awarded material compensation which should not be (much) lower than the compensation accorded to those unjustly convicted for crimes under the law in force, and that if a return in kind or in its entirety proves not to be possible, just material compensation should be awarded.

*Review of point 5 of Article 145. b of the ECSA*

41. Article 145. b is a special provision which defines the competent bodies that have to restitute the confiscated assets, since the provisions of the DenA on competent bodies for the restitution (of assets), in particular since companies ownership transformation procedures have been brought to the end, cannot be applied. Provisions of Article 145. b - when compared to the provisions of the DenA - grant the right to compensation in the form of shares and bonds of the Republic of Slovenia in cases where the restitution in kind is not possible. The challenged point 5 provides that the issuance of bonds for the payment of compensation shall be regulated by a special law. The principle of the state governed by the rule of law, which also comprises the principle of protection of the trust in the law, demands from the legislature to ultimately regulate a certain relation or right and in doing so not to invoke a regulation which does not yet exist and in relation to which the deadline by which it should be adopted has not yet been specified. In practice, there are numerous cases where the restitution of confiscated assets in kind is no longer possible, and the restitution will have to be carried out in the form of pecuniary remuneration. By failing even to determine a deadline by which it will adopt a law regulating issuance of the bonds of the Republic of Slovenia, the legislature did not ultimately regulate the possibility

of payment of “compensation” through bonds, thus practically excluding this form of compensation. As the legislature with the challenged provision violated the principle of protection of the trust in the law and, thus, the principle of the state governed by the rule of law referred to in Article 2 of the Constitution, the Constitutional Court found that the challenged provision was inconsistent with the Constitution and determined a deadline of six months for the legislature to adopt the envisaged law (Decision No. U-I-86/94, dated 14 November 1994, OdlUS V, 153).

*Review of Article 3 of the ECSA Amendment*

42. The challenged provision stipulates that “non-litigious and civil proceedings relating to the restitution of confiscated assets that commenced before this act entered into force and have not yet been decided by final decision before this act entered into force, shall be brought to an end in accordance with this act.” All the petitioners dispute this provision because they consider that, contrary to the second paragraph of Article 155 of the Constitution, it interferes with acquired rights.
43. It is evident from legislative materials that the legislature was aware of retroactive effect of the challenged provision, but it considered that such retroactive effect was required in the public interest - the prevention of extraordinary financial burdening of the state which could lead to its insolvency.
44. The second paragraph of Article 155 of the Constitution provides that retroactive effect is permissible only if two conditions are fulfilled cumulatively; retroactive effect of a law must be justified by public interest and, at the same time, retroactive effects may not infringe acquired rights. Already when reviewing Articles 145. a and 145. c, the Constitutional Court found that public interest justifies the interference with the right to compensation for damage or to compensation for confiscated assets. Therefore, the same reasons apply in relation to the existence of the public interest when reviewing this provision. With regard to the second condition, the legislature is wrong to find that the challenged provision does not infringe acquired rights, since the beneficiaries would only acquire the right to restitution of confiscated assets on the basis of a final decision on the restitution of confiscated assets or on compensation for the loss of profit.
45. The CrPA itself determines when the beneficiaries become entitled to compensation for damage which they demand on the basis of the CrPA, including the compensation for damage due to the loss of profit in connection with confiscated assets. Unjustly convicted persons shall become entitled to compensation for damage on the date of final decision by which they were acquitted of charges or by which the charges were dismissed, or by the final decision by which the indictment was quashed or by which the proceedings were discontinued (the first paragraph of Article 539 of the CrPA). The heirs become entitled to compensation for pecuniary damage when the beneficiary dies. Article 541 of the CrPA expressly provides that in the event of the death of an unjustly convicted person, his heirs may continue proceedings which have already been initiated, or they may initiate them within a specified deadline – within three years of the date of final judgment of acquittal or final decision to discontinue the proceedings. In contrast with the CrPA, the ECSA does not contain

any specific provisions concerning the limitation period relating to claims for the restitution of confiscated assets. Given the fact that the restitution of confiscated assets represents a special right in relation to the compensation for “damage” due to unjust sentencing, to which provisions of the CrPA do not apply, it is necessary to conclude that the general five year limitation period as determined in Article 371 of the OA applies.<sup>10</sup> Taking into consideration the general rule that the limitation period begins to run once the party is in a position to file his claim, it is necessary to find that also the right to the restitution of confiscated assets arose on the date of the final decision by which the sentence of confiscation of assets was overturned.

46. The challenged provisions therefore interfere with rights retroactively. In already initiated civil and non-litigious proceedings, courts would need to apply other regulations relating to the restitution (of assets) that are less favourable for the beneficiaries, namely the provisions of the DenA and of implementing regulations. There is no doubt that these persons, who initiated proceedings at the time when former legislation was in force, through no fault of their own incurred certain litigation costs, which were caused by the state amending the law.
47. In accordance with the third paragraph of Article 15 of the Constitution, a law can only interfere with acquired rights if it is subjected to constitutional review applying the strict test of proportionality, which has already been explained by the Constitutional Court in this Decision. The Constitutional Court therefore reviewed whether the conditions had been met in this case in order to justify the interference of the legislature with an acquired right. It is essential to take into consideration in this review that the challenged provision merely restricts the two constitutional rights granted in Articles 30 and 33 of the Constitution. The unjustly convicted persons and their heirs are still entitled to the restitution (of assets) in kind. If the restitution in kind is not possible, they have the right to ask for compensation for the confiscated assets, which in accordance with the amended provision is no longer evaluated based on the general rules of tort law but according to special provisions of the DenA and the regulations adopted on the basis thereof. In Article 145. b, the DenA provides for the possibility of compensation in the form of shares in possession of the Republic of Slovenia, the bonds of the Republic of Slovenia, and financial compensation under the conditions of Article 50 of the DenA. In case of payment of compensation for confiscated assets the legislature put the unjustly convicted persons into a more favourable position than denationalisation beneficiaries, since it did not provide that the latter are entitled to the payment of compensation (damages) with the bonds of the Compensation Fund. As already pointed out, exclusion of the right to compensation for the loss of profit due to the confiscation of assets does not entail that the unjustly convicted person or his legal successors do not have the right to request compensation for any other pecuniary damage (e.g. damage arising from the deprivation of liberty) on the basis of the CrPA. The Constitutional Court considers that the legislature had a necessary reason to interfere

<sup>10</sup> Article 371 of the OA: “The limitation period for claims is five years, unless other limitation period is determined by law.”

with the pending proceedings. During this period, most proceedings are pending and that is why, if it were otherwise, it would not be able to achieve the aim pursued by the challenged amendment and in reference with which the Constitutional Court already found that it was legitimate. The aim could not be attained by any milder measure either. As already mentioned, the legislature took into consideration the special position of the persons who were affected by its measure and envisaged a more favourable position of those persons with regard to the payment of compensation in bonds. In this way it achieved proportionality between interference with the right to compensation for the entire damage or the right to the restitution of confiscated assets according to their actual value and the equal rights of all those to whom the state will still have to pay damages or compensation for the injustices they suffered during the post-war period. In this regard, the Constitutional Court also took into account that a change to regulation would treat unequally those unjustly convicted persons and their legal successors who have not yet filed their claims or where judgment of acquittal or the discontinuance of criminal proceedings is yet to take place.

48. As the persons who initiated non-litigious and civil proceedings incurred litigation costs through no fault of their own, the Constitutional Court decided that the legislature must regulate separately the question of reimbursement of these costs within 6 months. The principle of the state governed by the rule of law requires that the state provides for the reimbursement of those costs that it caused by amending an act, and this even in case where the amendment of such act is constitutionally founded.

### **B – III**

*The third paragraph of Article 145 and the first paragraph of Article 145. č of the ECSA*

49. The petitioners Alojzija Farič, Anica Cimperc, Alojzija Osvald, and Mirko Lemež Jr. consider that the provision of the third paragraph of Article 145, also, renders the compensation for the entire damage resulting from the confiscation of assets impossible. The actual value of assets, which was of substantial value at the time of confiscation, should supposedly not be assessed at the time of the issuance of the decision on the restitution, for the market value (of agricultural machinery, car) was supposedly much higher at the time of confiscation than the present market value. By way of example they state that in 1948 a tractor cost a fortune, while due to the technical progress its present value is much lower.
50. Article 30 of the Constitution, which determines strict liability of the state for the damage caused by unjust conviction, puts the unjustly convicted persons in a more favourable position regarding the claims for damages than the one they would be in if they had based their claims on Article 26 of the Constitution. In Article 26, the Constitution grants the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority performing such function or activity. As of the day when the sentence of confiscation is finally overturned, unjustly convicted persons shall be entitled to the restitution of the aforementioned assets, and the state cannot be relieved of this liability by proving that the court or the judge acted "lawfully". The third paragraph of Article

145 provides that in case the restitution of confiscated assets in kind is not possible, the actual value of those assets as determined at the time of issuance of the decision on restitution of the assets and in the condition as it was in at the time of the confiscation of assets shall be paid. As already explained (Paragraph 16 of the reasoning), in the third paragraph of Article 145 the legislature excluded the application of provisions of the OA regarding unjust enrichment in conformity with Article 30 of the Constitution and made the scope of the compensation for damage for confiscated assets equal to the compensation for damage under the general rules of tort law. In cases where previous situation cannot be re-established, the injured parties are thus entitled to obtain financial compensation by which they can replace the confiscated assets with new assets. This is only possible if the value of confiscated assets is assessed as at the time of the issuance of the decision on the restitution (of assets), and not as at the time when it was confiscated.<sup>11</sup> This is why the assertions of the petitioners, that the third paragraph of Article 145 does not recognise full compensation as determined by Article 30 of the Constitution, are obviously unfounded, and the Constitutional Court consequently dismissed this part of their petition. The Constitutional Court again points out that the provision of Article 145 only applies in case of the restitution of assets confiscated in criminal proceedings that ended by final decision after 31 December 1958 (Paragraph 15 of this reasoning). Following the finding of the Constitutional Court that the provision of Article 145. a, which determines a special regulation of returning the assets confiscated prior to 31 December 1958, is not inconsistent with the Constitution, the petitioners can no longer base their claim on Article 145 but on the basis of Article 145. a, which provides that also in connection with the valuation of assets the provisions of Chapter III of the DenA shall apply *mutatis mutandis*.

51. With regard to challenging Article 145. č, the petitioners Alojzija Farič, Anica Cimperc, Alojzija Osvald, and Mirko Lemež Jr. consider that by determining the proceedings as non-litigious their rights referred to in Articles 22 and 23 of the Constitution were violated. The amendment regarding the subject-matter jurisdiction allegedly means that their action would be decided by the Maribor Local Court in non-litigious proceedings, and not by the district court in the civil proceedings. The legislature should not have determined different proceedings for protection of rights before the courts and state authorities for identical matters, i.e. for the restitution of confiscated assets. As the legislature determined that claims for the restitution of assets shall be considered in the non-litigious proceedings, which is in the opinion of the petitioners inappropriate for the consideration of cases regarding the restitution of confiscated assets, it allegedly also made it impossible for the courts to adjudicate without undue delay.
52. The former Article 145 of the ECSA did not prescribe the type of judicial proceedings with regard to the restitution of confiscated assets. This is why the Supreme Court at its plenary session of 21 and 22 December 1992 adopted a general legal opinion that the restitution of confiscated assets be decided by courts in non-litigious proceedings. The

<sup>11</sup> The second paragraph of Article 189 of the OA: "Compensation for damage shall be evaluated according to the prices at the time of the issuance of court decision, unless otherwise determined by law."

new Article 145. č then only enacted the existing case law and did not change the position of the beneficiaries entitled to the restitution of confiscated assets in any way. This is why the assertions of the petitioners on the basis of the challenged provision that the restitution of confiscated assets will be decided by the local court instead of the district court are erroneous. The assertions of the petitioners that the determining the non-litigious proceedings for consideration of matters relating to the restitution of already confiscated assets or assets confiscated in advance implies a violation of the principle of equality (Article 14) and the equal protection of rights (Article 22 of the Constitution), as well as the right to judicial protection without undue delay (Article 23 of the Constitution), are clearly unfounded. A non-litigious civil procedure is also a court procedure regulated by law and normally gives identical procedural guarantees to the parties as the civil procedure (Non-Litigious Civil Procedure Act, Official Gazette SRS, Nos. 30/86 and 20/88, [hereinafter referred to as the NCPA]). Also in these proceedings, the court must enable the parties to the proceedings to make their statements concerning the assertions of other parties, to take part in the hearing of evidence and to discuss the results of the entire proceedings (Article 4). In non-litigious civil procedures, the provisions of the Civil Procedure Act apply *mutatis mutandis* unless otherwise provided by the Non-Litigious Civil Procedure Act, or any other act (Article 37). Thus, the second paragraph of Article 154. č expressly provided that the judicial review of decisions of the courts of second instance is allowed, for it would otherwise not be allowed (Article 34 of the NCPA<sup>12</sup>). Bearing this in mind, the finding that the assertions of the petitioners of violations of constitutional provisions due to determining a non-litigious civil procedure are obviously unfounded and that the rights granted in Articles 22 and 23 of the Constitution cannot be violated by determining the non-litigious civil procedure in advance, the Constitutional Court did not proceed to review the reasons stated by the petitioners concerning the inappropriateness of a non-litigious civil procedure for the restitution of confiscated assets or the compensation of their value.

### C

53. The Constitutional Court adopted this decision pursuant to the second paragraph of Article 26, the first paragraph of Article 40, and Article 48 of the CCA, composed of: Dr Lovro Šturm, President, and Judges Dr Miroslava Geč-Korošec, Dr Peter Jambrek, Dr Tone Jerovšek, Mag. Matevž Krivic, Franc Testen, Dr Lojze Ude, and Dr Dragica Wedam-Lukić. Point 1 of the operative provisions was reached by six votes against two (Judges Šturm and Jambrek voted against), Point 3 of the operative provisions was reached by seven votes against one (Judge Šturm voted against), and Points 2, 4, and 5 of the operative provisions were reached unanimously. Judge Šturm submitted a dissenting opinion and was joined by Judge Jambrek.

*Dr Lovro Šturm*  
*President*

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12 Article 34 of the NCPA: "Appeal to the Supreme Court is inadmissible unless determined otherwise by law."

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**DISSENTING OPINION OF JUDGE DR ŠTURM,  
JOINED BY JUDGE DR JAMBREK**

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I voted against Point 1 of the operative provisions of the adopted Decision since it fails to take account of specific situations for specific categories of beneficiaries affected by the amendment to the law. The legislature should have dealt with the unjustly convicted persons who are still alive, as well as all those beneficiaries who have already been awarded the damages at the first instance, if no legal irregularities or factual errors with regard to the state of affairs were established in eventual further judicial proceedings. I would like to note that, also in these cases, I do not oppose the position of the Constitutional Court regarding its justification for not recognising the loss of profit, with which I agree. In this dissenting opinion I am instead defending the right of persons classified in one of the aforementioned categories to be awarded fair compensation for their confiscated property in cases where restitution in kind is not possible. The interference of the legislature with the legally protected positions of the beneficiaries who were direct victims of fabricated political judicial proceedings is objectively unfounded and illegitimate. Note in particular should be taken that the confiscations of property ordered by the courts were enforced before 1950, over half a century ago, and that only some of the convicted persons are still alive, i.e. only three among the petitioners. Therefore there are no objective grounds for the state to not be in a position to guarantee the right to compensation to these beneficiaries, whom are relatively few in number (here I exclude the claims for loss of profit) pursuant to the legislation in force on the date the claims were filed.

Redressing past injustices in these cases must not put the financial security of the state at risk. Pursuant to the DA, the beneficiaries are now required to align their claims to the new methodology for the valuation of the confiscated property, meaning that the current lengthy judicial proceedings will be of no avail and will have to be commenced anew. Such a situation runs contrary to: the constitutional principles of the protection of trust in the law and the protection of legitimate expectations derived from the principle of the rule of law referred to in Article 3 of the Constitution; the constitutional requirement that the courts must reach a decision without undue delay, as referred to in Article 23 of the Constitution; and to Articles 30 and 33 of the Constitution. Moreover, this is a degrading experience for the few remaining participants, who are advanced in age, and therefore also represents a violation of the constitutional ban on torture and degrading treatment by the state, as determined in Article 18 of the Constitution.

Therefore the interference of the legislature with the rights to compensation for the property confiscated by the courts of the former convicted persons that are still alive and were rehabilitated and filed a claim in accordance with the applicable statutory provisions, regardless of whether the first instance court already adopted its decision, is not only entirely disproportionate and excessive, but also not consistent with the Constitution and European Convention on Human Rights. The legal successors of the unjustly convicted persons who filed claims for compensation based on the final

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court decision, by which former judgments on the confiscation of property were overturned, and to whom the court of first instance had already awarded damages in accordance with the statutory provisions (here I again exclude the compensation for the loss of profit), had legitimate expectations that the judicial proceedings would be concluded pursuant to the statutory provisions that were in force when the court of first instance adopted the decision. There are also few such cases which can be attributed to the lengthy judicial proceedings at first instance. The legitimate expectations and the trust of these beneficiaries in the law have been violated, and thus the interference of the legislature in these cases is excessive and contrary to Articles 2, 23, and 33 of the Constitution and the European Convention on Human Rights.

I did not vote against Point 3 of the operative provisions, although I could have done so for the sake of consistency, because it nevertheless goes some way to mitigating the constitutionally impermissible interference of the legislature.

*Dr Lovro Šturm*

*Dr Peter Jambrek*

Decision No. **Up-50/99**, dated 14 December 2000

### DECISION

At a session held on 14 December 2000 in proceedings to decide upon the constitutional complaint of A. A., d. d., Z., and B. B. from Y., represented by Mag. C. C., attorney in X., the Constitutional Court

*decided as follows:*

1. Supreme Court Judgment No. II Ips 160/97, dated 30 October 1998, Ljubljana Higher Court Judgment No. II Cp 374/97, dated 21 May 1997, and Ljubljana District Court Judgment No. I P 328/95, dated 9 December 1996, rectified by Order No. I P 328/95, dated 17 March 1997, are abrogated.
2. The claim of the plaintiff D. D. is dismissed in the part that refers to the finding that “defendants A. A., d. o. o., and B. B., Y., violated the plaintiff’s constitutionally ensured privacy by publishing his name and surname on page 59 of the book “*V znamenju lože*” [“In the Sign of the Lodge”] and in the part in which the defendants are prohibited from further violating the right of D. D. to privacy by publishing in the press and by spreading his name and surname with regard to his membership in a freemason lodge, insofar as the prohibition refers to publishing his name and surname in the book *V znamenju lože*.
3. In the remaining part, the case is remanded to the Ljubljana District Court for new adjudication.

*Reasoning*

A

1. The District Court found for the plaintiff, whose claim was that the court should establish that by publishing the name of the plaintiff in the media the defendants interfered with his right to privacy, his personal rights, and his right to the protection of personal data. At the same time, the court prohibited the defendants from further interfering with the rights of the plaintiff and awarded the plaintiff monetary damages in respect of non-pecuniary damage in the amount of SIT 5,012,800.

The court calculated the amount of the damages in such manner that it calculated the costs of the publication of the commercial advertisements that interfered with the rights of the applicant. The Higher Court abrogated the judgment of the court of first instance in the part in which the damages were awarded. It was of the opinion that the court of first instance did not establish with sufficient precision in what forms the non-pecuniary damage arose. In the remaining part it upheld the judgment of the court of first instance. The Supreme Court partially granted the revision of the defendants against the judgment of the court of second instance and modified the judgments of the courts of the second and first instances so that the declaratory operative provisions only referred to the finding of a violation of the right to privacy and not also to the finding of a violation of personal rights and the right to the protection of personal data. The Supreme Court modified the operative provision that prohibited further interferences in such manner that it now states the following: Defendants A. A., d. o. o., Z., and B. B. are prohibited from further violating the right of the plaintiff D. D. to privacy by publishing in the press and by spreading his name and surname with regard to his membership in a freemason lodge. In the remaining part, the Supreme Court dismissed the revision as unfounded.

2. The defendants filed a constitutional complaint against the Judgments cited in the operative provisions in which they claim that the court erroneously weighed the relation between the plaintiff's right to privacy and their freedom of expression and freedom of artistic endeavour. In their opinion, the court failed to establish a fair balance between the opposing rights, but favoured the right to privacy instead. They allege that the complainant as the author of the book "*V znamenju lože*", published by the A. A. publishing company, described in it the problems of freemasonry in Slovenia and his personal experience with it, because he became a member of the society, which functions as an association, and remained a member thereof for some time. In this part, the book has an autobiographical character; [the author] also described in this respect several persons whom he encountered [in such context]. The complainant B. B. also draws attention to the fact that not only did he name the plaintiff by his full name, but also more than 16 persons. [Allegedly], the right of the complainant to independently decide which persons he would name by their real names, which by pseudonyms, and which he would black out cannot be limited. He allegedly named plaintiff D. D. by his full name due to the fact that he was his "guide" when he was accepted into the freemasons' association. The complainants further allege that the problems related to freemasonry do not refer only to the private sphere, because the activities of freemasonry as well as the activities of the associations that evoke the ideas of freemasonry are directed towards the benefit of all citizens. This is precisely why citizens allegedly have the right to obtain information regarding the functioning of these associations. The information regarding the functioning of such associations without the names being stated is, in the opinion of the complainants, imperfect information. The prohibition of spreading such information allegedly entails a violation of the freedom of expression. Consequently, with regard to the above, the challenged Judgments allegedly violated the complainants'

freedom of expression (Article 39 of the Constitution) and the freedom of science and the arts (Article 59 of the Constitution). The complainants also draw attention to the fact that only the Supreme Court carried out the procedure of weighing between individual rights and substantiated it, whereby the courts allegedly also violated his right to legal remedies (Article 25 of the Constitution).

3. On 10 October 2000, the panel of the Constitutional Court accepted the constitutional complaint for consideration. In conformity with the provisions of Articles 6 and 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the Constitutional Court served the constitutional complaint on the Supreme Court and the opposing party (the plaintiff) in the dispute. The opposing party in the dispute alleged in his reply to the complainant's allegations from the constitutional complaint that the challenged judicial decisions did establish a fair balance between the right to privacy and the freedom of expression. He is of the opinion that already the order in which constitutional rights are listed in the Constitution demonstrates that when weighing and where all the circumstances of the concrete case are taken into consideration, the right to privacy must be given priority over the right [i.e. freedom] of expression. The opposing party also draws attention to the fact that he is no longer a public person, but an entirely ordinary citizen, about whom it would only be admissible to publish information in connection with his activities as an attorney. He is of the opinion that the complainant collected data on the freemason society in an unfair manner, because he joined the society under the pretence that he wished to become a member thereof, whereas in fact he was only interested in collecting information. In such manner, he allegedly violated the rules of the society and also the rules of journalism. The opposing party also alleges that the disclosure of his name did not in any way contribute to informing the public in a better manner, nor did it contribute to the artistic power of expression of the complainant's work. The citation of his name was allegedly unfair, immoral, and written for the purposes of chicanery and vengeance, because the opposing party and the complainant had a long-term dispute. In the opinion of the opposing party, also in the event one allowed the possibility that the citation of his name in the copyrighted work is in conformity with the admissible aim and that it is intended to inform the public – which is something that he doubts – the citation of his name in commercial advertisements would only serve the economic interests of the complainants and the sensationalistic promotion of the book and would thus be inadmissible. The Supreme Court did not reply to the constitutional complaint.
4. The Supreme Court stated in the reasoning of the Judgment that in conformity with the principle in accordance with which human rights are limited only by the rights of others and in such cases as are determined by the Constitution (the third paragraph of Article 15 of the Constitution), in the concrete case it weighed between the right to privacy (Article 35 of the Constitution), on the one hand, and the freedom of expression (Article 39 of the Constitution) and the freedom of sciences and the arts (Article 59 of the Constitution), on the other. In doing so, it allegedly took into consideration the principle of proportionality between the interference and the aim pursued by

the measure. In the opinion of the court, the existence of the public interest in being informed is important for the assessment of the relation between the right to privacy and the freedom of expression. The court concluded that there was no public interest in the interference with the defendant's privacy, because it would have also been possible to describe freemasonry with all its characteristics and positive and negative influences without mentioning the name of the plaintiff. In the opinion of the court, with regard to the right to be informed of a certain important occurrence in social life it is namely necessary to separate the event (a certain activity or association) from the individuals participating in the event. In the assessment of the Supreme Court, the individuals in the concrete case were not important to the description of the event, which is also confirmed by the fact that the other most important participants in the association were referred to by pseudonyms. The Supreme Court stresses that there were also no other circumstances that would justify the citation of the plaintiff's full name. Despite his past positions (e.g. the president of the Basketball Association and the president of the Rotary Club), which in the opinion of the court can in fact have an influence on whether a person is recognised in public, he was not a person from political or public life, therefore it was not allowed for his name to be used in public without his authorisation for purposes that have no connection with his past positions. The Supreme Court also warns that not even the possible authorisation given some time ago by the defendant that certain of his personal information may be published entails that he agrees with all the future statements given regardless of the context. With regard to that, the Supreme Court assessed that the right to privacy must be given priority over the freedom to expression. Mentioning a person's membership in a certain association can even entail, in the opinion of the Supreme Court, a violation of the right of association (Article 42 of the Constitution), which allegedly also follows from the case law of American courts. With regard to the collision between the right to privacy and the right to artistic endeavour, on the basis of the findings of the courts of lower instances that the informational value of the copyrighted work would not have been reduced if the plaintiff had not been referred to by his real name, the Supreme Court concluded that the right to artistic endeavour was not affected.

5. The Supreme Court separately assessed the question of whether the relation between the right to privacy and the right [i.e. freedom] to expression or to be informed must be assessed differently when what is at issue are names that are mentioned in advertisements. In its opinion, advertising in newspapers for commercial purposes can entail a significantly more severe interference with privacy than the publication of a name and surname in an artistic or any other copyrighted work. While publication in the context of a copyrighted work could even be allowed, in the assessment of the Supreme Court, "advertising with sentences taken from the copyrighted work in newspapers with a large circulation, which applies in particular to A. A. and D., in any event [entails] an inadmissible interference with privacy if only the name of one member of the lodge is mentioned in the advertisements and if precisely that name is the subject of marketing." For such reason, the assessment of the collision between the two rights requires a different weighing of opposing interests, which in the case at

issue brings us to the result that the protection of privacy has priority over providing [the public with] information. The Supreme Court adds that the same also applies to naming the plaintiff by his real name in the book.

## B

6. In constitutional complaint proceedings, the Constitutional Court examines the challenged decision with regard to the question of whether human rights or fundamental freedoms were violated therewith. The opposing party stated in its reply to the constitutional complaint that the challenged Judgments refer exclusively to commercial advertisements and that they did not interfere with the book "*V znamenju lože*", therefore the right of the complainants to the freedom of expression and to the freedom of sciences and the arts cannot be violated therewith. The Constitutional Court found that point 2 of the operative provisions of the judgment of first instance, which prohibits the defendants from further violating the plaintiff's human rights and fundamental freedoms (after the judgment of revision, only the plaintiff's human right to privacy) by "publishing in the press," is based on point 1 of the operative provisions, in which the court of first instance established that a violation of the plaintiffs' constitutional right *inter alia* also occurred due to the mention of the plaintiff's name on page 59 of the book "*V znamenju lože*". Also from the reasoning of the challenged Judgments it follows that the courts assessed the admissibility of the publication of the plaintiff's name both in the book and in commercial advertisements and that they thereby came to the conclusion that the plaintiff's right to privacy was violated already by the publication of his name in the book, therefore the Constitutional Court assessed whether such standpoint is in conformity with the Constitution. The Constitutional Court examined the challenged Judgments from the viewpoint of a possible violation of the freedom of expression (Article 39 of the Constitution) and the freedom of artistic endeavour (Article 59 of the Constitution), namely on the basis of allegations that the courts failed to establish a fair balance between the opposing rights, on the basis of the allegations that citizens have the right to obtain information regarding the functioning of associations whose objectives are directed towards the benefit of all citizens, on the basis of allegations that information regarding the functioning of such associations without the mention of names is imperfect information, and on the basis of allegations that authors have the right to independently decide whether they will name a certain person by his or her full name. It thereby took into consideration that in the dispute the plaintiff did not claim that the complainant's statement was not true, nor did he allege that the mention of his name with regard to his membership in the lodge was offensive to him and that it entailed an interference with his honour and good name.
7. Modern legal theory defines privacy as a sphere of an individual in which no one may interfere without special statutory authorisation.<sup>1</sup> The right to privacy estab-

1 J. Rivjero, *Les publiques*, Vol. 2, Presses Universitaires de France, 1989, p. 76, and A. Finžgar, *Osebnostne pravice* [Personality Rights], Slovenian Academy of Sciences and Arts, Ljubljana 1985, p. 121.

lishes, for individuals, a sphere of their own intimate functioning in which they may decide by themselves – and this is guaranteed by the state – which interferences there-with they will allow.<sup>2</sup> However, the right to privacy is not an absolute right;<sup>3</sup> it is limited by the protection of the rights and benefits of others and by the behaviour of an individual in public.<sup>4</sup> In fact, a human as a social being who perpetually comes into contact with other people cannot completely avoid the fact that for various reasons and motives also others are interested in him or her and his or her personal life.<sup>5</sup> In such context, we could divide the sphere of an individual's private life into the sphere of the individual's intimate life and family life, the sphere of the individual's private life that does not take place in public, and the sphere of the individual's [private] life that does take place in public.<sup>6</sup> In general, it is true that the less intimate the sphere of an individual's private life is, the smaller the scope of legal protection it enjoys when it comes into collision with the interests and rights of other individuals.<sup>7</sup> In the assessment of the admissibility of an interference with an individual's right to privacy also the characteristics of the individual whose right is interfered with must be taken into consideration. Legal theory states in such context that without the consent of the affected person it is admissible to write about the personal life of personalities from modern life in whom the public is interested (so-called absolute public persons) and of persons in whom the public is interested only in connection with a certain concrete event (so-called relative public persons), but not also about other persons. When describing the life events of absolute and relative public persons it is, in particular, allowed to describe, without the consent of the affected person, what is important for the character, actions, and thoughts of these persons with regard to their public activities. However, with regard to such persons it is not allowed, without the consent of the affected person, to publish matters from their intimate lives.<sup>8</sup> However, special rules for resolving collisions between the right to privacy and the freedom of expression or the right to artistic endeavour apply when a person reveals (in a conversation or in an artistic work), within the framework of the description of his or her own life, the private life of another person. The free development of an individual's personality namely requires that a person is not only entitled to an existence that is isolated from all other beings; we must namely allow an individual to develop in an active and extraverted manner precisely due to the free development of his or her personality (which is the basis for acknowledging all individual personal rights). A human being as a social being must be allowed not only to form his or her opinions, but also to

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2 Decisions & Reports 5, Report No. 6825, p. 89.

3 A. Finžgar, 1985, p. 121.

4 R. St. J. Macdonald *et al.*, *European System for the Protection of Human Rights*, Kluwer Academic Publishers, Netherlands 1993, p. 407.

5 See A. Finžgar, 1985, p. 121 *et seq.*

6 *Ibidem.*

7 M. Baston Vogt, *Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts*, Mohr Siebeck, 1997, p. 208.

8 A. Finžgar, 1985, p. 128.

convey them (in oral or written form or by conclusive actions) and to elaborate them in contacts with others.<sup>9</sup> With regard to the above, an author must have the right to describe in his or her work (or to mention in a conversation that refers to his or her life) the persons with whom he or she has come into contact and the events he or she has experienced therewith without needing their consent. This right belongs to him or her on the basis of his or her freedom of expression and of artistic endeavour regardless of whether this concerns a person from public life or any other individual.

8. In the particular case, the plaintiff, as the former president of the Bar Association, president of the Rotary Club, president of the Basketball Association, a known attorney in Ljubljana, and at the same time also a member of the freemasons (the plaintiff did not deny this fact during the lawsuit) was exposed to public interest, a consequence of which was also that the sphere of his privacy was reduced. The position of the Higher Court (also joined by the Supreme Court) – namely that the former positions of the applicant can indeed have an influence on his being recognised in public, yet without his consent it is not allowed for his name to be used in public for entirely different purposes that have no connection with his past positions – not only no longer corresponds to the factual standards that have become established in the Slovene press and in other media, where the general tolerance of individuals with regard to unveiling their private lives is significantly greater than that of the plaintiff, it even does not correspond to the standpoints in legal theory.<sup>10</sup> Human rights law theory, for instance, states that the right to private life is limited by the protection of the rights and benefits of others and by the behaviour of the individual in public.<sup>11</sup> The Constitutional Court has already emphasised that by entering the space of social activities, an individual must also assume the risk that his or her actions will be the subject of discussion and assessment (Decision No. U-I-172/94, dated 9 November 1994 – Official Gazette RS, No. 73/94, and OdlUS III, 123). What was at issue in the concrete case was actually not the unveiling of facts from the plaintiff's intimate sphere, but the description of his role in the events that occurred, where he came into contact with numerous people, *inter alia* also with the complainant, who then described in his book their interactions with regard to freemasonry. The complainant's primary purpose was not to reveal data from the plaintiff's private sphere; he wished to describe freemasonry as a phenomenon, as well as his own experience and perspective regarding freemasonry. In doing so, he also wrote of persons whom he encountered in connection with freemasonry and the events that he experienced with these persons. In such context, he also wrote about the plaintiff, due to the fact that allegedly the plaintiff was sort of his guide, because he helped the complainant join the freemasons, and he played the central role in his freemasonry-related life. The complainant only described events from the plaintiff's activities in this circle and not from his intimate life. In the framework of the freedom of expression and

<sup>9</sup> M. Baston Vogt, 1997, p. 207.

<sup>10</sup> E.g., R. St. J. Macdonald *et al.*, 1993, p. 407.

<sup>11</sup> *Ibidem*.

in the framework of artistic endeavour, the complainant as a social being undoubtedly has such right to describe the events in which he participated and the persons whom he encountered in his life. The fact that by this written work he violated the internal agreements between the members of the lodge has no influence on the existence of his freedom of expression. Therefore, the mentioned legal situation cannot be equalled to the example from the American case law where the government requested a list of the members of a certain association.<sup>12</sup> Due to the fact that what is at issue does not entail a violation of the plaintiff's right to privacy, it is irrelevant for the assessment whether in the book the complainant named by their real names also other persons or not. With regard to that, the decision [of the court] that in the concrete case the right to privacy must be given priority over the freedom of expression and artistic endeavour is inconsistent with the Constitution. The decision of the court thus entails a violation of the complainant's freedom of expression (Article 39 of the Constitution) and artistic endeavour (Article 59 of the Constitution).

9. The freedom of expression determined by Article 39 of the Constitution also includes the right to advertise for commercial purposes. The Constitutional Court concurs with the position that stricter criteria apply for the assessment of whether the mention of names for advertising and commercial purposes entails a violation of the right to privacy than if names are published in a copyrighted work. In foreign and Slovene legal theory and case law it is not disputable that it is not allowed for an individual's name or image to be exploited for advertising and commercial purposes without the consent of the person concerned.<sup>13</sup> However, in the concrete case it must be taken into consideration that what was at issue was the publication of a name in an advertisement for a copyrighted work in which the plaintiff's name figured; according to the complainant's allegation, even a direct quotation from the book was published. Due to the fact that the finding of the courts in the challenged Judgments that the publication of the plaintiff's name in an advertisement entails a violation of his right to privacy was based on the assessment that the publication of the plaintiff's name in the book already entails such a violation – while the Constitutional Court established that this standpoint is not in conformity with the Constitution – a new assessment of this question must be carried out.
10. In light of the above, the Constitutional Court abrogated the challenged Judgments. In the part in which the challenged Judgments refer to the publication of the plaintiff's name in the book, it decided on the matter itself, by applying the first paragraph of Article 60 of the CCA, and in this part dismissed the claim. The Constitutional Court decided to adopt such decision because it assessed that the standpoint that in the concrete case the right to privacy must be given priority over the freedom of expression and artistic endeavour is inconsistent with the Constitution, and because

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12 As follows from the file, it is not disputable between the parties that the plaintiff did not request, from the state or the Lodge, the list of all persons engaged in freemasonry [in Slovenia], nor did the state request such list from the database manager; therefore, the reference of the Supreme Court to the American case law that examines such cases is irrelevant.

13 A. Finžgar, 1985, p. 102; F. Seifert, NJW 27/99, p. 1893.

in the file there was enough data for the adoption of such decision. It thereby also took into consideration that the proceedings have already lasted several years and that in the event of new decision-making on this question they would be additionally delayed, to the detriment of the complainant's constitutional rights.

11. In the part in which the challenged Judgments refer to the publication of the plaintiff's name in commercial advertisements, the Constitutional Court remanded the case to the court of first instance for new adjudication. When deciding anew, the court will have to reassess the question of whether the constitutional complainants violated the plaintiff's right to privacy by publishing his name in commercial advertisements, by taking into consideration all the circumstances of the case and by observing the consideration of the Constitutional Court that the position that the publication of the plaintiff's name in the book already entails a violation of the plaintiff's right to privacy is inconsistent with the Constitution. The court will have to substantiate the outcome of such weighing with arguments that are in conformity with the Constitution and that ensure that each of the colliding rights is assigned appropriate constitutional weight.
12. Since the Constitutional Court abrogated the challenged Judgments already due to a violation of the rights determined by Articles 39 and 59 of the Constitution, it did not examine whether the Supreme Court Judgment also violated the complainants' right to legal remedies (Article 25 of the Constitution).

### C

13. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 and the first paragraph of Article 60 of the CCA, composed of: Franc Testen, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Lojze Janko, Milojka Modrijan, Dr Mirjam Škrk, Dr Lojze Ude, and Dr Dragica Wedam-Lukić. The decision was reached unanimously.

*Franc Testen*  
*President*

**DECISION**

At a session held on 7 October 2004 in proceedings to decide upon the constitutional complaint of A. A., from Z. Z., the Constitutional Court

*decided as follows:*

1. Supreme Court Judgement No. II Ips 495/2001, dated 17 April 2002, Ljubljana Higher Court Judgment No. II Cp 214/2000, dated 25 April 2001, and Ljubljana District Court Judgment No. II P 384/99, dated 22 December 1999, are abrogated.
2. The case is remanded to the Ljubljana District Court for new adjudication.

*Reasoning*

**A**

1. In renewed civil proceedings, the court of first instance established that the sales contract dated 30 June 1995 that the complainant had entered into with the plaintiff was rescinded. Furthermore, it imposed on him the obligation to return to the plaintiff the possession of real properties entered under land register entry No. 1319, cadastral municipality Z., and to reinstate the land register situation as it had existed prior to the filing of the land register proposal dated 3 July 1995, which is registered under No. Dn 5806/95. The complainant appealed against such decision. The Higher Court dismissed his appeal as unfounded and upheld the judgement of the court of first instance. The Supreme Court dismissed his request for a revision.
2. In the challenged judgment, the Supreme Court stated that it had already replied to the entire set of allegations contained in the request for a revision that refer to the “recording of the conversation and the eavesdropping on the conversation between the plaintiff and the defendant in the attorney’s office” in Order No. II Ips 80/98, dated 25 March 1999, by which it abrogated Ljubljana Higher Court Judgment No. II Cp 381/97, dated 15 October 1997, in relation to Ljubljana District Court Judgment No. II P 1401/95, dated 6 September 1996, and remanded the case to the court of first instance for new adjudication. Moreover, the Supreme Court explained that the case

involved a question of principle, with regard to which the plenary session of the Supreme Court adopted a legal opinion on the basis of the mentioned Order, therefore, in its opinion, there is no need to substantiate again why the evidence related to the disputed telephone conversation between the original plaintiff and the defendant (the audio recording of the conversation, a copy thereof on cassette, and the examination of the witness regarding that conversation) were admissible.

3. In his constitutional complaint, the complainant expresses his disapproval of the decision of the court and alleges that the second paragraph of Article 14 and Article 22 of the Constitution were violated. He argues that the court did not reply to all of his allegations, but only referred to its principled legal opinion, which states in general that testimony as to what a witness knows about a telephone conversation between litigating parties is not inadmissible. He is also of the opinion that in the case at issue the inadmissible recording [of the conversation] was prepared in advance, in which also the plaintiff's attorney participated. He adds that he does not agree with the Supreme Court's position according to which, in the revision proceedings, he allegedly produced new evidence, because he had produced that evidence already in the first-instance proceedings, however the court of first instance had not admitted it. For such reason, his right to the equal protection of rights determined by Article 22 of the Constitution was allegedly violated.
4. By Order No. Up-472/02, dated 25 May 2004, a panel of the Constitutional Court accepted the constitutional complaint for consideration. In conformity with Article 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the Constitutional Court sent the constitutional complaint to the Supreme Court, which did not respond thereto. On the basis of Article 22 of the Constitution, the constitutional complaint was sent to the opposing party in the civil proceedings, who did not take delivery thereof. In conformity with Article 6 of the CCA in relation to the second paragraph of Article 141 of the Civil Procedure Act (Official Gazette RS, No. 26/99 etc. – hereinafter referred to as the CPA), after the expiry of the fifteen-day time limit the document was deemed to have been served, which is what the opposing party was also warned of in the postal notification.

## B

5. By stating that in the challenged judgment the Supreme Court did not respond to his allegations, but only referred to its own reasoning in Order No. II Ips 80/98, dated 25 March 1999, and to the legal opinion adopted on the basis of that Order, the complainant substantiates that Article 22 of the Constitution was violated, which in the field of judicial proceedings is a reflection of the principle of equality before the law determined by the second paragraph of Article 14 of the Constitution. The Constitutional Court has already emphasised numerous times that from the right of a party to make a statement (Article 22 of the Constitution) there also follows the duty of courts to take notice of the party's allegations, to weigh their significance, and to adopt a position with regard to those allegations that are of essential importance for the decision. However, by merely referring to the reasons stated in its previous decision and its legal opinion, the Supreme

Court did not violate the complainant's right to make a statement. This is in particular true in the case at issue, as the decision to which the Supreme Court referred was adopted in a preliminary stage of the same proceedings, and the complainant does not allege that he stated any new reasons in the request for a revision.

6. By the Order to which the Supreme Court referred in the challenged judgment the Supreme Court abrogated the judgements of the courts of the first and second instances, which had been based on the position that in a civil procedure it is inadmissible to testify on what a witness knows about a telephone conversation between two other persons (in the case referred to, between the two litigating parties), where one of them was unaware that someone else was also listening to the conversation. The Supreme Court carried out the assessment from the viewpoint of the protection of privacy and concluded that a party to proceedings may be opposed to a witness testifying on the content of a telephone conversation with regard to which that party would have the right to refuse to testify thereon for the reasons determined by Article 271 in relation to the first paragraph of Article 238 of the CPA, because otherwise his or her right to refuse to testify would be circumvented. Evidently, according to the Supreme Court, the rejected evidence in the case at issue is not such an example. The Supreme Court further explained why, in the taking of such evidence, it did not see the danger of violating the defendant's right to privacy, and in such context it particularly emphasised that this was the case due to the content of the telephone conversation, which was of a business character – a conversation on the sale and purchase of real property. The court was thus of the opinion that the participants in the business-related telephone conversation were not entitled to expect that the other participant in the conversation would not enable someone else to listen to such telephone conversation. Common knowledge includes knowing means by which this can be achieved, as does knowing that business partners, e.g. parties to an agreement in the event of a dispute, completely justifiably wish to ensure the possibility to secure evidence in order to be able to prove in a possible judicial dispute the content of such business relationship. Therefore, the expectation that in such a conversation the interlocutor would not take advantage of such possibility cannot be considered to be justified – but only if the confidentiality of the conversation was not evident due to the intertwining of the business conversation with strictly private (e.g. intimate or erotic) content or was not explicitly agreed upon, mutually promised, or guaranteed to both interlocutors. According to the Supreme Court, a course of events such as the plaintiff alleges occurred in the case at issue cannot be deemed to entail an interference with privacy regarding a telephone communication.
7. With regard to the evidence of “a cassette recording of a conversation between the parties to proceedings,” the Supreme Court adopted the position that an audio recording of a conversation with another person that is recorded by a participant in the conversation – by means of a cassette recorder or any other type of recording device (e.g. a voice recorder, which is merely a mobile cassette recorder – a miniature cassette recorder with a built-in microphone) – must in principle be assessed in entirely the same manner as notes made regarding a conversation. Irrespective of the type of

transcript (by hand, by a typewriter, or by a computer) and regardless of the time of the transcription (during the conversation or afterwards), such transcript allegedly in any case firstly entails (in particular) an aid to the writer's memory – his or her “memory's record”, as today one could completely justifiably say given the current knowledge of the functioning of a human brain. Secondly, it allegedly (only) entails additional evidence (an aid to the credibility of the narrative, i.e. the verbalisation of the “memory's record”). That which applies to a participant in a conversation who records his or her conversation with another person should allegedly also apply in instances where the audio record of the conversation is made, in accordance with the will of one participant, by a third person. According to the Supreme Court, “in general, no reason can be seen why – to put it simply – the decisive basis for a different assessment should be who “pressed the button,” i.e. who turned on the cassette recorder by which the conversation was recorded.”

8. On the basis of a constitutional complaint the Constitutional Court also assesses whether the disputed decision is based on a position that from the viewpoint of the protection of human rights is unacceptable. In the case at issue, the question is raised whether some constitutional right of the complainant was violated due to the fact that the Supreme Court adopted a position in favour of the admissibility of the testimony of the defendant's attorney with regard to the content of the telephone conversation between the parties to proceedings, and of using the record thereof.
9. The complainant assesses, *mutatis mutandis*, that by adopting such positions, the Supreme Court violated his rights determined by Articles 35 and 37 of the Constitution. The Constitution protects that part of privacy that refers to the freedom of communication in two instances: in Article 35, where it sets the general rule that every person has the right to privacy and that privacy is inviolable, and especially in the first paragraph of Article 37 of the Constitution, by which the privacy of correspondence and other means of communication is guaranteed.
10. The Constitutional Court has already adopted the position that a person's privacy, the inviolability of which is guaranteed by Article 35 of the Constitution, refers, in the context of a person's existence, to a more or less complete whole of his or her behaviours and involvements, feelings, and relations, for which it is characteristic and essential that the person shapes and maintains it alone or alone with those near to him or her with whom he or she lives in intimate community, for example with a spouse, and that he or she lives in such community with a sense of being protected against intrusion by the public or any other undesired person (Decision of the Constitutional Court No. Up-32/94, dated 13 April 1995, OdlUS IV, 38). Human actions thus also constitute a common and essential part or aspect of such whole. These include the right of a person to his or her own voice, i.e. the right over one's voice.<sup>1</sup> The latter allows everyone to decide on their own on the appearance of their personality [which

1 In German (constitutional) case law and literature, one speaks of “*Recht an der eigene Stimme*” or “*Recht am gesprochenen Wort*,” while in France a similar expression, “*le droit à la voix*,” is used. The same is stated in A. Finžgar: *Osebnostne pravice* [Personality Rights], SAZU, Ljubljana 1985, p. 114.

they convey] in communication with others. The personality of a person is namely reflected in his or her words. Everyone has the right to speak freely, without reservation, and in normal circumstances, which is expressed in the proverb: “*verba volant, litterae scriptae manent*.”<sup>2</sup> The [mentioned] protection includes the possibility that in communication with others the person responds in a manner he or she deems most appropriate and adapts to each individual addressee. Another element that corresponds to this fundamental right is also that the person decides for him- or herself who can hear the content of his or her communication – only his or her interlocutor, a certain closed group of persons, or the public. Such a decision regarding oneself and one’s words therefore also encompasses the determination of the circle of persons who are to hear the content of one’s conversation. This right finds substance in the entitlement of every person to decide whether his or her voice shall be recorded and thereby, through a sound carrier, perhaps transmitted to third persons, whereby the words and the voice become separated from the person and independent. A recording gives power over another person, over a personal asset of someone else, as it enables repetition and thus interferes with the exclusive right of the person to control the spread of the content of his or her communication and to decide by him- or herself who shall or who may hear such communication.<sup>3</sup> With the protection guaranteed by Article 35 and in particular by Article 37 of the Constitution, human communication is safeguarded against the threat that words (e.g. a thoughtless or impulsive statement, a superficial opinion, or any kind of conversation due to the content or the tone of the voice in different circumstances) could be used as evidence against the person who uttered them. Therefore, protection from the (secret) recording of conversations without the permission of all the persons participating therein is ensured. Furthermore, not only protection from recording is guaranteed, but also protection from other violations. Protection also extends to the situation wherein an interlocutor includes in the conversation a third person as a listener without the other interlocutor being aware thereof. The protection of this right does not depend on whether an action can be qualified as a criminal offence as determined by Article 148 of the Penal Code (Official Gazette RS, No. 63/94, etc.). The punishable character of a certain action can certainly point to the fact that a certain particularly protected asset is affected; however, for the constitutional protection of the right to privacy it is not decisive whether, in a specific legal order, listening to or recording a telephone conversation between two persons is also regulated by criminal law. The right over one’s voice as a reflection of the right to privacy is protected regardless of that. However, if a person behaves in a manner such that his or her words can be heard without much difficulty by a third person, he or she must bear the consequences him- or herself. What is essential, therefore, is whether a person can reasonably expect, given the circumstances of the case, that a third person will not hear him or her. The [mentioned] right is also not violated if the person allows a third person to either record or listen to the conversation.

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2 A. Finžgar, *ibidem*.

3 *Ibidem*.

11. The right over one's voice is also not limited with regard to the content of the conversation. For the protection of this right it is not relevant that the content of the conversation may be of an intimate character or that it may concern an exchange of secret information (e.g. business secrets), or the fact that the interlocutors have specifically agreed that the conversation would be confidential. Often times it is impossible to predict in advance how the conversation will develop. Thus, a conversation that was first of a business character can turn into a private conversation, and a private conversation can become a business conversation. The possibility of changing the topic of the conversation without one person losing their ability to be at ease therein is contained in the right of [each] interlocutor to decide on his or her own actions. Such possibility to decide on one's actions entitles the person to prepare for the possible legal consequences of the conversation. Therefore, if a person knows that a third person is listening to the conversation or that the conversation is being recorded, such that it will be possible for the third person to be examined as a witness or such that the recording of the conversation may be used in subsequent judicial proceedings, he or she may refrain altogether from speaking about something that could have legal consequences. Similarly, he or she could as well acquire evidence by him- or herself or say something in such a manner that subsequently in judicial proceedings could be used to his or her benefit. All these possibilities are taken from the person if he or she is not given the possibility to decide by him- or herself whether he or she allows the content of the conversation to be heard or recorded by someone else.
12. The concrete case concerned a conversation between two contracting parties regarding (in their opinion) important issues related to a concluded sales contract on real property, and their conversation was not intended to be heard by an indefinite circle of persons. The interlocutor, i.e. the plaintiff in the lawsuit, enabled the telephone conversation to be listened to by a third person (i.e. her legal representative) and she also recorded it. Her legal representative was then examined as a witness in the judicial proceedings, and the recording of the telephone conversation was used as evidence as well.
13. The Supreme Court substantiated the position that what is at issue is not an interference with the complainant's right to privacy by stating that the complainant as a participant in the telephone conversation should have expected that his interlocutor would enable a third person to listen to the telephone conversation. As has already been explained, the possibility of such an interference cannot be excluded already due to the fact that different means enabling listening to the conversation are considerably widespread (multiple telephone connections, multiple handsets, an internal network of telephones, or a telephone with a loudspeaker).<sup>4</sup> The court, however, did not establish that the complainant was acquainted with the fact that a third person

4 Devices built into a telephone (another handset or a loudspeaker) have various purposes. They give the user the technical possibility to extend the circle of persons participating in a telephone conversation. A loudspeaker can also be used so that the interlocutor's hands are free during the conversation, and he or she is thus able to take notes of the conversation or to browse through documentation without interrupting the telephone conversation.

was listening to the telephone conversation. Furthermore, not even the general finding that a third person listening to a telephone conversation or a recording thereof is in certain fields a usual or even standard practice can substitute for the interlocutor's consent that a third person may also listen to such conversation. On the other hand, the court did not determine even the [possible] facts that would indicate that the complainant had tacitly consented to the listening [of the conversation by a third person] or to the recording [thereof]. An audio recording of a telephone conversation cannot be equated with notes on the conversation. There namely exists an essential difference in their quality. Notes on a conversation consist of abstracts of what has been said and are written in accordance with the subjective assessment of the person recording what is so important that it should be written down. A recording, on the other hand, is an authentically preserved series of words or voice that was separated, when it was recorded, from the person who said it. As has already been emphasised, an audio recording gives power over another person or a personal asset thereof, because it enables repetition (repeated playbacks). Therefore, if such a recording is made without the affected person being aware thereof, then the exclusive right of such person to control the spread of his or her words or voice is thereby interfered with.<sup>5</sup>

14. In fact, the latter does not mean that such an interference with the right to privacy cannot be admissible under certain conditions; however, particularly justified circumstances must exist in order to take, in civil proceedings, evidence obtained by means of a violation of the right to privacy. The taking of such evidence must be of particular importance for the exercise of a certain right protected by the Constitution. In such a case, courts must observe the principle of proportionality and carefully assess which right should be given priority (the third paragraph of Article 15 and Article 2 of the Constitution). Since the challenged decision is based on the position that admitting the testimony of the witness who listened to the telephone conversation, as well as playing the recorded conversation in court as evidence, does not entail an interference with the complainant's right to privacy, it is evident that the court at issue did not even address whether the circumstances in the case at issue would justify such an interference.
15. With regard to the above, the complainant's right to privacy determined by Article 35 and the right to the privacy of correspondence and other means of communication determined by the first paragraph of Article 37 of the Constitution were violated by the challenged judgments. Therefore, the Constitutional Court abrogated them and remanded the case to the court of first instance for new adjudication. In the renewed proceedings, the court must not base its decision on the position that the Constitutional Court established is inconsistent with the Constitution.

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5 This is also the position adopted in German (constitutional) case law. Two recent cases from this field include, for example, Decision of the Federal Constitutional Court No. 1 BvR 1611/96 and 1 BvR 805/98, dated 9 October 2002, and Judgment of the Federal Supreme Court No. XI ZR 165/02, dated 18 February 2003. The same position is also supported in Austrian and Swiss case law; see, for example, Judgment of the Austrian Supreme Court No. 6Ob190/01m, dated 27 September 2001, and Judgment of the Swiss Supreme Court No. 5P.308/1999/min, dated 17 February 2000.

**C**

- 16.** The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr Dragica Wedam Lukić, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Lojze Janko, Milojka Modrijan, Dr Ciril Ribičič, Dr Mirjam Škrk, and Jože Tratnik. The decision was reached unanimously. Judge Mag. Marija Krisper Kramberger was disqualified from deciding in the case.

*Dr Dragica Wedam Lukić*  
*President*

**DECISION**

At a session held on 26 March 2009 in proceedings to review constitutionality initiated upon the petition of Zmago Jelinčič Plemeniti, Ljubljana, and Bogdan Barovič, Ljubljana, the Constitutional Court

*decided as follows:*

1. The first sentence of the first paragraph of Article 16 and the fourth indent of the first paragraph of Article 17 of the Restrictions on the Use of Tobacco Products Act (Official Gazette RS, Nos. 57/96, 119/02, 101/05, 17/06 – official consolidated text, and 60/07) are not inconsistent with the Constitution.
2. The petition to initiate the proceedings for the review of the constitutionality of the first and fifth paragraphs of Article 14 and Article 20 of the Restrictions on the Use of Tobacco Products Act is rejected.

*Reasoning*

**A**

1. The petitioners, who filed a petition as both National Assembly deputies and citizens of the Republic of Slovenia, challenge Articles 4, 6, 7, and 9 of the Act Amending the Restrictions on the Use of Tobacco Products Act (Official Gazette RS, No. 60/07 – hereinafter referred to as RUTPA-C). They allege that the ban on smoking in hospitality establishments puts smokers in an unequal position, as they can no longer freely smoke in hospitality establishments and are forced to smoke in designated smoking rooms, where, however, they cannot drink or eat, as the law prohibits them from doing such. In their opinion, the challenged regulation interferes with their right to act freely (Article 35 of the Constitution), as the principle that applies is that everything which is not prohibited is permitted, whereas smoking is not declared to be a criminal offence. Therefore, in their opinion, smokers have the right to smoke. The fact that in public indoor places smoking is restricted to designated smoking rooms and that the consumption of food and beverages in such rooms is prohibited

allegedly also interferes with their personal liberty (Article 19 of the Constitution), their freedom of movement (Article 32 of the Constitution), and their personality and dignity (Articles 21 and 34 of the Constitution). Allegedly no sound reason exists for the prohibition of the consumption of food and beverages in the designated smoking rooms. Furthermore, in their opinion, the legislature should allow specialized hospitality establishments with limited admission where smoking should be unrestricted. Namely, only in such a manner would smokers' right to socialize and associate, as guaranteed by Article 42 of the Constitution, be ensured. Thereby hospitality establishment owners' free economic initiative, as determined in Article 74 of the Constitution, is interfered with, as they cannot freely choose whether to have a smoking or non-smoking hospitality establishment.

2. With reference to Article 4 of the RUTPA-C, which prohibits persons under 18 years of age from selling tobacco products, the petitioners allege the inconsistency with Articles 14, 15, 34, 35, 49, and 66 of the Constitution. Such regulation allegedly prohibits work that persons under 18 years of age could carry out before the amendment of the Act and allegedly offends their personal dignity and integrity, as it demonstrates the legislature's lack of trust towards young people. With reference to Article 9 of the RUTPA-C, which regulates supervision of the implementation of the Act and accountability for the implementation of the ban on smoking, the petitioners claim that it does not meet the requirements laid down in Article 2 of the Constitution, as it is allegedly not determined in what manner inspectorates shall act, what is the relation between the accountability of the owners and tenants of hospitality establishments, etc. Thus, in their opinion, the state did not fulfil its obligations determined in Article 5 of the Constitution.
3. The National Assembly did not reply to the petition. In the opinion of the Government, the challenged regulation is not inconsistent with the Constitution. In its opinion, the Government reiterated standpoints which have already been stated in the legislative materials.

#### **B – I**

4. Anyone who demonstrates legal interest may lodge a petition requesting that the procedure for the review of constitutionality be initiated (the first paragraph of Article 24 of the Constitutional Court Act, Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA). In accordance with the second paragraph of the same article, legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his rights, legal interests, or legal position.
5. The petitioners challenge Articles 4 and 9 of the RUTPA-C. Article 4 of the RUTPA-C amends the first paragraph of Article 14 of the Restrictions on the Use of Tobacco Products Act (hereinafter referred to as the RUTPA) and adds a new fifth paragraph, whereas Article 9 of the RUTPA-C amends Article 20 of the RUTPA. The Constitutional Court thus deemed that the petitioners challenge the first and fifth paragraphs of Article 14 and Article 20 of the RUTPA. The first paragraph of Article 14 of the RUTPA

prohibits the sale of tobacco products to persons under 18 years of age and persons under 18 years of age from selling tobacco products. In addition, the fifth paragraph of Article 14 requires that the prohibition of the sale of tobacco products to persons under 18 years of age is displayed visibly in shops where tobacco products are sold. The above-mentioned provisions do not directly interfere with petitioners' rights, legal interests, or their legal position, as the petitioners, who lodged the petition also as National Assembly deputies, are not persons under 18 years of age. Furthermore, also the provisions of Article 20 of the RUTPA, which regulate supervision of the implementation of the RUTPA and the accountability for the implementation of the ban on smoking, do not interfere with their rights, legal interests, or legal position. The provisions of Article 20 of the RUTPA, which regulate competence for supervision of inspection bodies for supervision of the implementation of the individual parts of the Act in and of themselves cannot interfere with the petitioners' legal position, whereas with reference to accountability for the implementation of the ban on smoking in indoor public places and indoor workplaces, the petitioners did not demonstrate that they are owners, tenants, or managers of places where the ban on smoking should be implemented. The petitioners therefore do not demonstrate legal interest for the review of the constitutionality of the challenged statutory provisions. Therefore, the Constitutional Court rejected their petition in this part (Point 2 of the operative provisions).

6. The petitioners also challenge Articles 6 and 7 of the RUTPA-C. Article 6 amends Article 16 of the RUTPA, whereas Article 7 amends the text of Article 17 of the RUTPA. The Constitutional Court deemed that the petitioners challenge the provisions of the RUTPA. With reference to such, the allegations in the petition only refer to the first sentence of the first paragraph of Article 16 and the fourth indent of the first paragraph of Article 17 of the RUTPA, therefore the Constitutional Court reviewed the RUTPA only in this part. The Constitutional Court accepted the petition for consideration in the above-mentioned part and, with consideration of the fact that the requirements laid down in the fourth paragraph of Article 26 of the CCA are fulfilled, proceeded to decide on the merits.

#### **The Review of the First Sentence of the First Paragraph of Article 16 of the RUTPA**

7. The first sentence of the first paragraph of Article 16 of the RUTPA reads as follows: "Smoking is prohibited in all indoor public places and indoor workplaces."
8. Articles 34 and 35 of the Constitution protect individuals' personal dignity, personality rights, safety, and privacy. The right to personal dignity ensures individuals recognition of their worth as human beings and from which there follow their ability to decide independently. Also the guarantee of personality rights stems from this human characteristic. The name itself indicates that these are the rights which a human being as a person, thus a human being as such, is entitled to. The guarantee of personality rights ensures the elements of individuals' personality that are not protected by other provisions of the Constitution (by the freedoms of conscience, expression, etc.), but only by them all together are individuals given an opportunity

to develop freely and live their lives as they decide (see Constitutional Court Decision No. U-I-226/95, dated 8 July 1999, Official Gazette RS, No. 60/99 and OdlUS VIII, 174). Constitutional case law also includes in this scope the general right to act freely (e.g. in Decision No. U-I-137/93, dated 2 June 1994, Official Gazette RS, No. 42/94 and OdlUS III, 62). This constitutional right also encompasses the principle that in a state governed by the rule of law a person is permitted to do everything which is not prohibited and not vice versa (Decision No. U-I-290/96, dated 11 June 1998, Official Gazette RS, No. 49/98, and OdlUS VII, 124).

9. However, the general right to act freely is not an unlimited and abstract “natural” freedom. It can be exercised only within the constitutional framework. In a substantive sense, the general right to act freely entails a legally determined freedom which is limited yet protected within these boundaries. As members of society, individuals must endure the limitations of the general right to act freely which are dictated by the interests of others and society as a whole. These limitations in and of themselves do not entail an interference with the general right to act freely, but define its constitutionally protected substance. As regards the above-mentioned, the Constitutional Court had to first establish whether the challenged regulation concerns an interference with the constitutional right to act freely or if the challenged regulation stems from the very nature of this right as a constituent part thereof.
10. The general right to act freely gives individuals the right “to do what one will with oneself” and with all aspects of one’s person, without external interferences. It is namely important that individuals are able to choose their own lifestyle, develop their personality, and live their personal life as they choose.<sup>1</sup> The general right to act freely thus also comprises the individuals’ right to decide whether to smoke or not. The individuals’ choice necessarily includes their free will.<sup>2</sup> With reference to the use of tobacco products, also the fact that such cause addiction, which can to a certain extent exclude the freedom of choice not only of smokers but also of users of other tobacco products, must necessarily be taken into consideration.<sup>3</sup> Regardless of the existence of addiction to tobacco products, the use of tobacco products is not an inborn need of men, such as eating, drinking, sleeping, moving about, and voicing one’s opinion, but at least in the beginning<sup>4</sup> (before addiction develops) it is their free choice.
11. As applies for all human rights and fundamental freedoms, it also applies for personality rights, which are protected by Article 35 of the Constitution, that they are not absolute and unlimited. In accordance with the third paragraph of Article 15 of the Constitution, they are limited by the rights of others and in such cases as are provided by the Constitution. The Constitutional Court holds that the challenged statutory reg-

1 A. Kjonstad, Is it a Human Right to Smoke Tobacco?, in: R. Bainpain and G. Anderson (Editor), *Smoking and the Workplace*, Kluwer Law International, The Hague, 2005, p. 65.

2 Cf., M. L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the privacy rights of cigarette smokers*, *Georgetown Law Journal*, 86 (1998) 1, pp. 802 – 803.

3 See Constitutional Court Decision No. U-I-141/97, dated 22 November 2001, Official Gazette RS, No. 104/01 and OdlUS X, 193, paragraph 25 of the reasoning.

4 Cf., American Federal Appellate Court Judgment in *Case Palmer v. Liggett Group Inc.*, 825, F 2<sup>nd</sup> 680 (1<sup>st</sup> Cir. 1987).

ulation which prohibits smoking in indoor public places and indoor workplaces, entails an interference with the general right to act freely (Article 35 of the Constitution). Interferences with human rights or fundamental freedoms are, in accordance with the established case law, admissible if they are consistent with the principle of proportionality. The Constitutional Court carries out a review of whether an interference with a human right is admissible on the basis of the so-called strict test of proportionality (see Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS XII, 86; paragraph 25 of the reasoning). The Constitutional Court must first establish (review) whether the legislature pursued a constitutionally admissible aim.

12. As follows from the legislative materials,<sup>5</sup> the aim of the challenged statutory regulation is to ensure employed persons in all occupational groups full protection from exposure to the adverse health effects of tobacco smoke in workplaces and all persons full protection from exposure to the adverse health effects of tobacco smoke in public places, to reduce demand for tobacco products, to reduce smoking among young people and adults alike, and to increase the number of persons that give up smoking. The Constitutional Court holds that the above-mentioned suffices for the conclusion that the legislature had a constitutionally admissible aim in limiting the petitioners' general right to act freely, as protected within the framework of Article 35 of the Constitution.
13. In addition to the conclusion that the interference pursues a constitutionally admissible aim and that it is not inadmissible from this point of view, it must also always be reviewed whether such is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), and thus with that constitutional principle which prohibits excessive interferences (the general principle of proportionality). The review of whether an interference is excessive is carried out by the Constitutional Court on the basis of a strict proportionality test. The test comprises a review of three aspects of the interference: (1) whether the interference is at all necessary (needed) in order to achieve the pursued aim; (2) whether the evaluated interference is appropriate for achieving the pursued aim in the sense that such aim can in fact be achieved by the interference; (3) whether the weight of the consequences of the reviewed interference with the affected human right is proportionate to the benefits which will result therefrom (the principle of proportionality in the narrower sense or the principle of proportionality). Only if the interference passes all three aspects of the test is it constitutionally admissible (see Constitutional Court Decision No. U-I-18/02).
14. Within the framework of the review of the necessity of the interference, the Constitutional Court reviews whether the interference is at all necessary (needed) in the sense that the aim in question cannot be achieved without an interference in general (i.e. by means of some manner of interference) or that the aim cannot be achieved without the reviewed (concrete) interference but by means of some other interference which would be less severe in nature. These requirements are met regarding the challenged regulation on the ban on smoking. As is true for active smoking, second-hand smoking is also harmful to one's health. The first paragraph of Article 8 of the WHO Framework

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5 National Assembly Gazette, No. 30/07, p. 9.

Convention on Tobacco Control. (Official Gazette RS, No. 16/05, IT, No. 2/05 – hereinafter referred to as the FCTC), which is binding on the Republic of Slovenia, requires that parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease, and disability. Second-hand smoking or environmental tobacco smoke is the combination of smoke emitted from the burning end of a cigarette or other tobacco products and smoke exhaled by the smoker.<sup>6</sup> Environmental tobacco smoke contains thousands of known chemicals, at least 250 of which are known to be carcinogenic or otherwise toxic.<sup>7</sup> Evidence on the adverse health effects of exposure to tobacco smoke has been accumulating for nearly 50 years. In this period, the link between environmental tobacco smoke and the following illnesses has been established: coronary heart disease, lung cancer, breast cancer, respiratory symptoms and illnesses, whereas among children exposure to tobacco smoke effects asthma (exacerbates preexisting asthma and causes new-onset asthma), lung growth and development, and middle-ear disease (*otitis media*).<sup>8</sup> According to the data contained in the legislative materials,<sup>9</sup> as many as 65% of all adult residents of the Republic of Slovenia are exposed to tobacco smoke (with different durations and frequencies). 57% of non-smokers were exposed to tobacco smoke. As many as 60% of all adult residents were exposed to tobacco smoke in hospitality establishments, among which one quarter was exposed to it every day or almost every day. Slightly more than 27% of adult residents of the Republic of Slovenia were exposed to second-hand smoke every day or almost every day. Most often they were exposed to tobacco smoke in hospitality establishments, at their workplace, and in a home environment. On average these persons spent somewhat less than 3 hours per day in smoky places, in a timeframe from a few minutes to more than 16 hours. Almost one half of the group of exposed persons were non-smokers.

15. In order to ensure employed persons in all occupational groups full protection against exposure to the adverse health effects of tobacco smoke, smoking must be banned in all indoor public places and indoor workplaces. A hospitality establishment is a workplace for persons employed in the hospitality sector and protecting such employees from second-hand smoking can only be ensured by the complete prohibition of smoking in hospitality establishments. The measures laid down in the RUTPA before the implementation of the RUTPA-C, which comprised the prohibition of smoking in public places except in parts which were specially marked and separated from places designated for non-smokers, whereby it was left to the owners of hospitality establishments to designate such special places for smokers as well as their size, did not achieve their aim. The RUTPA before the implementation of the

6 World Health Organisation, Protection from Exposure to Second-Hand Tobacco Smoke, Policy Recommendations, 2007, p. 4.

7 United States Department of Health and Human Services, National Institutes of Health, National Institute of Environmental Health Sciences, National Toxicology Program, Report on Carcinogens, 11<sup>th</sup> Editions, Washington DC 2005, published at: <http://ntp.niehs.nih.gov/ntp/roc/toc11.html> (23 February 2009).

8 World Health Organisation, Protection from Exposure to Second-Hand Tobacco Smoke, Policy Recommendations, 2007, pp. 5–6.

9 National Assembly Gazette, No. 30/07, p. 3.

RUTPA-C did not enable employed persons in all positions of employment or workers in all occupational groups appropriate protection from tobacco smoke.<sup>10</sup> In addition, employed persons in the hospitality industry, who are to a greater extent and for longer periods exposed to tobacco smoke, did not exercise their right to require that their employer ensure a smoke-free work environment, as they were not aware of the adverse effects of second-hand smoking or they were afraid to lose their jobs.<sup>11</sup> Furthermore, in accordance with recent scientific evidence, the statutory provision of the RUTPA before the implementation of the RUTPA-C, which introduced the requirement of appropriate ventilation in order to prevent the mixing of [smoky and non-smoky] air, is no longer appropriate, as none of the accessible ventilation technologies or air purification systems can ensure protection against exposure to tobacco smoke without extensive and impractical increased ventilation. Even separated places for smokers and non-smokers do not protect workers. What is more, there is a high concentration of carcinogens and toxins from tobacco smoke in separated places for smokers.<sup>12</sup> In view of the fact that there is no safe level of exposure to tobacco smoke,<sup>13</sup> the Constitutional Court finds that the prohibition of smoking in all indoor public places and indoor workplaces is the only measure which enables the legislature's pursued aim to be achieved, i.e. the protection of workers and other persons from the adverse effects of environmental tobacco smoke.

16. The Constitutional Court holds that the interference is also appropriate in order to achieve the pursued aim. As already explained above, the prohibition of smoking in indoor public places and indoor workplaces is the only measure which can ensure effective protection from the adverse effects of tobacco smoke or from second-hand smoking. Thereby, exposure to environmental tobacco smoke and consequently the risks connected to second-hand smoking namely decrease considerably. Studies conducted in countries that have banned smoking show that indoor air quality improved considerably following the implementation of the prohibition of smoking. Reduced exposure to environmental tobacco smoke was primarily observable in places intended for leisure activities and in hospitality establishments. This is expressed in a considerable improvement in the respiratory health of workers employed in the hospitality sector and in a substantial decrease in the occurrence of heart attacks and the death rate within a few months following the implementation of the policy.<sup>14</sup>
17. In order for the challenged provision to pass the test of proportionality, the condition of proportionality in a narrower sense must also be fulfilled. Proportionality in a narrower

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10 *Ibidem*, p. 7.

11 *Ibidem*.

12 *Ibidem*, p. 8.

13 World Health Organisation, Protection from Exposure to Second-Hand Tobacco Smoke, Policy Recommendations, 2007, p. 7.

14 See especially the studies cited in footnotes 54-56 in the Green Paper of the Commission of the European Communities, Towards a Europe free from tobacco smoke: policy options at EU level, COM(2007) 27 final, 30 January 2007, published at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0027:SL:HTML> (23 February 2009).

sense concerns a review of whether the weight of the consequences of the reviewed interference with the affected human right is proportional to the value of the pursued aim or to the benefits which will result due to the interference. The ban on smoking limits smokers regarding their freedom to act when they are at their workplace or in indoor public places. This also applies to their visits to hospitality establishments, as such are made increasingly more difficult due to the ban on smoking, whereas visiting hospitality establishments is one of the aspects of social life. On the other hand are the individual's rights to health (Article 51 of the Constitution) and to a healthy living environment (Article 72 of the Constitution), which require that the legislature adopt appropriate measures for their provision. The FCTC also requires that Slovenia actively promote the adoption and implementation of effective legislative, executive, administrative, and/or other measures that provide for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places (the second paragraph of Article 8 of the FCTC). The challenged regulation is such a measure whose aim is to prevent or reduce the adverse effects of environmental tobacco smoke on employed persons and other persons and by which their right to health and a healthy living environment is ensured. Health is such an important value for everyone that right to act freely may be interfered with in order to ensure such. The interference with the right determined in Article 35 of the Constitution is not excessive due to the importance of the aim that the legislature pursues and due to the importance of the benefits which are protected by the challenged regulation. It is especially not excessive if it is taken into consideration that smokers can always leave an indoor public place or indoor workplace for a short period of time in order to use tobacco products. The challenged regulation of the ban on smoking is thus not inconsistent with the general right to act freely determined in Article 35 of the Constitution.

18. The petitioners also allege that the challenged regulation is inconsistent with the right of association determined in Article 42 of the Constitution, as the state renders it impossible for them to socialize and associate in hospitality establishments and as it does not allow specialized hospitality establishments where smoking is permitted.
19. Article 42 of the Constitution establishes several constitutional rights. In the first paragraph the right of peaceful assembly and the right of public meeting are ensured. The second paragraph ensures the right to freedom of association. In accordance with the third paragraph of Article 42, legal restrictions of these rights are permissible where so required for national security or public safety and for protection against the spread of infectious diseases. A special restriction is determined in the fourth paragraph for professional members of the defence forces and the police; they namely may not be members of political parties. An assembly of people is a meeting of people – either in an indoor place or under the open sky – together with their participation in expressing or exchanging ideas or opinions.<sup>15</sup> It is exercised through a less formal form of a

15 L. Šturm, 42. člen (*Pravica do zbiranja in združevanja*) [Article 42 (Freedom of Assembly and Association)] in: L. Šturm (Editor), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske in evropske študije, Ljubljana, 2002, p. 461.

connection of people than an association,<sup>16</sup> which is a more organised and permanent community of individuals who are closely connected in order to pursue common interests. Due to such characteristics of association, by their very nature associating or socializing in hospitality establishments cannot be considered association within the meaning of the second paragraph of Article 42 of the Constitution.

20. The constitutional provision on the right of assembly determined in the first paragraph of Article 42 is a special provision in relation to the general right to act freely, which is protected in Article 35 of the Constitution. It entails the assembly of at least two persons,<sup>17</sup> which is not coincidental,<sup>18</sup> and which requires at least some degree of internal connection of the participants. The participants must be aware of the fact that they are assembling and must wish to participate in such (the element of willingness). The right of assembly requires assembly with the intention of common expression with the aim of participating in a public expression of opinions.<sup>19</sup> Assembly is thus not merely a connection [of individuals] or amusement,<sup>20</sup> therefore entertainment (e.g. public festivities) or commercial events (e.g. sporting events<sup>21</sup> or public parties in the open air<sup>22</sup>) are not considered assemblies, as they lack the element of the internal connection [of the individuals involved].<sup>23</sup> Considering the characteristics of spending time and socializing in hospitality establishments, they cannot be regarded as assembly within the meaning of the first paragraph of Article 42 of the Constitution, as they are in general coincidental, they do not entail a group expression, and also the element of the internal connection of visitors in general does not exist. Therefore, the petitioners' allegation regarding the inconsistency of the challenged regulation with the right determined in Article 42 of the Constitution is not substantiated.
21. Furthermore, the petitioners allege that the challenge regulation also violates the principle of equality before the law determined in the second paragraph of Article 14 of the Constitution, as smokers cannot freely visit hospitality establishments, as non-smokers can. They claim that smokers are severely restricted due to the ban on smoking when visiting hospitality establishments, whereas the state does not allow hospitality establishments to be specialized so that smoking is permitted in them.
22. The second paragraph of Article 14 of the Constitution determines that all are equal before the law. Respecting the principle of equality and ensuring equal treatment are thus fundamental requirements which the legislature must observe when regulating

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16 *Ibidem*.

17 D. C. Umbach and T. Clemens (Editor), *Grundgesetz, Mitarbeiterkommentar und Handbuch*, Band I, C. F. Müller Verlag, Heidelberg 2002, p. 626 – hereinafter referred to as Umbach/Clemens.

18 *Ibidem*, p. 627.

19 *Cf.*, German Federal Constitutional Court Decision in the Loveparade Case, BVerfG, 1 BvQ 28/01, dated 12 July 2001, paragraph 16 of the reasoning.

20 Umbach/Clemens, p. 627. The same also in H. D. Jarass and B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, 4<sup>th</sup> Edition, Beck Verlag, München 1997, p. 241 – hereinafter referred to as Jarass/Pieroth.

21 Jarass/Pieroth, *ibidem*.

22 Umbach/Clemens, p. 627.

23 Jarass/Pieroth, p. 241.

rights and obligations. However, this principle cannot be viewed as simple general equality for all. In accordance with the established case law of the Constitutional Court, the principle of equality before the law does not entail that a regulation – in cases in which the bases for different regulation are not the circumstances determined in the first paragraph of Article 14 of the Constitution – should not differently regulate the same positions of legal subjects, but that such cannot be done in an arbitrary manner, without a sound and objective reason. There must thus exist a sound reason deriving from the nature of the matter.

23. The challenged regulation, *inter alia*, pursues the aim of protecting employed persons in all occupational groups, thus also persons employed in the hospitality industry. Also the latter have the right to work in a workplace environment where they are not exposed to environmental tobacco smoke. Also persons employed at specialized hospitality establishments would have to be exposed to environmental tobacco smoke because of the nature of the matter. Finally, also the fact that the RUTPA also protects employed persons who are smokers from the adverse effects of second-hand smoking must be taken into consideration. It can namely not be deemed that because of the fact that they are smokers they consent to being exposed to environmental tobacco smoke at their workplace. It also follows from the legislative materials that the measures pursuant to the RUTPA before the implementation of the RUTPA-C, according to which it was left to owners (or tenants or managers) of hospitality establishments to designate special places for smokers as well as their size, did not achieve their aim, and workers often were not able to exercise their right to require that their employer ensure a smoke-free work environment, due to their existential dependency on their employment. The Constitutional Court finds that the protection of employed persons from environmental tobacco smoke (i.e. second-hand smoking) is not an unsound reason for the challenged regulation, in which specialized smoking hospitality establishments are not envisaged. Therefore, the petitioners' allegations regarding the inconsistency of the challenged regulation with the principle of equality before the law determined in the second paragraph of Article 14 of the Constitution are not substantiated.
24. The Constitutional Court cannot agree with the petitioners that the prohibition of smoking in indoor public places and indoor workplaces violates Article 19 of the Constitution, as it only protects individuals' personal liberty, especially from arrest and similar, and not from the fact that in certain special situations (e.g. when visiting hospitality establishments), in which individuals enter voluntarily, they are required to respect certain rules of conduct.
25. The Constitutional Court did not review the alleged inconsistency of the first sentence of the first paragraph of Article 16 of the RUTPA with Article 74 of the Constitution, which regulates free economic initiative, as the petitioners did not demonstrate their legal interest from the viewpoint of free economic initiative, as they did not demonstrate that they are owners, tenants, or managers of a hospitality establishment. The very general allegations that the challenged regulation deprives numerous subjects on the market of the possibility of having a hospitality establishment for smokers, do not demonstrate the petitioners' legal interest.

26. As regards the above-mentioned, the challenged provision of the first sentence of the first paragraph of Article 16 of the RUTPA is not inconsistent with the Constitution.

**The Review of the Fourth Indent of the  
First Paragraph of Article 17 of the RUTPA**

27. The fourth indent of the first paragraph of Article 17 of the RUTPA determines that food and beverages may not be consumed in smoking rooms.
28. The Constitutional Court holds that the above-mentioned prohibition interferes with the petitioners' general right to act freely laid down in Article 35 of the Constitution. As already explained above (paragraph 11 of the reasoning), also personality rights, which are protected by Article 35 of the Constitution, are not absolute and unlimited, but are, pursuant with the third paragraph of Article 15 of the Constitution, limited by the rights of others and in such cases as are provided by the Constitution. The interferences with human rights or fundamental freedoms are, in accordance with the established constitutional case law, admissible if they are in compliance with the principle of proportionality.
29. In order to ensure the possibility to work in an environment where air is not polluted and in order to prevent employed persons from being exposed to the adverse effects of environmental tobacco smoke against their will, the Constitutional Court finds that such entails that the legislature had a constitutionally admissible aim in limiting the petitioners' right to act freely, which is protected within the framework of Article 35 of the Constitution.
30. The interference must also be necessary, appropriate, and proportionate in a narrower sense in order not to be excessive. In view of the fact that the petitioners' allegations only refer to smoking rooms in hospitality establishments, the Constitutional Court limited the strict test of proportionality only to such. The Constitutional Court holds that also in the case of the prohibition of the consumption of food and beverages in smoking rooms in hospitality establishments all three conditions are still met. In the case of smoking rooms in hospitality establishments, it is namely presumed that in order to carry out their work obligations, i.e. serving and cleaning up after guests (with the exception of self-service restaurants, and even those require some cleaning up), employed persons would have to enter such. This entails that they would be exposed to environmental tobacco smoke, regarding which it follows from the scientific evidence that there is no safe level of exposure to tobacco smoke.<sup>24</sup> Such is particularly dangerous in separated places for smokers where a high concentration of carcinogens and toxins from tobacco smoke are present.<sup>25</sup> If it was allowed that food and beverages were consumed in smoking rooms in hospitality establishments, the aim that the legislature pursues would not be achieved. Thus the interference with the general right to act freely is not excessive, especially if it is considered that the limitation is only of a temporary nature. Smokers namely stay in smoking rooms only a short time and may

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24 See footnote 10.

25 See footnote 12.

immediately after they leave such rooms consume food and beverages. The aim of the law is namely to protect the health of employed persons so that they are protected from second-hand smoke in situations in which they are not smoking themselves. The fourth indent of the first paragraph of Article 17 of the RUTPA, which prohibits food and beverages from being consumed in smoking rooms, is not inconsistent with the general right to act freely protected in Article 35 of the Constitution.

31. As regards the starting points of the principle of equality laid down in the second paragraph of Article 14 of the Constitution, which the Constitutional Court explained in paragraph 22 of this reasoning, the Constitutional Court has to answer the question of whether there exists a sound reason, deriving from the nature of the matter, for the prohibition of the consumption of food and beverages in smoking rooms. It follows from the legislative materials<sup>26</sup> that the challenged regulation ensures employed persons the possibility to work in an environment where the air is not polluted and at the same time prevents them from being exposed to the adverse effects of tobacco smoke against their will. The Constitutional Court finds that the above-mentioned reasons are not unsound and are relevant to the aims pursued by the legislature. The possibility of consuming food and beverages in smoking rooms in hospitality establishments namely presumes that employed persons will enter such rooms in order to serve guests and related activities (i.e. to bring food and beverages as well as to clean up after guests). In this manner the full protection of employed persons is guaranteed, as they do not need to enter such rooms within the scope of their work obligations and consequently they are not exposed to second-hand smoke. The allegation that the prohibition of the consumption of food and beverages is inconsistent with the fourth indent of the first paragraph of Article 17 of the RUTPA is thus not substantiated.
32. As the Constitutional Court explained in paragraph 24 of the reasoning, Article 19 of the Constitution only protects individuals' personal liberty, especially from arrest and similar, and not from the fact that in certain special situations, e.g. in smoking rooms in which individuals enter voluntarily, they are required to respect certain rules of conduct. Therefore, the allegation regarding the alleged inconsistency of the prohibition of the consumption food and beverages in smoking rooms determined in the fourth indent of the first paragraph of Article 17 of the RUTPA is not substantiated. Also the allegation regarding the inconsistency of the challenged regulation with Article 21 of the Constitution is not substantiated, as the protection of human personality and dignity in accordance with this article is specifically limited to protection in legal proceedings in cases of arrest, detention, and the enforcement of punitive sanctions. In addition, the above-mentioned prohibition does not interfere with the freedom of movement determined in Article 32 of the Constitution, as such only refers to free movement, especially in the sense of choosing a place of residence, movement in and outside the country, etc.
33. Thus, the Constitutional Court finds that the first sentence of the first paragraph of Article 16 and the fourth indent of the first paragraph of Article 17 of the RUTPA are not inconsistent with the Constitution (Point 1 of the operative provisions).

<sup>26</sup> National Assembly Gazette, No. 30/07, p. 10.

**C**

34. The Constitutional Court reached this decision on the basis of Article 21 and the third paragraph of Article 25 of the CCA, composed of: Jože Tratnik, President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Mag. Miroslav Mozetič, Dr Ernest Petrič, Dr Ciril Ribičič, and Jan Zobec. The decision was reached unanimously.

*Jože Tratnik*  
*President*

Decision No. **Up-2530/06**, dated 15 April 2010

### DECISION

At a session held on 15 April 2010 in proceedings to decide upon the constitutional complaint of Miha Kozinc, Ljubljana, represented by Odvetniška družba Čeferin, o. p., d. o. o., [the law firm Čeferin], Grosuplje, the Constitutional Court

*decided as follows:*

The constitutional complaint against the second paragraph of the operative provisions of Supreme Court Decision No. Dsp 2/2006, dated 27 October 2006, in conjunction with Decision of the Disciplinary Court of the Bar Association of Slovenia No. Ds 4/2005, dated 27 March 2006, is dismissed.

### *Reasoning*

#### **A**

1. By the contested decision, the Disciplinary Court of the Bar Association of Slovenia (hereinafter referred to as the Disciplinary Court) held the complainant responsible for a violation of the professional duties of a lawyer pursuant to the sixth paragraph of Article 77.a of the Statutes of the Bar Association of Slovenia (Official Gazette RS, No. 15/94 etc. – hereinafter referred to as the Statutes), in conjunction with Article 18 of the Lawyers Professional Code of Conduct, as on 26 July 2005 he unjustifiably refused to carry out the duty to be present during the search of a lawyer's office. It imposed upon him a disciplinary measure, i.e. a warning. The Supreme Court rejected the complainant's appeal, and dismissed the appeals of his defence counsel and of the Disciplinary Court prosecutor.
2. The Disciplinary Court rejected the allegations of the complainant that the warrant of the investigating judge had not been drawn up in accordance with the Lawyers Act (Official Gazette RS, Nos. 18/93, 24/01, 54/08, and 35/09 – hereinafter referred to as the LA), and stated that the warrant contains all the essential elements required for the search pursuant to the provisions of the Criminal Procedure Act (Official Gazette RS, No. 63/94 etc. – hereinafter referred to as the CrPA) and Article 8 of the

LA (it stated, however, that the files and objects that the search had been ordered for could have been indicated more precisely in the operative provisions of the judgment), and assessed the complainant's refusal to be present during the search of the lawyer's office as unjustified. This was confirmed also by the Supreme Court, which stated that a representative of the Bar Association is obliged to be present during the search of a lawyer's office due to the protection of the secrecy of files which are not the subject of such search, and that the lawyer's departure from the premises of the search may result in the search being carried out without supervision by a lawyer. It also held that a representative of the Bar Association has the right to assess whether the search warrant was drawn up in accordance with the law, but he does not have the right to refuse to be present during the search on the basis of his own assessment regarding the (in)completeness of the warrant.

3. The complainant alleges a violation of Articles 36 and 137 of the Constitution. He states that as a representative of the Bar Association he refused to cooperate in the search of the lawyer's office as the search warrant was unlawful. According to the allegations of the complainant, the files and objects subject to the search were not listed in the operative provisions of the warrant but only in its reasoning. He refers to Article 8 of the LA, which is *lex specialis* with respect to the general provisions of the CrPA regarding the search of premises. Due to the special status enjoyed by lawyers in the legal order, the LA allegedly determines in greater detail the conditions for the conduct of a search of the premises of lawyers' offices as it allegedly specifies that in the warrant it must be stated which files and which objects are to be examined. The complainant states that a lawyer and his clients are linked by a special relationship, which has the nature of confidentiality and secrecy. Therefore in a search, law enforcement authorities should not intrude into case files that are not connected with the criminal case in question. If law enforcement authorities were allowed to conduct a search of the entire premises of a lawyer's offices, these confidential relations would be irreparably damaged. In legal theory there allegedly exists a generally accepted standpoint that it is merely the operative provisions of a legal act that become final and executable, whereas the reasoning allegedly serves only to ensure the right to a legal remedy. In the opinion of the complainant, the statements stated in the reasoning of the warrant in question are not sufficient since the addressees of the legal act are bound only by the operative provisions. The operative provisions of the type of warrant in question should allegedly contain instructions to the police officers who are to perform the search on how to act in a specific case. The police officers should allegedly act in accordance with the operative provisions of the search warrant as they are allegedly not even obliged to read the reasoning. The complainant believes that in the case at issue the police officers were entitled to search the entire premises and examine all the case files of the lawyer's office, which is in complete contradiction to the constitutional and statutory rights of the complainant as a lawyer. The complainant stresses that the attorneyship is an independent and autonomous service within the system of justice, regulated by law, and that, owing to the particularities of their profession, lawyers are in a special position as parties in criminal proceedings, which

should be taken into account when such procedures are carried out. The complainant therefore opposes the standpoint of the Supreme Court according to which representatives of the Bar Association do not have the right to refuse to be present during the search of a lawyer's office if they assess that such is unlawful since the search warrant was not drawn up in accordance with Article 8 of the LA.

4. The complainant opposes the standpoint of the Supreme Court that a search may be conducted also in the absence of a representative of the Bar Association. He believes that the presence of a representative of the Bar Association is a necessary condition for a search to be conducted. The role of the representative of the Bar Association in the search is allegedly not to protect secrecy but to see to it that the search is conducted in accordance with the law. The complainant was allegedly aware that as a representative of the Bar Association he must ensure that the search of a lawyer's office is conducted in accordance with the law and the Constitution. However, as in his opinion it was not possible to ensure such, he allegedly acted out of necessity so as to avert an immediate danger (i.e. an unlawful search) which he did not cause himself and which allegedly could not have been averted in any other way (before leaving, the complainant allegedly urged the court to amend the warrant), whereby the harm thus incurred did not exceed the harm which threatened him (the right of the inviolability of dwellings was allegedly more important than an expeditious performance of a search, which would have occurred if the court had issued an accurate warrant). The complainant was allegedly punished only because he had observed the relevant provisions of the LA, the Criminal Procedure Act, and the Constitution, and due to this the independence of the attorneyship was allegedly put in jeopardy.
5. In proceedings pursuant to the third paragraph of Article 55.c of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court accepted the constitutional complaint for consideration by its Order No. Up-2530/06, dated 6 April 2009. In accordance with the first paragraph of Article 56 of the CCA, it informed the Supreme Court thereof.

#### **B – I**

6. The Constitutional Court consulted case files Nos. Ds 4/2005 and Dsp 2/2006 of the Disciplinary Courts of the first and second instances. As follows therefrom, the search of the lawyer's office was conducted in the following manner: On the basis of Warrant No. Kpd 462/05, dated 25 July 2005, issued by the investigating judge of the Koper District Court, the detectives of the Koper Police Directorate intended to conduct a search of the office of lawyer D. A. on 26 July 2005. The complainant came to the site of the intended search as a representative of the Bar Association and established that in the warrant the objects and case files subject to the search were not precisely defined. In a telephone conversation with the investigating judge and later with the President of the Koper District Court, he requested that the scope of the search be precisely defined in the warrant in accordance with Article 8 of the LA. As both of them continued to maintain that there was nothing wrong with the warrant as such, the complainant addressed a written complaint against the conduct of the investi-

gating judge to the President of the Koper District Court. To protect the interests of the lawyer's clients, he refused to cooperate in such a search and reasoned his refusal in the annex to the record of the search. In a written statement he indicated that he refused to cooperate in the conduct of the search as he believed that the conditions for such were not fulfilled. The warrant issued by the investigating judge was allegedly inconsistent with the first paragraph of Article 8 of the LA, pursuant to which only an examination of case files and objects specifically mentioned in the warrant is permitted. In the complainant's view, the case files and objects should have been precisely indicated in the operative provisions of the search warrant. Due to the unfulfilled formal requirements (the absence of the Bar Association representative), the police did not conduct the search. The detectives sealed the lawyer's office and ordered the lawyer into police custody. After the investigating judge was informed of the event, he ordered that the search warrant be executed on the following day, i.e. on 27 July 2005. On that day the complainant and the President of the Regional Assembly [of the Bar Association] were present during the search. As is apparent from the oral defence given by the complainant, the search was conducted in such a manner that the lawyer's defence counsel and the head of the criminal police squad agreed to set apart the files subject to search. Those case files were taken to a special room where they were examined by the detectives.

## B – II

7. The inviolability of a lawyer's office is ensured within the framework of the spatial aspect of privacy determined by Article 36 of the Constitution.<sup>1</sup> The search of a lawyer's office entails a severe interference with this constitutionally protected living space. Due to the weight of the interference and the constitutional significance of the protection of spatial privacy, only the judicial branch of power may order a search (the second paragraph of Article 36 of the Constitution). In a search of a lawyer's office it is not possible to observe only this aspect of privacy but also the aspects related

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1 The first and second paragraphs of Article 36 of the Constitution read as follows: Dwellings are inviolable. No one may, without a court order, enter the dwelling or other premises of another person, nor may he search the same, against the will of the resident. In the context of „reasonably expected privacy“, the word dwelling should not be understood only as dwelling in the narrow sense but also as hotel rooms and all premises in general where a citizen has the right to the privacy he or she may reasonably expect. See B. M. Zupančič 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, p. 388. Some authors interpret the term other premises of another person as referring to business premises, premises of undertakings, and other legal persons (G. Klemenčič, *Hišna preiskava* [Search of Premises]; in: G. Klemenčič, B. Kečanović, M. Žaberl, *Vaše pravice v policijskih postopkih* [Your Rights in Police Procedures], Založba Pasadena, Ljubljana 2002, p. 157). A provision similar to the one in the Slovene Constitution is also contained in the German Constitution, which in Article 13 explicitly refers only to the inviolability of dwellings and does not mention any other premises. It follows from the commentary on Article 13 of the German Constitution that the object of protection also includes business premises, with the exception of those which are generally accessible. H. D. Jarass, B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, 3. Auflage, Verlag C. H. Beck, München 1995, p. 310.

to the nature of the lawyer-client relationship. As an independent and autonomous adviser and assistant, a lawyer is bound to engage in legal acts for the benefit of his clients within the limits of the law. A prerequisite for the performance of this task is a confidential relationship between a lawyer and his client.<sup>2</sup> In criminal proceedings, the right to confidential contact between the defendant and his defence counsel is an essential element of the right to legal counsel.<sup>3</sup> Confidential contact between a defence counsel and a defendant (or a detained person) is protected within the framework of the third paragraph of Article 19 of the Constitution and the second indent of Article 29 of the Constitution. This relationship is protected irrespective of whether the information is intended to be used in the criminal proceedings by the defence. Due to the fact that in a search of a lawyer's office there exists a risk that the police will obtain documents and objects not related to the criminal offence which is the subject of investigation, the legal order must ensure the protection of the rights determined by Article 35, the first paragraph of Article 37, and the first paragraph of Article 38 of the Constitution.<sup>4</sup> Therefore, this does not concern protection of the lawyer's interests (or his privilege), but his duty to protect professional secrets<sup>5</sup> and the protection of the human rights and fundamental freedoms of his clients. Legal protection of this confidential relationship encourages clients to communicate freely with their lawyer or defence counsel, i.e. without fear that a potential subsequent disclosure of confidential data will jeopardise their legal position.<sup>6</sup>

- 2 The privilege of the confidential relationship between a lawyer and his client is one of the oldest acknowledged privileges relating to confidential communications. The purpose of the privilege is to foster full and open communication between lawyers and their clients, and thereby foster broader public interest in respect for the law and judiciary. See US Supreme Court judgment in the case *Upjohn Co. v. United States*, 449 U. S. 383, 389 (1981). See also the judgments in the cases *Fisher v. United States*, 425 U. S. 391 (1976), and *Swidler & Berlin v. United States*, 524 U. S. 399 (1998).
- 3 Defence counsels cannot perform any of their duties well unless the persons deprived of their freedom can present to them without reservations the circumstances of their case and how they have been treated. Constitutional Court Order No. Up-101/96, dated 1 October 1998 (OdlUS VII, 249).
- 4 Privilege refers to confidential communication between clients and their legal advisers when such is intended for obtaining or providing legal advice or for its application in proceedings which have already been or are to be initiated. This privilege is essential for the adequate and dignified arrangement of personal matters in a social environment poisoned by interferences with privacy. The individual must be enabled to obtain legal advice and legal assistance without fearing that his communication will be subject to investigation and seizure on the basis of a court order. Denying the privilege against a search warrant would have a minimal effect in securing convictions but a major damaging effect on the relationship between the legal profession and its clients. It would engender an atmosphere in which citizens feel that their private papers are insecure and that relationships they previously thought confidential are no longer safe from police intrusion. See judgment of the High Court of Australia in the case *Baker v. Campbell*, (1983) 153 CLR 52.
- 5 In accordance with the first paragraph of Article 6 of the LA, a lawyer must protect what his client has confided in him as a secret. A violation of the duty to protect a professional secret is defined as a severe violation of a lawyer's duty in practicing the legal profession (the first paragraph of Article 77.b of the Statutes).
- 6 The objective significance of legal practice and the legally protected confidential relationship between a lawyer and his client is in any case affected when, due to the risk of unlimited access to data, the lawyer-client

8. The violations of third party privacy rights which might occur in a search of a lawyer's office would be irreparable. Due to the protection of the confidential relationship and privacy of the lawyer's clients, an act must determine the conditions under which a search of a lawyer's office is admissible. These conditions are determined by Article 8 of the LA, which stipulates the conditions for a search of a lawyer's office that supplement those contained in the CrPA.<sup>7</sup> Pursuant to the first paragraph of Article 8 of the LA, a search of a lawyer's office is permitted only on the basis of a warrant issued by a competent court, and only regarding the case files and objects which are explicitly stated in the search warrant. The same paragraph also stipulates that in a search the secrecy of other documents and objects must not be compromised. Pursuant to the second paragraph of Article 8 of the LA, a representative of the Bar Association of Slovenia must be present during a search of a lawyer's office. The presence of a representative of the Bar Association is intended to protect the human rights of third parties who in the situation referred to in the first paragraph of Article 8 of the LA reasonably expect that the protection of their privacy will be ensured. The position of such representative differs from the usual position of solemn witnesses. The latter observe closely how the search is conducted and make objections, if any, to the contents of the record (the third paragraph of Article 216 of the CrPA). The representative of the Bar Association, on the other hand, must ensure that the secrecy of documents and objects which are not the subject of the search is respected. It follows also from the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR) that national law must regulate searches of lawyers' offices by providing for special safeguards.<sup>8</sup>

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relationship is burdened from the beginning with uncertainty regarding its confidentiality. With the extent of the potential knowledge of confidential statements that state authorities may acquire, the probability increases that in pursuing their interests even those who are not suspects will no longer trust the persons who are normally entrusted with professional secrets. See paragraph 94 of Order of the Second Senate of the German Federal Constitutional Court 2 BvR 1027/02, dated 12 April 2005.

- 7 The CrPA does not contain any detailed provisions regarding the manner of conducting a search of a lawyer's office.
- 8 A search of a lawyer's office entails an interference with the right to respect for privacy determined by Article 8 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); see the case of Niemietz v. Germany, judgment dated 16 December 1992. Such interference is admissible if it is provided for by the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. According to the standpoints of the ECtHR, the search and seizure of documents in the office of a lawyer undoubtedly interfere with the professional secrecy which is the basis for a confidential relationship between a lawyer and his client. The protection of professional secrecy [in the lawyer-client relationship] is related to the right of the client against self-incrimination, which presupposes that the authorities obtain evidence without force or pressure, i.e. against the will of the defendant. If national law envisages the possibility of a search of a lawyer's office, the search must be consistent with special safeguards (*garanties particulières*). The ECHR does not prohibit the imposition of certain duties on lawyers that may relate to the relationship with their clients if there are reasonable indications that a lawyer has participated

9. The complainant challenges the standpoints of the courts which were the basis for disciplinary punishment. He alleges a violation of the spatial aspect of privacy determined in the first paragraph of Article 36 of the Constitution, but there is manifestly no such violation. The warrant in question namely did not refer to a search of his office. Nor can the complainant succeed by alleging a violation of the first paragraph of Article 137 of the Constitution, which regulates the institutionalized position of the attorneyship – it defines such as an independent and autonomous service within the system of justice. The Constitutional Court agrees with the complainant that an independent and autonomous attorneyship is of particular importance for the functioning of a state governed by the rule of law, in which human rights and fundamental freedoms are respected. However, the Constitution does not directly regulate human rights or fundamental freedoms in this provision, therefore the complainant cannot substantiate the constitutional complaint by referring to this provision.
10. The allegations of the complainant that he was punished because he observed the provisions of the Constitution and that he acted out of necessity in order to avert an immediate danger which he did not cause himself and which allegedly could not have been averted in any other way, could be taken into consideration in light of the right to personal dignity determined in Article 34 of the Constitution. This right would have been violated if it were established that the bases for his disciplinary punishment included an unconstitutional standpoint. Therefore, the Constitutional Court had to evaluate the allegations in the light of the constitutionality of the standpoints on which the challenged court decisions are based.
11. When a search is conducted on the premises of a lawyer's office, the scope of the search must be strictly limited in the warrant to the case files and objects which, in order to provide evidentiary material relating to a particular criminal offence, make the search of the lawyer's office admissible.<sup>9</sup> The reasoning of the warrant must not lead one to conclude that all the documentation in the lawyer's office should be examined or that one should search in the lawyer's office for whatever one wishes to find. The Supreme Court based the challenged decision on the standpoint of the case law according to which a warrant must include: the data on the person whose premises are to be searched; the reasons which lead to the justified suspicion that a criminal offence has been committed if a search is conducted before the initiation of the judicial investigation; an indication of the person, traces, or objects to which the search relates, and an indication of the circumstances that demonstrate the likeli-

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in a criminal offence, or within the framework of combating certain forms of conduct. Such measures must, however, be strictly limited as lawyers have a central role in the administration of justice, and, due to their mediatory role between clients and courts, they could be defined as courts' assistants. Paragraphs 41 and 42 of judgment in the case *André et al. v. France*, dated 24 July 2008.

- 9 The protection of the confidential relationship between a lawyer and his client does not entail an impediment to obtaining communications which were used for a criminal offence. Communications lose the nature of confidentiality if they were made with a view to obtaining legal advice to facilitate the commission of a criminal offence. See, for example, the judgment of the Supreme Court of Canada in the case *Descôteaux et al. v. Mierzwinski*, [1982] 1 S. C. R. 860.

hood that the defendant will be apprehended or that the traces and objects that are important for the criminal proceedings will be revealed; and a specific indication of the premises where the search is to be conducted.<sup>10</sup> It stated that comparing a warrant to a judgment, which the law prescribes what its operative provisions must contain, is inappropriate, and it agreed with the standpoint of the court of first instance that the reasoning of the warrant clearly stated which objects and documents were to be searched for and which clients the case files that may be subject to search refer to.

12. The complainant does not contest the fact that the case files and objects subject to search were defined in the warrant, but he alleges that it was insufficient that they were defined only in its reasoning. Police officers are allegedly not obliged to read the reasoning. [The Court finds, however, that] he cannot substantiate the alleged violation thereby. It would indeed be clearer and more correct if the case files and objects regarding which the search of the lawyer's office had been ordered were stated in the operative provisions, as was already established by the court of first instance. However, this is irrelevant from the viewpoint of the protection of the privacy of the persons who are in a confidential relationship with the lawyer (Articles 35, 37, and 38 of the Constitution) – what is essential is that the subject of the search is described in sufficient detail, and one cannot imagine how the judge could have written the warrant in any more detail. From the warrant it clearly follows that only the documents connected to the matter should be searched for and examined, without the police officers being permitted to examine all other documents in the lawyer's office as well; such is also the standpoint that follows from the decision of the Supreme Court.
13. A court warrant must enjoy respect for the authority of a decision issued by the judicial power equal to any other court decision; an individual is obliged to comply therewith. If the decision is not executable and if legal remedies are available to the individual, he or she may contest it. If legal remedies are not available, the decision is binding. The binding power of court decisions is an element of a state governed by the rule of law determined by Article 2 of the Constitution, and an element of the right to effective judicial protection determined by the first paragraph of Article 23 of the Constitution. It can be stripped of this binding power only in highly exceptional cases due to which this power should be considered “invalid”. The case at issue is not such a case. Considering the significance of the authority of a court decision, a representative of the Bar Association does not have the right to assess whether the warrant was drawn up in accordance with the law, moreover, he has even less right to oppose it. Therefore, the Supreme Court's central standpoint, according to which the complainant does not have the right to refuse to be present during a search of a lawyer's office which is to be conducted on the basis of a court warrant cannot be deemed unconstitutional. The position of the Supreme Court according to which such conduct is contrary to the established legal order (Article 2 and the first paragraph of Article 23 of the Constitution) is namely relevant from the point of view of constitutional law. This position is decisive for a review of the contested decisions;

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10 See Judgment of the Supreme Court No. I Ips 214/97, dated 28 November 2002.

the complainant, however, does not state any arguments against it that are relevant from the point of view of constitutional law.

14. As regards the aforementioned, a violation of Article 34 of the Constitution is not demonstrated, therefore the Constitutional Court dismissed the constitutional complaint.

### C

15. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Mag. Miroslav Mozetič, Vice President, and Judges Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Jadranka Sovdat, and Jan Zobec. Judges Jasna Pogačar, Dr Mitja Deisinger, Dr Ernest Petrič, and Jože Tratnik were disqualified from deciding in the case. The decision was adopted unanimously. Judge Sovdat submitted a concurring opinion.

Mag. Miroslav Mozetič  
Vice President

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**CONCURRING OPINION OF JUDGE MAG. JADRANKA SOVDAT,  
JOINED BY JUDGE MAG. MARIJA KRISPER KRAMBERGER**

*“We must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice, and [...] build the rule of law which must possibly satisfy both concepts.”*  
(Radbruch, from Appendix III to Philosophy of Law)<sup>1</sup>

1. The Disciplinary Court of the Bar Association of Slovenia found the complainant responsible for a violation of the professional duties of a lawyer pursuant to the sixth paragraph of Article 77.a of the Statutes of the Bar Association of Slovenia (hereinafter referred to as the BAS) (Official Gazette RS, No. 15/94 etc.), in conjunction with Article 18 of the Lawyers Professional Code of Conduct, since, as a representative of the BAS, he unjustifiably refused to carry out the duty to be present during a search of a lawyer's office. It imposed on him a disciplinary measure, i.e. a warning. The Supreme Court, which acting as an appellate disciplinary court, rejected the complainant's appeal as time-barred, and dismissed the appeals of his defence counsel and of the Disciplinary Court prosecutor, adopted a number of standpoints. One of the adopted standpoints was that the complainant did not have the right to refuse to be present during the search of the lawyer's office. I agree with the finding of the decision that, in light of the complainant's allegations, which he primarily kept directing at the court search warrant, before the beginning of the search as well as in legal remedies against the court decisions, this is the central standpoint of the contested decision. I also agree with the fact that the said standpoint cannot be deemed unconstitutional

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<sup>1</sup> G. Radbruch: *Filozofija prava* [Philosophy of Law], Študijska izd., Cankarjeva založba (Zbirka pravna obzorja; 16), Ljubljana 2001, p. 281.

as a court warrant must enjoy respect for the power of a decision made by the judicial power equally as any other court decision. If the legal order does not provide any legal remedies against such (and it does not follow from the constitutional order that the statutory regulation is unconstitutional if it does not provide legal remedies), the warrant is binding. In this case, it is binding also for the representative of the BAS when fulfilling the duty following from the second paragraph of Article 8<sup>2</sup> of the Lawyers Act<sup>3</sup> (hereinafter referred to as the LA).<sup>4</sup> The Constitutional Court did not consider the question of which legal remedy is available to the lawyer whose office is searched or even to the clients of this lawyer, and whether the court warrant is constitutional from their viewpoints, as this was not the subject of deciding in this case.

2. The essential allegation of the complainant directed against the court search warrant is that the particulars stated in the reasoning denoting which files and objects were to be searched for in the lawyer's office,<sup>5</sup> should have been stated in the operative provisions and not merely in the reasoning, since police officers are allegedly only bound by the operative provisions, whereas they are allegedly not even obliged to read the reasoning of a court warrant, thus on such basis they could search the entire office of a lawyer. Thereby, the complainant does not provide a legal qualification specifying which human right such would entail a violation of. This is understandable, in a way, since it could be merely a question of legality and, in this respect, it would certainly be more appropriate if the contents of the reasoning of the court warrant, the obligatory presence of a representative of the BAS, and the obligation to respect the secrecy of documents and objects not defined as the subject of the search were stated in the operative provisions of the warrant, whereas the reasoning would state what is now written in the operative provisions, i.e. that the above-stated is ordered because Article 8 of the LA must be respected in the search of a lawyer's office.<sup>6</sup> Nevertheless, the mere issue of the interpretation of the procedural rules defining the manner in which a court decision is structured cannot be the subject of review in a constitutional complaint unless at the same time a matter of constitutionality is at issue.

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2 It reads as follows: "A representative of the Bar Association of Slovenia shall be present at the search of a lawyer's office."

3 Official Gazette RS, No. 18/93 etc.

4 Conversely, the Supreme Court stated in the contested decision that the BAS representative has the right to assess whether the search warrant is drawn up in accordance with the law. Such standpoint would be reasonable only if the legal order provided for a special legal remedy by which he could contest the (constitutionality and) legality of the court warrant.

5 In the reasoning of the court warrant it is stated: "Business and other documents of the company [...] referring to the actual and modified records, the income [...] in [...] from 1996 onwards, statements of accounts sent [...], data on current accounts and transactions on them, a list of the financial assets of the company and in [...], data and evidence referring to the assets owned by the company [...], as well as to all the confidential documents of A. A. referring to the operations of the company [...] and the representation of the suspects B. B. and C. C."

6 The first paragraph of this Article stipulates: "A search of a lawyer's office shall be permitted only on the basis of a warrant issued by the competent court and only with reference to the records and objects explicitly stated in the search warrant. The search shall not affect the secrecy of other documents and objects."

3. I agree with the arguments of the decision, therefore I voted in favour of the dismissal of the constitutional complaint. However, I also wish to draw attention to the fact that the contested decision of the Supreme Court also contains standpoints which are, in my opinion, unconstitutional or which [could] consequently lead to unconstitutionality or may even lead to severe violations of human rights, not those of the complainant, but those of the clients of the lawyer whose office was searched. Moreover, in my opinion this raises another serious issue, namely the issue of the constitutionality of the statutory regulation of searches when such concern a lawyer's office, which makes it necessary for the legislature to regulate the issues pointed out below as soon as possible in order to prevent, in future cases of searches of lawyers' offices, violations of Article 35, the first paragraph of Article 37, the first paragraph of Article 38, and, in cases involving the defence of defendants in criminal proceedings, even of Article 29 of the Constitution. It is true, however, that the standpoints that I consider unconstitutional do not constitute the central standpoint of the decision, and it is also true that in this case what follows from this was not even highlighted since a situation wherein these issues could have arisen as key issues did not occur. The representative of the BAS namely left the site of the search before it began.
4. In addition to the requirements determined in Article 8 of the LA, the provisions of the Criminal Procedure Act (Official Gazette No. 32/07 – official consolidated text etc. – hereinafter referred to as the CrPA) apply for the search of a lawyer's office. Pursuant to these provisions, *inter alia*, a search is to be conducted by the investigating judge of a competent court (the first paragraph of Article 171 of the CrPA), who may assign the execution of a warrant ordering a search of premises or a personal search (the third paragraph of Article 172 of the CrPA) to the police, which evidently is generally what happens,<sup>7</sup> whereby two adults must be present at the search as witnesses. Before the search begins, the witnesses must be warned to observe closely how the search is conducted, and they must be informed of their right to make objections before signing the record of the search if they consider its content to be inadequate (the third paragraph of Article 216 of the CrPA). I highlighted precisely the provisions stated above because: 1.) it is obvious that a general rule has been established according to which the police carry out searches of lawyers' offices (as well), although in my opinion the investigating judge should not assign such task to the police, and 2.) in the contested decision, by limiting the role of the representative of the BAS to having the right to be present and to make objections, comments, and suggestions that are entered into the record "as anybody who has the right to be or must be present during a search of premises for the purposes of the protection of his rights or the rights of other persons in accordance with the provisions of the seventh paragraph of Article 216 and Articles 79-82 of the CrPA", the Supreme Court assigned the representative of the BAS only the role of a witness in the performance of his du-

<sup>7</sup> Horvat denotes such as an operative investigative act which is normally not performed by an investigating judge himself. See Š. Horvat, *Zakon o kazenskem postopku s komentarjem*, GV Založba, Ljubljana 2004, p. 402.

ties pursuant to Article 8 of the LA. From a constitutional point of view, both reasons seem highly questionable to me.

5. The special rules which must apply in the search of a lawyer's office are intended to protect professional secrecy. Despite the fact that we usually refer to legal professional privilege, this is not a lawyer's privilege, but entails, by its nature, his duty to protect the rights of third parties who are in a confidential relationship with the lawyer. Thereby, it is most important that this in fact concerns the protection of the human rights of his clients, which is ensured by the Constitution within Article 35, the first paragraph of Article 37, the first paragraph of Article 38, and, in the case of a counsel for the defence in criminal proceedings, also within the framework of the right to defence determined by Article 29 of the Constitution, since the confidentiality of the relationship between a lawyer and a defendant is, so to speak, a natural constituent part of the said right.<sup>8</sup> A search of a lawyer's office is therefore undoubtedly an attack on the professional secrecy on which this confidential relationship is based.<sup>9</sup> And therefore, a search of a lawyer's office must be carried out only in exception, however, the exceptional nature of such a search cannot entail that a search of a lawyer's office would not be permitted in the event of suspicion that a lawyer has committed a criminal offence. If a search is permitted, it is precisely in order to protect these human rights that the rules according to which the search may be conducted must be set out in detail. The Constitutional Court has already adopted the position precisely regarding the constitutional provisions protecting human dignity, personal rights, privacy, and safety (Articles 34 to 38 of the Constitution) that these are provisions which have a special place among human rights and fundamental freedoms, and which prohibit everyone - beginning with the State - from (inadmissibly) interfering therewith (Decision No. U-I-25/95, dated 27 November 1997, Official Gazette RS, No. 5/98, and OdlUS VI, 158, Paragraph 32 of the reasoning). The basic condition set by the Constitution is that a limitation of human rights and fundamental freedoms may be prescribed only by law, for, pursuant to the second paragraph of Article 15 of the Constitution, if the manner in which a human right is exercised may (only) be determined by law, then under the conditions set by the Constitution in the third paragraph of the same Article, the limitation of the human right must all the more be determined by law.<sup>10</sup>

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8 "The privilege protecting from disclosure communications between solicitor and client is a fundamental right - as fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege. The Courts should be astute to protect both." *Cf.* the Supreme Court of Canada in the judgment *Descôteaux et al. v. Mierzwiński*, [1982] 1 S.C.R. 860.

9 *Cf.* the European Court of Human Rights (hereinafter referred to as the ECtHR) in the judgment in the case *André and other v. France*, dated 24 July 2008, in Para. 41: "The Court assesses that searches and seizures in the case of lawyers undoubtedly entail an attack on professional secrecy, which is a basis of the confidentiality relationship between a lawyer and his client."

10 In the aforementioned judgment of the Supreme Court of Canada, the Court established that the legislation enabled the search of a law office and the seizure of the objects for which there existed reasonable reasons that they entailed evidence in relation to the commission of a particular criminal offence, but it did not lay down a special procedure that would apply to such cases. The Court believed that in granting a search war-

The regulation must be specific and unambiguous in order to rule out any possibility of arbitrary deciding by a state authority. As the Constitutional Court has already stressed in several decisions, legal certainty (*lex certa*) is a primordial element of a state governed by the rule of law (Article 2 of the Constitution) and would apply as an imperative constitutional postulate even if it were not explicitly mentioned in the Constitution (Decision No. U-I-25/95, Paragraph 42 of the reasoning).

6. When a court warrant specifies the files to be examined, it is perfectly logical that the judge who issued the warrant cannot order, for example, that the second file from the left on the third shelf on the left-hand side of the lawyer's study should be taken out and therein the first three documents should be examined and seized (if I may exaggerate), such that it could be said that judicial power ordered with absolute precision what the subject of the search is. Since, naturally, such level of precision is impossible, it is necessary to set up other mechanisms to ensure the protection of human rights. The first mechanism is undoubtedly a court decision which allows such interference, and which is required by the Constitution in the second paragraph of Article 36. As soon as a court warrant exists, at least three basic questions are raised:
  1. Who should search the lawyer's office for the files that, according to the court warrant, are permitted to be the subject of the search and who should select the documents that are to be examined?
  2. Who is to make an assessment of whether it is admissible to seize all the selected documents?
  3. Who may object to the seizure of documents, and, in the event of such, who decides thereon and when, and what happens to the seized documents until such decision is taken?
7. Pursuant to Slovene regulations, the answers to these questions are the following: The files are to be searched for by the police, who also decide what they will seize and when this will happen (while conducting the search). Nobody can effectively object to such in a way that would prevent the seizure, therefore the one who in this State is called upon to decide objectively and independently (a part of this decision-making of course also being the protection of human rights), i.e. the courts - cannot decide thereon and because of that they cannot decide on the protection of professional secrecy either, which is in the particular interest of the clients who are not associated with the search of the lawyer's office, on the basis of the first paragraph of Article 23 of the Constitution, and regarding human rights, particularly on the basis of the fourth paragraph of Article 15 of the Constitution. If we define the role of a representative of the BAS as the role of a "qualified" witness, then pursuant to the third paragraph of Article 216 of the CrPA [the duty of] such witnesses [is to] closely observe how the search is conducted and they have the right to make objections

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rant the judge must be particularly demanding and must grant it if there is no other reasonable alternative. Moreover, the search should be made in the presence of a representative of the Bar. The Supreme Court ordered the courts to set out in the court warrant procedures for its execution which take into account the right to privacy and limit the interferences with this right to what is strictly unavoidable.

before they sign the record of the search if they consider its contents inadequate. Neither the witness referred to in the third paragraph of Article 216 of the CrPA nor the representative of the BAS merely in the role of such witness has the right to assess the contents of the documents that the police wish to seize, and even less right to object to the seizure thereof. The objections made by witnesses to be entered into the record may play a role in criminal proceedings in comprising an assessment of whether individual evidence was obtained in a constitutional and legal manner. They play no role whatsoever in preventing interferences with the rights of the lawyer's clients. It is no less important to raise a question as to the extent to which the seizure of documents from files is permitted, i.e. documents which are a reflection of the confidential relationship between a lawyer, as a defence counsel in criminal proceedings, and his client, as a defendant in the same proceedings. There is no possibility for the representative of the BAS to prevent inadmissible interferences with these rights. Therefore his presence cannot play the role for which it was enacted by the legislature, i.e. the protection of the confidential relationships between a lawyer and his clients. Violations of human rights thereby already occur; in their nature they may be such that a question arises as to whether their consequences are at all remediable, such as is prescribed by the fourth paragraph of Article 15 of the Constitution.

8. Therefore, in my view, the standpoint according to which a representative of the BAS may act merely in the role of a witness who may only put forward objections and comments to be entered into the record is unconstitutional, however, this unconstitutionality does not remain at the level of a statutory interpretation contrary to the Constitution, but is incorporated into the statutory regulation in force itself. The latter is not sufficient to achieve the purpose pursued by Article 8 of the LA,<sup>11</sup> which is also confirmed by the standpoints adopted by the ECtHR on the interference with the confidential relationship between a lawyer and his client.
9. In its judgment in the case *Wieser and Bicos Beteiligungen GmbH v. Austria*, dated 16 October 2007, the ECtHR examined whether national law ensures appropriate and effective safeguards to prevent any abuse and arbitrariness.<sup>12</sup> It established that the safeguards provided for by the Austrian criminal procedure were fully complied with as regards the search of documents. Whenever the representative of the Bar Association objected to the seizure of a particular document, this document was sealed. Later the investigating judge decided, in the presence of the applicant, which documents were subject to professional secrecy, and returned a number of them to the applicant. The same safeguards, however, were not observed as regards electronic data. The repre-

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11 Therefore, in the contested decision the standpoint of the Supreme Court according to which "the lawyer's departure from the premises of the search may result in the search being carried out without the supervision of a lawyer" is questionable as well.

12 It examined, in particular, whether the warrant was issued by a judge, whether the scope of the warrant was reasonably limited, and - since the search of a lawyer's office was concerned - whether it was carried out in the presence of an independent observer in order to ensure that documents protected by professional secrecy were not seized. The ECtHR found that the search warrant was issued by the investigating judge and that the scope of the warrant was reasonably limited.

sentative of the Bar Association could not properly exercise his supervisory function in this respect.<sup>13</sup> The ECtHR found that, due to the failure to comply with these safeguards, the search and seizure of the data in digital form were disproportionate to the legitimate aim pursued. It therefore decided that the applicants' right determined in Article 8 of the European Convention on Human Rights (hereinafter referred to as the ECHR) was violated. It established an infringement of the same Convention right also in its judgment in the case *Iliya Stefanov v. Bulgaria*, dated 22 May 2008.<sup>14</sup> Among other things, the presence of two witnesses with no legal education was problematic, and therefore it is highly unlikely that they were able to assess, independently of the investigators, whether particular evidence was protected by professional privilege. The presence of these witnesses therefore did not entail an effective safeguard against excessive police interference with the professional secrecy of the applicant.<sup>15</sup>

10. While a statutory requirement corresponding to the second paragraph of Article 8 of the Slovene LA has evidently not been enforced in Bulgaria, it is different in France. Notwithstanding this, the ECtHR established an infringement of a Convention right in its judgment in the case *André and other v. France*. The search of a lawyer's office was carried out in the presence of the Head of the Bar Association. The documents that were seized included handwritten notes of the lawyer and the documents on which the notes of the lawyer in his own handwriting were added. The Head of the Bar Association explicitly stated that these were the lawyer's private documents and therefore they were absolutely protected by professional secrecy. The applicants lodged a request for cassation against the seizure, which was unsuccessful. The ECtHR found that a special guarantee applied to the search because it was carried out in the presence of a representative of the Bar Association. Furthermore, the presence of this representative and his observations related to the protection of professional secrecy

13 Whereby the list of computer files seized was not drawn up at the end of the search but only subsequently. Moreover, the police officers did not inform the applicant or the representative of the Bar of the results of the search before leaving the premises.

14 The ECtHR examined the severity of the offence in connection with which the search was carried out, whether it was carried out on the basis of a court warrant, whether the warrant was based on reasonable suspicion, and whether its scope was reasonably limited. It also reviewed the manner in which the search was executed, and – since this concerned a lawyer's office – whether it was carried out in the presence of an independent observer in order to ensure that evidence subject to legal professional privilege was not seized. The ECtHR also examined the possible repercussions on the work and reputation of the persons affected by the search. See Para. 38 of the judgment.

15 The ECtHR found that the search warrant was based on a sufficiently reasonable suspicion and that it was issued by a court. However, neither the warrant nor the application for its issue specified what was expected to be found in the applicant's office, or whether privileged material was to be seized as well. The warrant was therefore drawn up in overly broad terms and was thus not capable of minimising the interference with the applicant's right determined in Article 8 of the ECHR and with professional secrecy. On the basis of this warrant, the search, too, was carried out in an excessively broad manner. The entire computer used by the applicant for his work was seized, and it is natural to suppose that it contained files covered by professional privilege. The ECtHR therefore established that in these circumstances the search disproportionately interfered with the applicant's professional secrecy. See Paragraphs 40–43 of the judgment.

were stated in the record of the relevant investigative act. However, the presence of this representative and his objection did not prevent the actual examination and seizure of documents subject to professional secrecy.<sup>16</sup> The ECtHR also established that the search warrant was written very broadly as it referred to the search and seizure of all the documents and data storage devices related to the alleged fraud which might have been found on the premises of the applicants. The search of the applicants' premises was carried out merely because of their role as lawyers of the suspected company, as the applicants were not suspected of being involved in the criminal offence.<sup>17</sup> On the basis of everything stated above, the ECtHR established that the search and seizure of the applicants' documents were disproportionate to the legitimate aim pursued.<sup>18</sup> Therefore, [it established that] Article 8 of the ECHR was violated.

11. Whenever the ECtHR has established that sufficient guarantees for respect for rights have been fulfilled, it has decided the cases already at the level of the inadmissibility of the case. In this context, in its decision on the inadmissibility of the application in the case *Alwin Tamosius v. United Kingdom*, dated 19 September 2002, it examined whether the search was carried out with sufficient procedural safeguards to prevent any abuse and arbitrariness. It stated that the search of a lawyer's office interferes with or threatens to interfere with the protection of professional secrecy and may have repercussions on the proper administration of justice, and hence on the rights determined in Article 6 of the ECHR.<sup>19</sup> In this particular case, the search was carried out under a court warrant, which, contrary to the allegations of the applicant, was not excessively broad. The warrant that was executed was accompanied by a schedule of 35 companies and individuals listed as being under investigation. The applicant did not persuade the ECtHR that he was not able to assess whether the investigators acted unlawfully. Furthermore, the search was carried out under the supervision of counsel, whose task was to identify<sup>20</sup> which documents were protected by professional privilege. Although the applicant claimed that this was not a sufficient safeguard, the ECtHR noted that the counsel was under instructions to act independently of the investigators and to give independent advice. The applicant also did not claim in any domestic proceedings that the counsel had made erroneous decisions. The ECtHR established that in domestic law such privilege provides a sufficient safeguard against interferences with professional secrecy and the administration of justice, therefore the search was not disproportionate to the aim pursued.

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16 Para. 44 of the judgment.

17 Para. 46 of the judgment.

18 Para. 48 of the judgment.

19 Regarding this, the ECtHR refers to its judgment in the case *Niemietz v. Germany*, dated 16 December 1992, Para. 37.

20 The Inland Revenue obtained a search warrant in order to search the applicant's premises. During the search some 69 documents, files, and books were examined and seized. Officers searched for relevant data. Once their relevance had been established, the documents were then reviewed by the counsel nominated by the Attorney General. The task of the counsel was to advise whether any document was or was not subject to professional privilege. Any document found to be subject to privilege was returned to the applicant's attorneys. All the documents seen by counsel were listed, with counsel's opinion as to each.

12. Judgments of the ECtHR have the power of precedent, therefore the standpoints of the ECtHR are also binding on Slovene State authorities.<sup>21</sup> The Constitutional Court has already stressed such.<sup>22</sup> Besides the standpoints of the ECtHR, it is worth noting that a number of countries provide for additional guarantees in their legal orders relating to searching a lawyer's office in order to prevent violations of human rights or even abuse. In France, for example, a search of a lawyer's office may be carried out only by a judicial officer (a *magistrat*)<sup>23</sup> in the presence of the Head of the Bar Association, whereas a representative of the Bar Association may prevent, by the powers vested in him, an inadmissible interference with human rights. In this respect, a special role was played by the case law of the highest court in the State, which had established certain conditions even before the enactment of the mentioned regulation in 2000. In particular, it developed standpoints on the exceptional admissibility of the seizure of the correspondence between a lawyer and his client if the seized documents are evidence of the lawyer's involvement in a criminal offence,<sup>24</sup> and it decided the same in cases concerning the seizure of electronic data.<sup>25</sup> Despite all these safeguards, a violation of a Convention right may occur, as follows from the judgment of the ECtHR in the case *André and other v. France*.

13. Also in the Federal Republic of Germany the police may not examine files [at a lawyer's office] without the lawyer's permission. This is exclusively the right of a State Prosecutor.<sup>26</sup> The lawyer may insist on sealing the disputed documents even if the State Prosecutor is present. The lawfulness of the measure is decided upon by the court in appellate proceedings. In Belgium, certain practices have evolved, notwithstanding the absence of the (relevant) explicit statutory provisions, according to which the investigating judge must personally be present in the search of the

21 See B. M. Zupančič in: *The Owl of Minerva, Essays on Human Rights*, Eleven International Publishing, Utrecht 2008 (On the Interpretation of Legal Precedents and of the Judgements of the European Court of Human Rights), pp. 351–392.

22 Decision No. U-I-65/05, dated 22 September 2005 (Official Gazette RS, No. 92/05, and OdlUS XIV, 72), Paragraph 12 of the reasoning, *inter alia*, stipulates: "The Constitutional Court must consider this case law irrespective of the fact that it was adopted in a case in which Slovenia itself did not participate in proceedings before the ECtHR."

23 Pursuant to Articles 56-1 and 96 of the *Code de procédure pénal*, the search of a lawyer's office and of the premises of his residence may be carried out only by a judicial officer (a *magistrat* – normally the investigating judge or the State Prosecutor) in the presence of the Head of the Bar Association or his deputy, to whom the judicial officer first presents the contents of the reasoned court decision. Only the judicial officer and the Head of the Bar Association may become acquainted with the documents found on the site of the search before they are seized. If the Head of the Bar Association objects to the seizure of a particular document, it must be sealed, a report must be written and the sealed document must be submitted to the 'Judge of freedoms and detention', who decides on its seizure after previously hearing the judicial officer who conducted the search, the State Prosecutor, the lawyer whose premises were searched, and the Head of the Bar Association.

24 Judgments of the Criminal Chamber of the Court of Cassation dated 12 March 1992, 20 January 1993, and 27 June 2001.

25 Judgments of the Criminal Chamber of the Court of Cassation dated 14 November 2001 and 8 August 2007.

26 Article 110 of the Criminal Procedure Act (*Strafprozessordnung*).

premises, after he has informed the Head of the Bar Association and called for a representative of the Association to be present at the search.<sup>27</sup>

14. By his conduct the applicant evidently pursued justice. This was explicitly stated by the first panel of the Disciplinary Court, which took into consideration the fact that by his conduct the applicant “wished to pursue the legitimate aims of the protection of the inviolability of the lawyer’s office in terms of the protection of the confidentiality of the data of the lawyer’s clients” as one of the reasons for pronouncing the mildest disciplinary measure. However, in so doing, the applicant could not be successful unless he took into account legal certainty, a component of which is also compliance with court decisions. As I have already stated above, this was the essential reason why I voted in favour of the dismissal of the constitutional complaint. I believe that it was necessary to draw attention to the unconstitutionality of some of the standpoints handed down by the Supreme Court in this regard, and to the fact that, in light of the standpoints of the ECtHR and a number of examples from the comparative data, it is necessary for the legislature to supplement the regulation determined in Article 8 of the LA either by amending this Act or the CrPA in the part that regulates the search of premises.

*Mag. Jadranka Sovdat*

*Mag. Marija Krisper Kramberger*

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27 In theory, there exist various positions regarding the powers vested in the investigating judge and the Head of the Bar Association in an examination of the files and private notes of a lawyer. Some authors claim that where the investigating judge believes that evidence is to be found in the files of the lawyer, he should indicate such to the Head of the Bar Association. The latter should examine the file by himself in order to establish whether it really contains evidence, and in such case he should hand them over to the judge. See M. Franchimont, A. Jacobs, and A. Masset, *Manuel de procédure pénale*, Second edition, Larcier, Bruxelles 2006, p. 462. Others believe that such interferes with the powers vested in the investigating judge. In their opinion, only the investigating judge may decide which documents are protected by professional secrecy, after consulting the Head of the Bar Association or his deputy if necessary. See H.-D. Bosly and D. Vandermeersch, *Droit de la procédure pénale*, Fourth edition, La Chartre, Bruges 2005, p. 663.

Decision No. **U-I-40/12**, dated 11 April 2013

### DECISION

At a session held on 11 April 2013 in proceedings to review constitutionality initiated upon the request of the Supreme Court of the Republic of Slovenia, the Constitutional Court

*decided as follows:*

1. The first sentence of the first paragraph of Article 28 of the Prevention of Restriction of Competition Act (Official Gazette RS Nos. 36/08, 40/09, 26/11, 87/11, and 57/12) is inconsistent with the Constitution.
2. The National Assembly of the Republic of Slovenia must remedy the unconstitutionality referred to in the preceding paragraph within one year following the publication of this Decision in the Official Gazette of the Republic of Slovenia.
3. Until the established unconstitutionality is remedied, the first sentence of the first paragraph of Article 28 of the Prevention of Restriction of Competition Act shall apply.
4. Articles 54, 56, 57, 59, and 61 of the Prevention of Restriction of Competition Act are not inconsistent with the Constitution.

*Reasoning*

#### A

1. The Supreme Court of the Republic of Slovenia filed a request to review the constitutionality of Articles 28, 29, and Articles 54 to 61 of the Prevention of Restriction of Competition Act (hereinafter referred to as the PRCA-1). Articles 28 and 29 of the PRCA-1 are allegedly inconsistent with the right to the inviolability of dwellings determined by Article 36 of the Constitution, with the right to the protection of the privacy of correspondence and other means of communication determined by Article 37 of the Constitution, and with the right to respect for private and family life determined by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (Official Gazette RS No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). The other challenged provisions are allegedly inconsistent

with the right to a legal remedy determined by Article 25 of the Constitution. The Supreme Court underlines that it proceeds from Articles 28 and 29 of the PRCA-1 that the legal basis for the search of a company against which a procedure is being conducted is a search order, which is issued by the Slovene Competition Protection Agency (hereinafter referred to as the Agency) and which can only be challenged in appellate proceedings against the final decision. Allegedly, the Constitutional Court has not yet answered the question of whether also legal entities enjoy protection under Article 36 of the Constitution with regard to their business premises. The Supreme Court assesses that it can be logically concluded from the constitutional case law that Article 36 of the Constitution also protects legal entities. The second paragraph of Article 36 of the Constitution namely expressly mentions also “other premises of another person”, which allegedly also include the business premises of legal entities subject to search by the Agency. The spatial aspect of the right to privacy determined by Article 36 of the Constitution is allegedly also ensured to legal entities on premises where they justly expect one – on business premises that are not generally publicly accessible. The Supreme Court is of the opinion that legal entities also enjoy protection under Article 37 of the Constitution, as they, through their representatives, also use means of communication or transferring data. Due to the fact that for entry onto business premises, the inspection thereof, and the inspection of business documentation, the PRCA-1 requires nothing but a search order issued by the Agency, which is a part of the executive branch of power, Articles 28 and 29 of the PRCA-1 are allegedly inconsistent with the requirements determined by Articles 36 and 37 of the Constitution. The Supreme Court also alleges that by their nature, procedures for determining violations of competition law are punitive procedures. Such is allegedly confirmed by the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR). In addition, in the case *Société Calas Est and others v. France*, dated 16 April 2002, that Court allegedly ruled that the French legal regulation which allowed the national competition protection authority to conduct a search of a company without a court order violated Article 8 of the ECHR. The opinion of the Supreme Court is that the necessity of a court order being required to conduct a search in the procedure for determining a violation of competition law already proceeds from two facts: firstly, in minor offence proceedings, as a general rule, the Agency refers to its findings from the procedure for determining a violation of competition law; secondly, evidence acquired on the basis of the challenged provisions of the PRCA-1 would most probably also be used in criminal proceedings.

2. With regard to Articles 54 to 61 of the PRCA-1, the Supreme Court underlines above all that the guarantees determined by Article 25 of the Constitution can only be protected in proceedings where the court has full jurisdiction, interpreted in such a manner that a court can assess both the factual and the legal basis of the challenged decision. The procedure determined in the PRCA-1 allegedly only envisages one administrative and one judicial instance. These judicial protection proceedings are allegedly not proceedings where the court has full jurisdiction. As the procedure before the Agency is allegedly comparable to a pre-trial procedure, it would be sensible to expect, in the opinion

of the Supreme Court, that a party to judicial protection proceedings under the PRCA-1 would have more procedural rights ensured than in proceedings for the judicial review of administrative acts. In reality, the situation is allegedly just the opposite. The Supreme Court draws attention firstly to the prohibition of stating new facts and of proposing new evidence in an action under Article 57 of the PRCA-1 (which allegedly logically excludes the possibility that the Supreme Court take new evidence *ex officio*), secondly, to the fact that the Supreme Court adjudicates, as a general rule, without a trial (Article 59 of the PRCA-1), and thirdly, to the exclusion of an appeal issued in judicial protection proceedings (Article 61 of the PRCA-1). Such proceedings allegedly do not enable a plaintiff to efficiently challenge the state of the facts determined by the Agency, as the assessment of the state of the facts before the Supreme Court is allegedly limited to what the Agency determined in the administrative procedure. For the protection of the rights of parties in competition cases it is allegedly crucial that the state of the facts be determined before a court. The Supreme Court faults the regulation of the judicial protection in the PRCA-1 for interfering with the right to judicial protection determined by Article 25 of the Constitution. The pursued aim of a speedy procedure and efficiency in the Agency's supervision is allegedly unable to outweigh the weight of such interference. The Supreme Court is of the opinion that such an aim would also be attained to a sufficient degree if in judicial protection proceedings under the PRCA-1 the Act on the Judicial Review of Administrative Acts (Official Gazette RS Nos. 105/06, 62/10, and 109/12 – hereinafter referred to as the AJRAA-1) were applicable in its entirety. The Supreme Court proposes that the Constitutional Court adopt a declaratory decision on the unconstitutionality of the challenged provisions, impose a deadline on the legislature by which it must remedy the inconsistencies, and determine the manner of the implementation of its decision.

3. The request of the Supreme Court was served on the National Assembly of the Republic of Slovenia, which replied to it. The National Assembly is of the opinion that the challenged provisions of the PRCA-1 are not inconsistent with the Constitution. It stresses that the protection of competition is a constitutional category and a category of European Union law. The National Assembly describes in detail the characteristics of the legal regulation of the protection of competition in the European Union (hereinafter referred to as the EU). It draws attention to the fact that the Agency conducts minor offence procedures separately from administrative procedures. The Minor Offences Act (Official Gazette RS No. 29/11 – official consolidated text – hereinafter referred to as the MOA-1) predominantly applies for them, not the PRCA-1. The Agency is allegedly not the sole administrative authority to have the competence, within the framework of administrative procedures, to enter business premises and conduct a search thereof without a court order. The National Assembly substantiates such claim by citing specific provisions of the Tax Administration Act (Official Gazette RS Nos. 1/07 – official consolidated text, 40/09, and 33/11 – TAA-1), the Tax Procedure Act (Official Gazette RS Nos. 13/11 – official consolidated text, 32/12, and 94/12 – TPA-2), the Inspection Act (Official Gazette RS No. 43/07 – official consolidated text – hereinafter referred to as the IA), and the Customs Service Act (Official Gazette RS Nos. 103/04 –

official consolidated text, 40/09, and 9/11 – CSA-1). The regulation of the search in the PRCA-1 is allegedly comparable to the regulation of various inspection procedures. The aim of the search procedure allegedly lies in ensuring efficient supervision and in establishing the existence of restrictive conduct causing immense damage to consumers and to the economy. The National Assembly opposes the position of the Supreme Court that the procedure for determining violations under the PRCA-1 is a punitive procedure. It makes reference to Order of the Constitutional Court No. U-I-108/99, dated 20 March 2003 (Official Gazette RS No. 33/03, and OdlUS XII, 22), in which the Constitutional Court allegedly determined that a tax inspection procedure is not a criminal procedure. It is of the opinion that in minor offence procedures the Agency cannot make use of a piece of evidence not obtained in conformity with the MOA-1. In the ECtHR case law, a request to obtain documents from a suspect is allegedly not inconsistent with the right to remain silent, which is allegedly even truer with regard to an administrative procedure in which the existence of an unlawful restriction of competition is established. The National Assembly claims that for legal entities it cannot be true that everything that is connected with their market operations and with acquiring profit is private. Allegedly, the protection of legal entities cannot, in such sense, equal that of natural persons. The National Assembly refers to Decision of the Constitutional Court No. Up-430/00, dated 3 April 2003 (Official Gazette RS No. 36/03, and OdlUS XII, 57), in which the connection between an entry onto business premises and the guarantee of the inviolability of dwellings was allegedly not established. The ECtHR allegedly differentiates between the level of spatial privacy that natural persons enjoy, on one hand, and that legal entities enjoy, on the other. The regulation of the search under the PRCA-1 allegedly does not match the criteria that the ECtHR developed regarding the admissibility of interferences with Article 8 of the ECHR. With regard to the regulation of judicial protection in the PRCA-1, the National Assembly claims that the Supreme Court has all competence to assess substantive and procedural legal questions as well as the regularity and completeness of the determination of the state of the facts. The Supreme Court is allegedly not bound by the state of the facts established by the Agency. It allegedly proceeds from Decision of the Constitutional Court No. U-I-219/03, dated 1 December 2005 (Official Gazette RS No. 118/05, and OdlUS XIV, 88) that a multitude of legal remedies does not of itself guarantee more efficient protection of rights or higher quality and that Article 25 of the Constitution allows, under certain conditions, that a request for the judicial review of a decision serves as a legal remedy. Due to the similarity of the statutory provisions at issue, that Decision is allegedly legally important also for assessing the constitutionality of the PRCA-1. Such is allegedly true also for the limits and the scope of the assessment of a challenged administrative decision, for the preclusion of stating new facts, for suggesting new evidence, and for the Supreme Court deciding without a trial. The National Assembly is of the opinion that parties to proceedings already have, in the framework of administrative proceedings, sufficient possibilities to state their position on decisive aspects of the case. In addition, a party who discovers new facts or new evidence after the issuance of the decision allegedly would have

at its disposal a retrial in conformity with the General Administrative Procedure Act (Official Gazette RS Nos. 24/06 – official consolidated text, 126/07, 65/08, and 8/10 – hereinafter referred to as the GAPA).

4. The Government of the Republic of Slovenia submitted its opinion on the request of the Supreme Court. Its position is that all of the challenged provisions are consistent with the Constitution. With regard to the issuance of a search order, it claims that companies – as legal entities – as a general rule cannot be holders of personal rights determined by the Constitution. From the hitherto decisions of the Constitutional Court, namely Decision No. Up-430/00 and Order No. U-I-36/03, dated 9 June 2005, it allegedly proceeds that the right to the inviolability of dwellings determined by Article 36 of the Constitution cannot refer to the business premises of legal entities. The regulation of inspection competences in the IA allegedly conforms with such. The Government claims that the premises of legal entities are not intended for living, but for carrying out the activities of the company, therefore the protection determined by Article 36 of the Constitution does not apply thereto. In its assessment, individuals – who otherwise can invoke the constitutional provisions on privacy – also enjoy a lower degree of expected privacy at their workplace than in their residence. Also the Judgment of the Court of the European Union, dated 22 October 2002, in the case *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*, C-94/00 allegedly cannot essentially influence these conclusions. It allegedly proceeds therefrom that on one hand the respect for privacy of one's home determined in Article 8 of the ECHR can, in certain circumstances, expand to include business premises of companies, while on the other hand the permitted interferences can be much more far-reaching with regard to professional or business premises or regarding activities than in other cases. The Government claims that EU law (regarding the competences of the European Commission) as well as the legal systems of a large number of EU Member States (regarding the competences of national competition regulatory authorities) allow for searches of the business premises of legal entities to be conducted without a prior court order. It is of the opinion that it does not proceed from the ECtHR Judgment in the case *Société Calas Est and others v. France* that Article 8 of the ECHR protects business premises *per se*. Only the private content of the documents searched can allegedly have an influence on the applicability of Article 8 of the ECHR. Therefore, Articles 28 and 29 of the PRCA-1 are allegedly not inconsistent with either Article 36 of the Constitution or Article 8 of the ECHR. In the opinion of the Government, Articles 28 and 29 of the PRCA-1 are allegedly not inconsistent even with Article 37 of the Constitution. Communication between natural persons on behalf and for the account of a company which is in its entirety of a business nature is allegedly not constitutionally protected from the viewpoint of privacy, as the natural person is merely a medium who transfers information for the company, whose personality rights are not recognised. All competences to conduct searches under the second paragraph of Article 29 of the PRCA-1 allegedly refer to business correspondence connected to the operations of the legal entity, which is not protected by Article 37 of the Constitution. The Government claims that the Slovene Competition

Protection Office [i.e. the competition authority preceding the Agency] (hereinafter referred to as the Office) cannot, without the competences determined by Article 29 of the PRCA-1, obtain data necessary for carrying out procedures and for efficient conduct of its tasks. As the business nature of a document allegedly cannot be established before its examination, the Government holds the position that, as a general rule, all documentation that is located in the registered office of a company is deemed business documentation (while the individual allegedly retains the right and duty to be present at the search and during the delimitation of his personal sphere from the business one). The Government refers to Supreme Court Judgment No. G 3/2009, dated 30 June 2009, in which the Supreme Court allegedly explained that during the handing over of business documentation a selection must be made and personal correspondence must be eliminated. In the opinion of the Government, while communication of a business nature can certainly entail a business secret of a company, it cannot, however, entail a private piece of data of individual employees that they have a legitimate interest in hiding. The Government also stresses that the competences of the Office are determined so that they enable efficient implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (consolidated version, OJ C 326, 26 October 2012 – hereinafter referred to as the TFEU). In the case at hand, it is allegedly not relevant for the deciding of the Constitutional Court whether the use of evidence from the administrative procedure is possible also in other proceedings (especially in criminal and minor offence proceedings) – this allegedly remains a matter to be decided by the competent courts.

5. Articles 54 to 61 are allegedly not inconsistent with Article 25 of the Constitution. The Government underlines the special importance of supervision over conduct that, contrary to EU legislation, the Constitution, and the PRCA-1, limits effective competition. Thus, the preclusion regarding new facts and new evidence is allegedly legitimate especially due to the emphasised principle of the speediness of proceedings. However, in procedures before the Office parties are allegedly already ensured sufficient possibilities to state facts and evidence that benefit them. In this regard, especially the obligatory provision of a summary of the relevant facts and the possibility to give a statement thereon are allegedly important. The Government does not concur with the criticisms of the Supreme Court regarding the inadmissible limitation of the judicial assessment of the factual basis of the Office's decision – allegedly, under Article 64 of the AJRAA-1 the Supreme Court has the possibility, due to incomplete findings on the state of the facts, to abrogate the administrative act and to remand the case for new adjudication to the Office. Likewise, under Article 65 of the AJRAA-1, it allegedly has the possibility to carry out a trial, to determine a different state of the facts, and to overturn the decision. The Government is of the opinion that the right to an effective judicial remedy is ensured with the possibility of judicial protection before the Supreme Court. The purpose of single-stage proceedings for the judicial review of administrative acts is allegedly to accelerate proceedings and to attain standards of effective competition protection. Lastly, the Government stresses that the execution of the challenged provisions of the PRCA-1 is necessary for the fulfilment of the obliga-

tions of the Republic of Slovenia stemming from its membership in the EU, especially the obligation to effectively implement Articles 101 and 102 of the TFEU.

6. On the basis of the second paragraph of Article 28 of the Constitutional Court Act (Official Gazette RS Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), the Constitutional Court obtained the position of the Office on the request of the Supreme Court.<sup>1</sup> The Office is of the opinion that the addressee of the right to spatial privacy can only be a natural person. The possibility to enter the business premises of a legal entity without a court order, therefore, allegedly does not entail an interference with a human right of the legal entity. When assessing the proportionality of measures it is allegedly necessary to take into consideration that a search of business premises is always conducted in the presence of a person who can have a reasonable expectation of privacy. In the Office's estimation, too broad an interpretation of the right to privacy can supersede each and every possibility of the protection of public order and the rights of others. The protection of competition is allegedly impossible without the possibility to conduct unannounced searches of the premises of companies that violate competition rules. The same allegedly applies to the possibility of accessing company computers and e-mail. Therefore, the Office suggests such an interpretation of Article 37 of the Constitution that the phrase "criminal proceedings" is interpreted more broadly, such that it also includes punitive procedures, which procedures for the protection of competition are. The Office allegedly has always conducted searches of electronic data carriers and of e-mail in such a manner that users had the possibility to delimit private communications from business correspondence. The Office does not concur with the criticisms of the Supreme Court that judicial protection proceedings under the PRCA-1 are not proceedings where the court has full jurisdiction and that therefore there exists an inconsistency with Article 25 of the Constitution. It draws attention to the significant importance of the legal value of the effective competition and to the sophistication of the parties to a competition procedure. The Office does not concur with the position that in order to ensure the effectiveness of the procedure and the protection of the rights of parties, the AJRAA-1 should apply in its entirety in such a procedure. It stresses that in the challenged regulation there are no "exaggerated" limitations of the decision-making of the Supreme Court in proceedings where the court has full jurisdiction – in particular, the prohibition of stating new facts and of proposing new evidence and the exclusion of appeals against judicial decisions allegedly do not entail the exclusion of proceedings where the court has full jurisdiction. In the opinion of the Office, the Supreme Court can carry out a trial and determine, on the basis of the documentation from the file, a different state of the facts. The Supreme Court allegedly adopts a decision on the basis of those facts and evidence on which the Office grounded the decision challenged by the action, and on the basis of the facts and evidence that had been stated or proposed by the parties before the Office's

<sup>1</sup> After this position was adopted, the Agency, which was registered in the register of companies on 31 December 2012, assumed the tasks and authorisations of the Office.

decision was issued. The Office explains in detail how parties to proceedings have enough possibilities to claim facts and propose evidence that benefit them already in the administrative procedure before the Office. The subsequent expansion of such possibilities in judicial proceedings would allegedly transfer the centre of gravity of decision-making in matters concerning the protection of competition to a court.

7. The reply of the National Assembly, the opinion of the Government, and the position of the Office were served on the Supreme Court, which announced that it would not reply to them.
8. The companies Unior Kovaška industrija PLC, Zreče and RTC Krvavec PLC, Cerklje na Gorenjskem, otherwise parties to the judicial proceedings that were halted by the Supreme Court due to the filing of the request for a constitutional review, confirmed participation in the Constitutional Court proceedings to decide the request. The participants concur with the arguments of the request and allege that the PRCA-1 permits very intense interferences with the human rights of parties, which in the search procedure and in the judicial proceedings are very limited. They draw attention to the confrontation of the public interest in the protection of efficient competition with the parties' human rights to the inviolability of dwellings, to the protection of the privacy of correspondence and other means of communication, to respect for one's private and family life, and to an effective legal remedy. In their opinion, the search competences of the Agency are very broad and before and during the search there is allegedly no external supervision over their execution. The participants expressly underline that the PRCA-1 permits entry into a residence or other premises and a search thereof without a court order and against the will of the entity subject to search only on the basis of a decision of the Office, therefore, of the executive authority. They claim that the regulation of judicial protection under PRCA-1 interferes with the right of the parties to effective judicial protection. They assess that it would be also sensible in competition protection procedure to ensure judicial protection under the AJRAA-1. The current regulation allegedly does not pass the proportionality test.

## **B – I**

### **Determination of the Scope of Assessment**

9. The Supreme Court claims that it challenges Articles 28 and 29 of the PRCA-1. However, it is evident from the content of the request that in its opinion in the stated provisions the only unconstitutional aspect is that the decision on the basis of which the search of business premises and the examination of business documentation are conducted is adopted by the Agency instead of a court. This is determined by the first sentence of the first paragraph of Article 28 of the PRCA-1, under which the search order regarding a company against which a procedure is being conducted is issued by the Agency. Therefore, the Constitutional Court deemed that the applicant challenges only the first sentence of the first paragraph of Article 28 of the PRCA-1.
10. The applicant claims that it challenges all provisions from Article 54 to Article 61 of the PRCA-1. However, in its request there are no substantiated criticisms that refer to the regulation of the possibility of judicial protection against the decisions and or-

ders of the Agency, to the priority treatment of judicial protection under the PRCA-1, to the limits of the assessment of the challenged acts, and to the regulation of parties' right to review the documents of the case before the court (which is regulated in Articles 55, 58, and 60 of the PRCA-1). Therefore, the Constitutional Court deemed that the applicant only challenges Articles 54, 56, 57, 59, and 61 of the PRCA-1.

11. Even though the Supreme Court challenges a part of the statutory regulation of searches of "companies against which a procedure is being conducted", wherein the notion of a company is defined by the first indent of Article 3 of the PRCA-1 so as to also include natural persons running a sole proprietorship (sole proprietors, freelance professionals),<sup>2</sup> the applicant challenges Article 28 of the PRCA-1 exclusively from the viewpoint of the protection of the human rights of companies – legal entities who are subject to a search. Therefore, the Constitutional Court assessed the criticisms only from such point of view.

## B – II

### The Right to Privacy

12. The first sentence of the first paragraph of Article 28 of the PRCA-1 determines: "The order on the search of a company against which a procedure is being conducted is issued by the Agency." The applicant claims that the challenged provision is inconsistent with Articles 36 and 37 of the Constitution and with Article 8 of the ECHR. It is of the opinion that these provisions of the Constitution and the ECHR also protect the privacy of legal entities on business premises that are not generally publicly accessible. Therefore, the guarantees determined by the Constitution, among them especially the admissibility of interferences with the rights under the first paragraph of Article 36 and under the first paragraph of Article 37 of the Constitution, which are permitted only on the basis of a prior court order, should also apply to procedures under the PRCA-1, which by their nature should be punitive procedures.
13. In Article 35, the Constitution guarantees the inviolability of a person's physical and mental integrity, and the inviolability of his privacy and personality rights. In addition to this general provision on the protection of privacy, it also includes three special provisions which specifically protect the inviolability of dwellings (the first paragraph of Article 36 of the Constitution), the privacy of correspondence and other means of communication (the first paragraph of Article 37 of the Constitution), and the protection of personal data (the first paragraph of Article 38 of the Constitution).<sup>3</sup>

2 A company is an entity that exercises an economic activity, regardless of its legal form and ownership. An association of sole proprietors that does not directly exercise an economic activity, but influences or could have an influence on the conduct of companies under the first sentence of the mentioned indent on the market is also a company.

3 In Paragraph 19 of the reasoning of Decision No. U-I-272/98, dated 8 May 2003 (Official Gazette RS 48/03, and OdlUS XII, 42), the Constitutional Court stressed that the aspects of privacy that are traditionally protected include the inviolability of dwellings, the privacy of communication, and – in recent times – also the protection of personal data. However, the content of the protected privacy is not exhausted by the three special guarantees mentioned.

The inviolability of dwellings, or the so-called spatial aspect of privacy, and the privacy of correspondence and other means of communication, or the so-called communication aspect of privacy, are thus specifically protected as constitutional values.<sup>4</sup> It is true, as the applicant states, that the Constitutional Court has in its hitherto constitutional case law already taken a position on what content is protected by both the general provision and the mentioned special provisions of the Constitution when natural persons are at issue. However, it has not yet taken a position on the question of whether also legal entities enjoy constitutional protection of privacy.

14. When what is at issue is the protection of natural persons, the Constitutional Court has defined that a human's privacy, the inviolability of which is guaranteed by Article 35 of the Constitution, "refers, in the context of man's existence, to a more or less complete whole of his or her behaviours and involvements, feelings, and relations, for which it is characteristic and essential that the person shapes and maintains it alone or alone with those near to him or her with whom he or she lives in intimate community, for example with a spouse, and that he or she lives in such community with a sense of being protected against intrusion by the public or any other undesired person".<sup>5</sup> The right to privacy of an individual establishes a sphere of his or her own intimate functioning in which he or she is allowed to decide him- or herself which interferences with it he or she will allow. The more the field of the private life of the individual is intimate, the greater legal protection he or she must enjoy. This is even truer when it is admissible that the state or competent state authorities interfere with it. Matters that may not be revealed include personal matters which the individual wishes to keep hidden and which by the nature of the matter or with regard to moral or otherwise established rules of conduct in society have such status (for instance, one's sexual and family life, health status, confidential talks between close persons, and diary entries).<sup>6</sup>
15. The Constitutional Court has also defined the spatial aspect of constitutionally protected privacy. A matter is private also with regard to the space in which it happens. In the framework of the spatial aspect of privacy, an individual is protected from having his or her conduct revealed where he or she justifiably expects to be left undisturbed. His or her dwelling – a residence – is the first but not the only such location. He or she is protected everywhere where he or she, evidently for others, can justifiably expect that he or she will not be exposed to the eyes of the public.<sup>7</sup> A normal and an essential part or aspect of human privacy is one's habitation or domicile; the material environment for a person is usually his or her dwelling, home, or residence. The factual and exclusive authority over the space of the residence and over everything substantial in it is an essential part and condition of residence as a part of human privacy.<sup>8</sup> The Constitutional Court underlined that the subject of protection

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4 Cf. Paragraphs 40 and 75 of Decision of the Constitutional Court No. U-I-25/95, dated 27 November 1997 (Official Gazette RS No. 5/98, and OdlUS VI, 158).

5 Decision of the Constitutional Court No. Up-32/94, dated 13 April 1995 (OdlUS IV, 38).

6 Compare with Decision of the Constitutional Court No U-I-272/98, Paragraph 20 of the reasoning.

7 *Ibidem* and Decision of the Constitutional Court No. U-I-25/95, Paragraph 38 of the reasoning.

8 Decision of the Constitutional Court No. Up-32/94, Paragraph 12 of the reasoning.

of the right under the first paragraph of Article 36 of the Constitution is, proceeding from the purpose of the guarantee, the complete whole of the premises that a person uses as a dwelling, where he or she lives alone or with those nearest and dearest, hidden from the public view, and which he or she only permits persons whom he or she allows a view into the most hidden spheres of his or her life access to. Therefore, such are premises where the person justly expects to be left undisturbed because he or she lives there. Such is the manner the terms “dwelling” and “other premises of another person” under the second paragraph of Article 36 of the Constitution are to be interpreted.<sup>9</sup> The Constitutional Court specifically underlined that it is essential for the notions of dwelling and other premises of another person in the sense of the second paragraph of Article 36 of the Constitution that it is a complete spatial unit intended and used for living, and hidden from the eyes of the public.<sup>10</sup> It is not the space as such that is protected, but the individual’s privacy in that space. Therefore, what is protected is the residence as a home, as the privacy existing in the living space in which the individual justly expects privacy and regards as his or her living space. The point of such privacy is the purpose of residence in a space where the individual’s private life is developed, while privacy is protected against any interference against the will of the tenant or resident in that space.<sup>11</sup>

16. The right to communication privacy guaranteed by the first paragraph of Article 37 of the Constitution represents the “protection of the individual’s interest that the state or uninvited third persons do not learn of the content of a message that he or she transfers via any means that allows remote exchange or transfer of information; just as the individual’s interest in having control and freedom to decide to whom, to what degree, how, and under which conditions he will transmit a certain message”.<sup>12</sup> The subject of protection is free and uncontrolled communication and thus the protection of the confidentiality of relations into which the individual – when communicating – enters.<sup>13</sup> The protection of communication privacy cannot be reduced to only the content of communication, as this right also protects data on how the communication took place, who initiated it, with whom he or she initiated it, and whether it took place at all.<sup>14</sup> It also refers, for instance, to data on phone calls which constitute an integral part of the communication.<sup>15</sup> The statutory regulation of interferences with communication privacy must include detailed instructions that, while

9 Decision of the Constitutional Court No. Up-430/00, Paragraph 13 of the reasoning.

10 *Ibidem*, Paragraph 19 of the reasoning.

11 Decision of the Constitutional Court No. Up-3381/07, dated 4 March 2010 (Official Gazette RS No. 25/10), Paragraph 5 of the reasoning.

12 G. Klemenčič in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia: Supplement to the Commentary – A], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2011, p. 522.

13 *Ibidem*.

14 *Ibidem*, pp. 522–523.

15 See Decision of the Constitutional Court No. Up-106/05, dated 2 October 2008 (Official Gazette RS No. 100/08, and OdlUS XVII, 84).

taking into consideration the express constitutional requirements, prevent the arbitrariness of state authorities and the misuse of special methods and means. Thus, for instance, when what are at issue are special investigation competences of the police, the categories of persons on whom the police can eavesdrop must be determined, the criminal offences, and the duration of eavesdropping have to be determined more precisely, the procedure under which summaries of verbal communications are handled must be prescribed, the circumstances and conditions for their destruction must be determined, and supervision mechanisms must be arranged.<sup>16</sup>

### **The Privacy of Legal Entities**

17. On the basis of the hitherto constitutional assessments, it is thus possible to clearly conclude that natural persons enjoy the protection of privacy as guaranteed by the general provision of Article 35 of the Constitution as well as the first paragraph of Article 36 and the first paragraph of Article 37 of the Constitution in all the stated respects.<sup>17</sup> For the constitutional assessment at hand, however, it is first necessary to answer the question of whether also legal entities enjoy the right to privacy, including its spatial and communication aspects, which in this case are underlined by the applicant. The legal-ethical foundation of modern states which are based on the concept of constitutional democracy, i.e. on the presumption that the authority of the state has to be limited by some fundamental rights and freedoms which belong to a person due to his or her own worth, is respect for human dignity. Human dignity is the highest ethical value and the measure for limiting the functioning of the authority of the state.<sup>18</sup> The constitutional order is thus built on values that fundamentally belong to the individual – the free human being. Also the right to free economic initiative under the first paragraph of Article 74 of the Constitution belongs, as a human right, to the individual. In order to be able to exercise it, he or she also has the right to establish legal entities – economic organisations. However, he or she is not entirely free in that, as in the first sentence of the second paragraph of Article 74 the Constitution authorises the legislature to determine the conditions for establishing economic organisations and thus also their legal form of organisation. A typology of economic subjects regulated by law is necessary for the legal regulation of the market

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16 See Decision of the Constitutional Court No. U-I-158/95, dated 2 April 1998 (Official Gazette RS Nos. 31/98 and 70/98; OdlUS VII, 56, and OdlUS VII, 194). In Decision No. Up-412/03, dated 8 December 2005 (Official Gazette RS No. 117/05, and OdlUS XIV, 104), the Constitutional Court, modelling itself on the case law of the ECtHR, developed additional criteria regarding the necessary clarity and precision of the legal basis for interfering with communication privacy and with regard to preventing abuses.

17 The right to privacy with all the stated aspects is also protected by the ECHR. In Article 8, which regulates the right to respect for private and family life, it determines that everyone has the right to respect for his private and family life, his home, and his correspondence. With regard to the presented aspects of privacy, the ECHR does not ensure a higher level of protection of the right to privacy than the mentioned constitutional provisions.

18 Cf. Paragraph 6 of the reasoning of Decision of the Constitutional Court No. U-I-109/10, dated 26 September 2011 (Official Gazette RS No. 78/11).

and for the unfolding of legal transactions, and thus for legal certainty.<sup>19</sup> In addition, one of the aspects of the freedom of association determined by the second paragraph of Article 42 of the Constitution is that individuals have the possibility to establish a legal entity in order to enable collective functioning in a field of common interests. An essential integral part of the freedom of association is that the law enables the association to obtain the status of a legal entity. Without this, the freedom of association would often have no sense.<sup>20</sup> Legal entities are thus important also for exercising some rights of natural persons, including their human rights. Therefore, appropriate constitutional protection of legal entities is necessary.

18. Furthermore, developments as regards the establishment and functioning of legal entities have brought us to the point where also legal entities need to be ensured legal protection in some fields where otherwise natural persons are constitutionally protected, whereby such protection of legal entities is, by its nature, developed from the need to protect humans. Therefore, some of the rights that the Constitution guarantees to natural persons as human rights also need to be recognised to legal entities as constitutionally guaranteed rights. However, not because the legal entities and the human rights that they enjoy would constitute an end in themselves, but because the human rights of natural persons are protected through them.<sup>21</sup> Nevertheless, this protection of legal entities first depends on whether individual rights can apply to them with regard to their content and nature. The Constitutional Court has already decided that regarding property issues, legal entities enjoy rights equal to those of natural persons.<sup>22</sup> Likewise, the Constitutional Court has expressed its opinion that legal entities also enjoy constitutional protection under the first paragraph of Article 39 of the Constitution, which protects the right to freedom of expression,<sup>23</sup> protection of the general freedom of action (Article 35 of the Constitution)<sup>24</sup>, protection of constitutional procedural guarantees<sup>25</sup>, and the protection that the Constitution guarantees in Article 33 (private property) and in the first paragraph of Article 74 of the Constitution (free economic initiative).<sup>26</sup>

19 Order of the Constitutional Court No. U-I-49/94, dated 6 October 1994 (OdlUS III, 101).

20 Decision of the Constitutional Court No. U-I-155/07, dated 9 April 2009 (Official Gazette RS No. 32/09, and OdlUS XVIII, 17).

21 Legal entities function through natural persons who act on their behalf and for their account, or to their benefit, thereby even their responsibility for unlawful conduct can only be established through the conduct of natural persons. See Article 4 of the Liability of Legal Entities for Criminal Offences Act (Official Gazette RS Nos. 98/04 – official consolidated text, 65/08, 57/12 – LLECOA). Cf. M. Deisinger, *Odgovornost pravnih oseb za kazniva dejanja* [Criminal Liability of Legal Entities], GV Založba, Ljubljana 2007, p. 50.

22 Order of the Constitutional Court No. Up-10/93, dated 20 June 1995 (OdlUS IV, 164).

23 Decision of the Constitutional Court No. U-I-141/97, dated 22 November 2001 (Official Gazette RS No. 104/01, and OdlUS X, 193).

24 Decision of the Constitutional Court No. U-I-290/96, dated 11 June 1998 (Official Gazette RS No. 49/98, and OdlUS VII, 124).

25 Order of the Constitutional Court No. Up-199/98, dated 25 March 1999.

26 See, for instance, Decision of the Constitutional Court No. U-I-117/07, dated 21 June 2007 (Official Gazette RS Nos. 38/07 and 58/07, and OdlUS XVI, 64), and No. U-I-189/10, dated 15 March 2012 (Official Gazette RS No. 27/12).

Therefore, the right to free economic initiative, which is guaranteed by the Constitution as a human right of natural persons, also protects legal entities, once adapted to the nature of such right and to the nature of the legal entity at issue. On the constitutional level, we can thus speak of the constitutional protection of legal entities that encompasses – with regard to the above – rights that are adapted in comparison with those that the Constitution guarantees to natural persons as human rights. Therefore, we can speak of the constitutional rights of legal entities.

- 19.** The Constitution guarantees equal legal protection to legal entities only with regard to some rights that it otherwise recognises as the human rights of natural persons (for instance, with regard to constitutional procedural guarantees under Article 22 of the Constitution), a lower degree of protection than guaranteed to natural persons regarding some other rights, while legal entities cannot enjoy some rights at all due to the nature of human rights or legal entities. Therefore, it first has to be established – with regard to the above-mentioned aspects – whether a legal entity enjoys to any degree the right to privacy as a constitutional right. If we take into consideration only a literal interpretation of Article 35 of the Constitution, which speaks of the inviolability of a “person’s privacy”, such would indicate that the constitutional protection of privacy is reserved for humans (natural persons).<sup>27</sup> However, the sole literal interpretation of the Constitution does not suffice with regard to what was stated in the previous paragraph. When interpreting constitutional provisions, the Constitutional Court must also take into consideration their intention, as well as the legal nature of these provisions, whereby from the viewpoint of such assessment it is essential whether the individual rights that the Constitution otherwise guarantees to natural persons as human rights can, in light of their nature, apply to legal entities and to what extent. In the case at hand, the Constitutional Court must take a position on the question of whether also legal entities<sup>28</sup> enjoy privacy and especially whether they also enjoy the spatial and communication aspects of privacy. Therefore, it has to take a position on whether legal entities enjoy the constitutional rights under Article 35, the first paragraph of Article 36, and the first paragraph of Article 37 of the Constitution.
- 20.** Legal entities are an artificial form within the legal order. Their establishment and functioning are derived from the human right to establish legal entities in order for natural persons to exercise their interests. However, it is also important for the existence of legal entities and for the normal performance of their activities for which they were established that they enjoy a certain inner circle that is protected and sheltered to a reasonable extent from outside intrusions. In this circle, members of their human substratum (partners, members, employees, management, etc.) can peacefully carry out the activities directed at the purpose for which the entity was

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<sup>27</sup> The same can also be seen in the second paragraph of Article 37 of the Constitution.

<sup>28</sup> In the case at hand, the notion of legal entities entails private law legal entities that can be subject to a search under the PRCA-1, because they can be categorised as “companies” – i.e. subjects who exercise economic activities (see also Paragraph 11 of the reasoning of this Decision). In order to decide in this case, the Constitutional Court namely does not have to adopt a position with regard to other legal entities and especially not with regard to public law legal entities.

established. The reason for this lies in the tendency to protect organisations (in which individuals associate) from arbitrary interference by state authorities, which is the primary aim of the protection of privacy. It is not possible to imagine how a legal entity could plan its activities and attain its objectives in an undisturbed manner if it did not have the possibility to protect the fact of and data on its activities from (arbitrary) interferences by the state or from interferences by other individuals, or if it was not guaranteed a certain space safe from unwanted intrusions, and the possibility of safe and private communications, including at a distance. Also a legal entity has some functional, personnel, and spatially delimited internal sphere that it can justifiably expect to be protected from the intrusions of third persons who do not belong to the organisational structure of the legal entity. In such sense, also a legal entity enjoys the constitutional right to privacy, even though it is adapted to its nature. This starting point does not entail, however, that a legal entity must enjoy this constitutional right to the same extent as applies to the human rights of natural persons. As legal entities are artificial forms which are constitutionally protected in order for the sphere of individuals' freedom to be widened and protected, the level of their protection can from the outset be lower than for natural persons.

### The Spatial Privacy of Legal Entities

21. The sphere of privacy of legal entities includes, *inter alia*, both the spatial aspect (on the business premises on which it exercises its activity) and the communication aspect (the possibility of free and undisturbed communication at a distance on behalf and for the account of the legal entity inside its structure and with the outside world). However, for both aspects the special nature of the legal entity and its functioning has to be taken into consideration. When the spatial aspect is at issue, firstly, it is necessary to distinguish the business premises of the legal entity that are intended to be used by the public with regard to the purpose of its establishment and functioning. On such business premises the legal entity enjoys no privacy at all. In addition, the legal entity also has business premises that are not generally publicly accessible. On those business premises, however, the legal entity does enjoy the constitutional right to privacy,<sup>29</sup> but it has to be realised that such is formed in two layers or circles of privacy in which the expectations of the legal entity to be left undisturbed essentially differentiate. Such is due to the legal nature of legal entities. In the wider, outer circle of this expected privacy, the legal entity cannot expect privacy which in terms of its quality would correspond to the privacy that, under the first paragraph of Article 36 of the Constitution, is protected to the highest degree with regard to the spatial aspect of natural persons. In the inner, narrower circle of such privacy, also a legal entity can expect the same constitutional protection of spatial privacy as a natural person.

29 T. Keresteš and M. Repas state that the term dwelling or other premises under the second paragraph of Article 36 of the Constitution must be interpreted widely, so as to include also business premises, especially those to which public access is restricted. See T. Keresteš, M. Repas, *Nekateri ustavnopravni vidiki pooblastil Urada za varstvo konkurence* [Some Constitutional Law Aspects of the Powers of the Competition Protection Office], *LeXonomica – Revija za pravo in ekonomijo*, year IV, No. 2 (2012), p. 229.

22. The legal entities to which the constitutional assessment at issue applies are established for the purpose of exercising an economic activity. The Constitution expressly prohibits that the economic activity is exercised contrary to the public benefit (the second sentence of the second paragraph of Article 74 of the Constitution), and equally expressly prohibits acts of unfair competition, as well as acts which contrary to law limit competition (the third paragraph of Article 74 of the Constitution). These constitutional prohibitions, which are also the basis for limitations of the right to free economic initiative (the first paragraph of Article 74 of the Constitution), require appropriate action by the legislature. In certain instances, they can be joined by other constitutional requirements, such as the authorisation of the legislature to determine the conditions and manner of exercising economic activity so as to ensure a healthy living environment (the second paragraph of Article 72 of the Constitution). In order for the legislature to be able to apply all the mentioned constitutional authorisations, it does not suffice that it merely regulates the exercise of individual economic activities in accordance with them, but it also has to ensure the effectiveness of such rules in daily life. It can thereby also interfere with other rights that are guaranteed to legal entities. In order to ensure the effectiveness of the stated constitutional authorisations, the legislature can envisage, for instance, inspection supervision, as well as other forms of supervision over the exercise of the activity, and usually, as a general rule, also criminal sanctions for the most undesirable deviations from respect for the rules. It follows therefrom that legal entities cannot expect that the state will not supervise their operations. In order to ensure respect for the mentioned and other constitutional provisions, the state will, if necessary (on the basis of express statutory rules and in a predetermined manner of exercise of the authorisations of the competent state authorities), also enter into the wider sphere of the spatial privacy of legal entities, therefore also on their business premises that are otherwise inaccessible to the public, which, however, are intended for the exercise of their economic activity. Such privacy is not equal to the spatial privacy of natural persons. The wider, outer circle of the legal entity's privacy on its business premises is thus not protected by the first paragraph of Article 36 of the Constitution. In it, however, the legal entity does enjoy the general protection of privacy guaranteed by Article 35 of the Constitution. Interferences with this constitutionally protected right are admissible also with regard to a legal entity if such pursue a constitutionally admissible aim and if they are proportionate. Therefore, the measures by which competent state authorities can interfere with the right protected by Article 35 of the Constitution must be determined by law and be consistent with the third paragraph of Article 15 and with Article 2 of the Constitution.
23. The wider circle of privacy of legal entities, in which for the mentioned reasons the legal entity cannot expect that interferences – on the basis of rules which are predetermined by law – will not occur there relatively often, is not comparable with the expectancies of natural persons which are, as a human right, protected by the first paragraph of Article 36 of the Constitution. Namely, natural persons are very strongly protected in their residence and on other premises which they perceive as

their home and in which they can (except in cases determined by the fifth paragraph of Article 36 of the Constitution) always expect to be left undisturbed (see paragraph 15 of this reasoning); this especially applies to interferences by the state with the right to their spatial privacy. The second, third, and fourth paragraphs of Article 36 of the Constitution are specifically intended for such protection. Therefore, the Constitution already protects natural persons from any interference with this expected field of spatial privacy with the express requirement of a prior court order, which is required just to enter the residence itself, not merely for a search thereof (the second paragraph of Article 36 of the Constitution). With regard to the above, by itself, entry onto the business premises (and visual inspection of the premises without opening hidden compartments and without the seizure of objects and equipment to be found in these hidden compartments) by, for instance, an inspector exercising his competence, cannot be regarded as an interference with the right of the legal entity protected by the first paragraph of Article 36 of the Constitution, despite the fact that these premises are otherwise not accessible to the public. In this part, therefore, with regard to their nature, the purpose of their establishment and functioning, and the fact that they cannot expect that the state will not supervise the conduct of business activities in conformity with the stated constitutional requirements, legal entities do not enjoy the same level of constitutional protection as natural persons do. For this reason, it is also not necessary that they are protected from interferences with their privacy from the spatial perspective in the same manner as are natural persons.

24. However, it has to be realised at the same time that even with regard to the legal entity there exists a narrower sphere of its spatial privacy in which it can expect – regardless of the above facts – that there will be no interferences with it. In that sphere even the legal entity can expect to be left undisturbed, which must also apply to [potential interferences by] the state. Therefore, in this part also the legal entity does have the constitutional right to spatial privacy determined by the first paragraph of Article 36 of the Constitution. Interferences with that narrower sphere of privacy of the legal entity are by their nature connected with the high intensity of the interference, which is reflected in such authorisations of the competent state authority that they correspond to the content of the term “search” from the second paragraph of Article 36 of the Constitution. Then, it no longer concerns – for instance – the personnel of the legal entity being obliged to allow a certain limited inspection of the premises, but authorisations on the basis of which authorised persons of competent state authorities can, against the will of the legal entity,<sup>30</sup> execute a thorough search of the business premises, including the hidden compartments thereof.<sup>31</sup> Such a search is conducted for the purpose of obtaining data and seizing documents and

30 The free and uncoerced consent of a legal entity to a search of any degree of thoroughness, i.e. voluntarily enabling an examination and the submission of confidential documents of any degree excludes the obligation to fulfil the requirements under the second to fourth paragraphs of Article 36 of the Constitution.

31 The inspection of data saved on some information-communication media always entails, in this sense, the inspection of a “hidden compartment”, even though such media is, for instance, easily accessible and visible during a simple visual inspection of the premises of the legal entity.

other media on the basis of which competent officials can evaluate whether the legal entity conforms to the legal rules which the legislature enacted for the purpose of ensuring the effectiveness of constitutional prohibitions regarding the exercise of economic activities. In this manner, an interference with the privacy of a legal entity passes from the wider into the narrower sphere of its privacy, which is protected as a constitutional right of the legal entity by the first paragraph of Article 36 of the Constitution. Therefore, an interference with this constitutional right is only admissible on the basis of a prior court order as required by the second paragraph of Article 36 of the Constitution. In this regard, the privacy of the legal entity – with regard to the need for constitutional protection against intrusions – namely matches that level of expected spatial privacy that is essentially guaranteed by the first paragraph of Article 36 of the Constitution to natural persons. In such manner, it depends, above all, on the content and the intensity of the authorisations of the state authority whether an interference resulting from such authorisations entails an interference with the right of the legal entity protected by the first paragraph of Article 36 of the Constitution, for the admissibility of which, except in the instances determined by the fifth paragraph of Article 36 of the Constitution, a prior court order is required.

25. The ECHR does not contain a special provision regarding the spatial aspect of privacy, as such is protected by the general provision of the first paragraph of Article 8 of the ECHR. However, it also proceeds from the case law of the ECtHR that the term “home” in the mentioned provision of the ECHR in certain circumstances also includes the right to respect for the registered office of the company, of a branch thereof, or other business premises.<sup>32</sup> The second paragraph of Article 8 of the ECHR, which determines under which conditions interferences with the right determined by the first paragraph of that Article are admissible, does not otherwise specifically require a prior court order.<sup>33</sup> However, in instances in which, with regard to the circumstances of the case, it is necessary to recognise the spatial aspect of the right under the first paragraph of Article 8 of the ECHR to a legal entity, the ECtHR has also in-

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32 See, for instance, the Judgment of the ECtHR in the case *Société Colas Est and others v. France*, paragraphs 40 and 41.

33 With regard to the mentioned right, the ECtHR stressed that an interference therewith is only admissible if:

- (a) it is in accordance with the law, which entails that it has an appropriate basis in the domestic law, which must be accessible and predictable in the sense that its provisions are sufficiently detailed, clear, and precise for the citizens to understand under which conditions and in which circumstances the state authorities can exercise the measure at issue, while the national law must, in conformity with the principle of the rule of law, include appropriate and efficient safeguards against arbitrary interferences and abuses;
- (b) there exists one of the legitimate aims under the second paragraph of Article 8 of the ECHR; and
- (c) it is necessary in a democratic society. In the framework of the last criterion, the ECtHR assesses whether the measure corresponds to a pressing social need and if there exists proportionality between the measure and its legitimate aim. The reasons for the admissibility of the measure under the second paragraph of Article 8 of the ECHR must be interpreted narrowly and in every individual case it must be convincingly determined whether the measure is necessary. See, for instance, the decisions of the ECtHR in *Chappell v. United Kingdom*, dated 30 March 1989, *Petri Sallinen and others v. Finland*, dated 27 September 2005, and *Buck v. Germany*, dated 28 April 2005.

troduced the requirement of a prior court order as one of the conditions for ensuring the proportionality of a measure when such measure is very intense. Nonetheless, at the same time it allowed that interferences with this right with regard to legal entities can be more intense than with regard to natural persons.<sup>34</sup> In such a manner, we can realise that in instances when the competent state authorities intensely interfere with the narrowest protected circle of the spatial aspect of a legal entity's privacy by exercising statutorily determined authorisations, an essentially equal level of protection of the constitutional right to the spatial aspect of the privacy of the legal entity – from the viewpoint of the requirement of a prior court order before the search – is guaranteed by both the Constitution (the second paragraph of Article 36) and by the ECHR (Article 8). Therefore, in the case at issue, the constitutional assessment has to be conducted from the viewpoint of the Constitution.

### **The Communication Privacy of Legal Entities**

26. In addition to Article 35 of the Constitution, it is especially the first paragraph of Article 37 of the Constitution that protects the communication aspect of privacy. Also when legal entities are at issue there are communications at a distance that the legal entity can regard as confidential – and with regard to which it is entitled to expect privacy. Therefore, also legal entities are entitled to protection under the first paragraph of Article 37 of the Constitution and thus, in instances when they do not wish to disclose their communications at a distance, to claim protection of their communication privacy. Also the ECtHR in its case law has broadened the protection under the first paragraph of Article 8 of the ECHR to include legal entities with regard to electronic data in a computer system which fall under the term “correspondence” from the Convention.<sup>35</sup> The second paragraph of Article 8 of the ECHR allows the limitation of all aspects of the right to privacy when such is determined by law and necessary in a democratic society due to the security of the state, public safety, or the economic welfare of the state, in order for disorder or crime to be prevented, for the

34 See the Judgment in *Société Colas Est and others v. France*, paragraph 49. In that case, an extensive search of the business premises of 56 companies was conducted and the investigators of the National Investigation Agency (the authority was a part of the executive branch of power) seized a couple of thousand documents. Subsequently, another extensive search was conducted. The investigators entered the business premises without the consent of the companies' management and (which was then permitted by the law) without a prior court order. On the basis of the materials collected, procedures against the complainants before the competition regulator were later initiated due to the suspicion of a violation of competition rules, which concluded with the imposition of fines, which the courts upheld (with the exception of a change in the amount of certain fines). The ECtHR concluded that the actions of the investigators, due to the manner they were conducted (a detailed, far-reaching, and burdensome search of an extensive number of premises), fulfilled the elements of an interference with the complainants' home (domicile). The legislation and the practice did not offer appropriate and efficient safeguards against abuses. The executive authority namely had very extensive authorisations and exclusive competence to determine the necessity, number, length, and scope of searches. In addition, the searches were conducted without a prior court order and without the presence of a high ranking police officer. Due to the disproportionate measure, the complainants' right under Article 8 of the ECHR was violated.

35 See the ECtHR Judgment in *Wieser and Bicos Beteiligungen GmbH v. Austria*, dated 16 October 2007, paragraph 45.

protection of health or morals, or for the protection of the rights and freedoms of other people. It can be therefore stated that from the viewpoint of the ECHR, interferences with the right to privacy protected by Article 8 of the ECHR are admissible from all the aspects from which limitations of constitutional rights are admissible also in the Slovene legal order (the third paragraph of Article 15 of the Constitution).

27. The second paragraph of Article 37 of the Constitution contains in this regard a somewhat different provision than the ECHR and states that a law can prescribe “that on the basis of a court order, the protection of the privacy of correspondence and other means of communication and the inviolability of personal privacy [may] be suspended for a set time where such is necessary for the institution or course of criminal proceedings or for reasons of national security.” If the Constitution did not contain the stated provision, interferences with this right would be possible under the same conditions as are generally determined for limiting rights. This, however, would not entail that a prior court order is not necessary for interferences with this constitutional right of legal entities, as the Constitutional Court has already adopted the position that in cases of the most serious interferences with the right to privacy (with regard to an interference with Article 35 of the Constitution), the requirement of a court order already proceeds from the principle of proportionality.<sup>36</sup> However, by the second paragraph of Article 37, the Constitution delimits the possibility to interfere with the right to communication privacy also from the viewpoint of the possible aims that the statutory regulation pursues. In the instances that it determines, it namely allows its limitation only when such is urgent for the initiation or course of criminal proceedings, or for the security of the state. It does not allow, however, the legislature to determine different aims of such interferences with the right to communication privacy, such as the economic welfare of the state, which is expressly stated among the aims in the second paragraph of Article 8 of the ECHR. Whenever the standards of protection of a particular right enshrined by the Constitution are stricter than those in a treaty, which is what the ECHR is, the Constitutional Court must base its decision on constitutional rules.
28. The notion of the security of the state can be interpreted as including both state and public safety. The question is, however, what is included under the constitutional meaning of the term “criminal proceedings”. The sole literal interpretation of the second paragraph of Article 37 of the Constitution would lead to an interpretation that by the use of this term the constitution-framer envisaged only what, with regard to the respective positive law, is punished as a criminal offence. It is also true that the provisions that are the basis for limiting constitutional rights cannot be interpreted widely. When they are interpreted, however, their content and purpose have to be taken into consideration and, in the assessment of the case at hand, also the nature of legal entities. The second paragraph of Article 37 of the Constitution limits the aims due to which it is admissible to interfere with communication privacy, but the content

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36 Decision of the Constitutional Court No. U-I-272/98, Paragraph 37 of the reasoning. The Constitutional Court reiterated such position in Paragraph 23 of the reasoning of Decision No. Up-1293/08, dated 6 July 2011 (Official Gazette RS No. 60/11).

of these aims entails the protection of other constitutional values, and possibly also of human rights. The goals of such protection cannot be reached if they are always interpreted restrictively. When the constitution-framer defined the constitutionally admissible aims, it undoubtedly wanted to protect some values which in certain social circumstances would be assessed to also require protection under criminal law – which entails that an interference with the right to communication privacy is admissible, but only on the basis of a prior court order. When legal entities are at issue, the legislature does not necessarily achieve such objective only by defining criminal offences, but possibly also by defining other socially highly dangerous conduct which it penalises as minor offence when such is, by its nature and by the severity of the sanctions which are imposed for it, comparable to criminal offences. The fines prescribed for legal entities for minor offences are in certain instances even higher than the fines prescribed for criminal offences. Therefore, the starting point on the basis of which the Constitutional Court has already interpreted the term “criminal offence”, which is used in the Constitution, with regard to the content of proscribed conduct and the weight of the prescribed sanction can be used so that the constitutional provisions that refer to it also apply for minor offences.<sup>37</sup> When legal entities are at issue, it depends primarily on whether what is at issue is forbidden conduct which by its nature and weight is comparable with a criminal offence for the term “criminal proceedings” determined by the second paragraph of Article 37 of the Constitution to also possibly apply to such. The term criminal proceedings in this constitutional provision is, when the communication privacy of legal entities is at issue, therefore not connected only to criminal proceedings as such are established in positive law. This term entails, constitutionally speaking, proceedings which are carried out in order to ensure the protection of individual values which due to their high social importance must be highly protected. Such is also reflected in the fact that these values are also protected by means of punitive law, which in the stated framework can also include minor offences.

29. All of the above means that when assessing the admissibility of an interference with the constitutional right of legal entities to communication privacy under the first paragraph of Article 37 of the Constitution it first has to be assessed whether such interference pursues a constitutionally admissible aim under the second paragraph of the mentioned constitutional provision. If it does, the interference can only be admissible on the basis of a court order, which is specifically required by the second

37 In Decision No. Up-120/97, dated 18 March 1999 (Official Gazette RS No. 31/99, and OdlUS VIII, 126), the Constitutional Court adopted the position that “also a defendant in minor offence proceedings must be ensured the fundamental guarantees of fair trial, however the level of ensured rights can be, in instances of less serious violations, lower than that guaranteed in criminal proceedings”. The criterion for the assessment whether in minor offence proceedings a fair trial was ensured to the defendant is the guarantee of the equal protection of rights under Article 22 of the Constitution in conjunction with Article 29 of the Constitution on legal guarantees in criminal proceedings (The Constitutional Court held the same in Decision No. U-I-295/05, dated 19 June 2008, Official Gazette RS No. 73/08, and OdlUS XVII, 44). With regard to the constitutional requirement for *lex certa* for minor offences, see, e.g., Decision No. Up-456/10, U-I-89/10, dated 24 February 2011 (Official Gazette RS No. 26/11).

paragraph of Article 37. Such constitutional requirement must also apply to legal entities. With a prior court order, the arbitrary conduct of the state power and its possible misuse are namely prevented. As was already mentioned in Paragraph 20 of the reasoning of this Decision, also legal entities must be protected from such actions. With regard to the fact that communication privacy is more strictly protected by Article 37 of the Constitution than by Article 8 of the ECHR, the constitutional assessment also from this point of view has to be conducted on the basis of the Constitution and not on the basis of the ECHR.

### B – III

#### Assessment of the First Sentence of the First Paragraph of Article 28 of the PRCA-1

##### *a) The Challenged Regulation*

30. The challenged provision of the PRCA-1 is placed in Section 3 of Chapter 2 of Part V of the PRCA-1, whose title is The Search Procedure. The PRCA-1 otherwise regulates restrictive conduct, concentrations of companies, authoritarian limitations of competition and measures for preventing restrictive conduct, and concentrations that substantially limit efficient competition when they have or can have an effect in the territory of the Republic of Slovenia (the first paragraph of Article 1 of the PRCA-1). The PRCA-1 applies, in conformity with Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4 January 2003 – hereinafter referred to as Regulation 1/2003), also to violations of Articles 101 and 102 of the TFEU<sup>38</sup> (the second paragraph of Article 4 of the PRCA-1).<sup>39</sup> The Agency is namely not competent only to exercise control over the implementation of the PRCA-1, but also to exercise control over respect for both of the mentioned Articles of the TFEU (the first paragraph of Article 12 of the PRCA-1). The search procedure is a part of the procedure regarding restrictive conduct (i.e. restrictive agreements and abuses of a dominant position), which are otherwise defined in Articles 6 to 9 of the PRCA-1 and by Articles 101 and 102 of the TFEU. The Agency can namely issue an order on the initiation of the procedure *ex officio* when it discovers circumstances that indicate the probability of a violation of either Articles 6 or 9 of the PRCA-1, or Articles 101 or 102 of the TFEU (Article 23 of the PRCA-1). In the search procedure, which is intended for determining the existence of restrictive conduct, the Agency has at its disposal multiple investigation instruments. In addition to the request to convey data under Article 27 of the PRCA-1, the most important instrument is precisely the search of the company against which the procedure is being conducted, which is de-

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38 Due to the fact that the text of PRCA-1, which literally reads “Articles 81 and 82 of the Treaty establishing the European Community”, is to be (everywhere) interpreted after the entry into force of the TFEU.

39 Article 2 of the PRCA-1 determines that the PRCA-1 regulates the procedure and competence regarding the implementation of Regulation No. 1/2003 and Council Regulation (ES) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29 January 2004 – Regulation No. 139/2004).

terminated especially in Articles 28 and 29 of the PRCA-1. The search is the main tool for uncovering evidence connected with the most serious violations of competition law, such as trusts and abuses of a dominant position.<sup>40</sup> Numerous provisions of the PRCA-1 on the search procedure with regard to restrictive conduct – including Articles 28 and 29 of the PRCA-1 – are applied *mutatis mutandis* also for the procedure with regard to concentrations (see Articles 47 to 49 of the PRCA-1).

31. Article 28 of the PRCA-1 determines that the Agency issue an order to search the company<sup>41</sup> against which the procedure is being conducted.<sup>42</sup> In addition, it determines the obligatory components of the search order (the subject and the purpose of the search, the date of the beginning of the search, the name of the authorised person who will lead the search, the scope of the authorisations of the Agency, and a warning stating the prescribed fine for declining to cooperate or obstructing the search), the manner of it being served on the company (at the beginning of conducting the search, possibly together with the serving of the order on the initiation of the procedure) and that there exists no direct judicial remedy against such order.<sup>43</sup> The search of business premises and residences of “third party” natural persons or legal entities (regarding a company against which the procedure is not being conducted or in the residences of members of the managing or supervisory body, employees, or other associates of a company against which the procedure is not being conducted), however, cannot be ordered by the Agency itself, as it has to obtain, in conformity with the first paragraph of Article 33 of the PRCA-1, an order issued by the competent court.

#### *b) Authorisations of the Agency*

32. Article 29 of the PRCA-1 determines who and when can conduct a search and, above all, enumerates the competences of the competent persons who are to conduct the search. The competent persons can conduct the search also against the will of the company (the fourth paragraph of Article 29 of the PRCA-1),<sup>44</sup> with regard to which

40 T. Bratina in: P. Grilc (Ed.), *Zakon o preprečevanju omejevanja konkurence (ZPOmK-1) s komentarjem* [The Prevention of Restriction of Competition Act with Commentary], GV Založba, Ljubljana 2009, p. 314.

41 With regard to the first indent of the second paragraph of Article 29 of the PRCA-1, a search can be carried out in the registered office of the company against which the procedure is being conducted and in other places where this company carries out the activity and business from which there arises the probability of a violation of competition rules. The same as applies to a company against which the procedure is being conducted also applies to a company operating under its authority.

42 The supervision procedure is initiated by a special order (Article 23 of the PRCA-1), which under the first paragraph of Article 24 of the PRCA-1 includes a description of the conduct which is the reason for the initiation of the procedure, the statement of the provisions of the Act for which the probability of a violation has been demonstrated, and the substantiation of the reasons for the initiation of the procedure.

43 The search order can be challenged in judicial protection proceedings against the decision of the Agency (the second indent of the third paragraph of Article 55 of the PRCA-1).

44 If a company disallows entry onto its premises, obstructs it, or disallows access to its business books or other documentation, obstructs such, in any other way obstructs the search, or if such is justifiably expected, an authorised person can enter the premises or access the business books or other documentation against the company's will with the assistance of the police (the first paragraph of Article 31 of the PRCA-1). The second

they may enter and inspect premises, plots of land, and means of transport, inspect books and other business documentation regardless of the media carrying data, seize or obtain copies or summaries from books and other documentation in whatever form, seal all business premises, books, and other documentation for the period of the of investigation, seize objects and documents for a limited period of time, request oral and written explanations from the representatives and employees of the company with regard to the subject and the purpose of the search, inspect documents by means of which the identity of persons can be established, and conduct other actions which are in line with the aim of the search. The only thing excluded from the search is communication between the company against which the investigation is being conducted and its legal counsellor, insofar as such refers to this procedure. Article 32 of the PRCA-1 regulates a special procedure for resolving any dispute between the Agency and the company with regard to the existence of such privileged communication, in which the Administrative Court decides.

33. For the regulation of the search of a company against which the procedure is being conducted which is ordered independently by the Agency, which is not a court, wide and intense authorisations of the Agency are typical. There is no hierarchy among the acts of investigation and the Agency can freely choose among them, and, in conformity with the search order, apply one or more of the statutory measures. It is admissible to inspect premises that are (in any manner) connected with the activity and business from which there arises the probability of a violation of competition law. It is not necessary that in the search order it is precisely determined which documents the authorised persons wish to inspect, as often even the Agency cannot know what documents the company has. Authorised persons have the right to actively seek potentially relevant documents on the searched premises.<sup>45</sup> It is evident from the intention of the legislature to give the Agency efficient and sufficient authorisations so that the Agency may, by force, enter the premises of a company which are not freely publicly accessible, at its registered office or at some other location (a branch, an office, etc.), and inspect such premises, i.e. open closets, drawers, safes, closed boxes, and do everything necessary to achieve the aim of the search. The Agency may also review business books and other documents which concern the functioning of the company, regardless of the type of media which carry such data, and make copies or summaries (which also applies to business letters, e-mails, and SMSs stored on a computer or on a telephone, and to various other forms of communication saved in information systems of the company or accessible therefrom, etc.). The search authorisations of the Agency are thus such that the Agency has, on their basis, the possibility to inspect the whole internal sphere of the company, so that nothing remains hidden from those searching. This exceeds the viewing and acquisition of documents which the legal entity must – already on the basis of numerous statutory provisions – submit to competent state authorities when such exercise supervision over its op-

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to fifth paragraphs of Article 31 of the PRCA-1 prescribe high fines for obstructing and preventing a search.

45 T. Bratina, M. Kocmut in: P. Grilc (Ed.), *op. cit.*, pp. 325–328.

erations. Furthermore, the Agency independently decides on the number of searches necessary and which premises of the company are to be searched.

34. A search is possible whenever there exists a suspicion of restrictive conduct as determined in the PRCA-1. It is, however, not possible to conduct a search before the supervision procedure is initiated against the company. For such, it is required that the Agency discovers circumstances from which there arises the “probability of a violation” of either Articles 6 or 9 of the PRCA-1, or Article 101 or 102 of the TFEU (Article 23 of the PRCA-1). In addition, the first indent of the second paragraph of Article 29 of the PRCA-1 determines that a search is to be carried out where the company exercises its activities and business from which there arises the “probability of a violation”. This provision is to be interpreted so that the search is carried out where it is probable that it will be possible to find appropriate evidence of a violation.<sup>46</sup> By conducting a search determined in Articles 28 and 29 of the PRCA-1 it is possible to gather data which allow the discovery and limitation of restrictive conduct. It is reasonable to expect that evidence of the existence of restrictive conduct and abuse of a dominant position are concealed on such premises which are inaccessible to the public, and in the written and electronic documentation of the company.

*c) The Legal Nature of the Procedure before the Agency*

35. The applicant and the Agency claim that the procedure in which the stated authorisations of the Agency are exercised is, by its nature, a punitive procedure. In fact, the PRCA-1 regulates two different kinds of procedures regarding the assessment of violations of competition law. On one hand, it regulates such procedures as were conducted in cases in which the Supreme Court halted the proceedings and requested an assessment of the constitutionality of a law and which are in their entirety held under the provisions of the PRCA-1, and on the other hand, procedures on minor offences which are carried out under the provisions of Part VIII of the Act in conformity with the MOA-1, while the PRCA-1 includes only a few special provisions on these minor offence procedures. On this basis it would be possible to assume that the procedures for determining violations of competition law which are carried out in their entirety under the PRCA-1 are not, by their nature, punitive procedures.<sup>47</sup> It would be possible to qualify them as special procedures for supervising the conduct of subjects on the market, which are conducted by a specialised authority, i.e. the Agency. At the same time, however, it has to

46 In addition to the above mentioned, the PRCA-1 must be interpreted (consistently with the Constitution) so that it is not admissible to order and conduct a search if the relevant information can be obtained in a less severe manner, especially by means of a request to transfer information under Article 27 of the PRCA-1.

47 The Constitutional Court has already stressed that not every definition of prohibited conduct and sanctions for violating such prohibition can be regarded as defining criminal offences – such would require that the substantive guarantees that the Constitution specifically determines for criminal offences be fulfilled. Likewise, decision-making on the imposition of sanctions for violations of these prohibitions cannot always be regarded as criminal proceedings in which, therefore, all the constitutional procedural guarantees that specifically refer to criminal proceedings would have to be fulfilled (see Decision of the Constitutional Court No. U-I-145/03, dated 23 June 2005, Official Gazette RS No. 69/05, and OdlUS XIV, 62).

be realised that under the first paragraph of Article 12 of the PRCA-1, the Agency is competent to exercise control over the execution of the PRCA-1 and of “Articles 81 and 82 of the Treaty Establishing the European Community” (now Articles 101 and 102 of the TFEU), and that the Agency is, under the second paragraph of Article 12 of the PRCA-1, also a minor offence authority which decides on minor offences due to violations of the provisions of the PRCA-1 and the TFEU. As a minor offence authority, the Agency has no discretion over the initiation of minor offence procedures, but it has to carry out, in instances when it determines the existence of the elements of a minor offence, also the minor offence procedure. The data gathered on the basis of the search order will thus regularly be used in two procedures before the same authority which deal with the same state of the facts, even though they are different in terms of their legal nature.<sup>48</sup>

36. The supervisory authorisations of the Agency are directed towards remedying the unconstitutional situation and towards the reestablishment of the compliance of the market with the rules on competition. In its procedure for assessing restrictive conduct, the Agency determines *ex officio* the existence of a violation of the prohibition of concluding restrictive agreements and a violation of the prohibition of the abuse of a dominant position (Article 23 of the PRCA-1), and it also conducts procedures regarding assessments of concentrations (Article 11 of the PRCA-1). In the supervision procedure, the Agency enjoys wide authorisations, as it has the power to determine, by a decision, the existence of a violation of the prohibition of concluding restrictive agreements or a violation of the prohibition of the abuse of a dominant position, and to demand that the company cease such violation. It also may impose on the company measures which it considers suitable for remedying the stated violation and its consequences, it can accept commitments voluntarily proposed by the company for remedying the unlawful situation (Articles 37 and 39 of the PRCA-1), and it may also prohibit concentrations inconsistent with competition rules, demand that the effects of unconstitutional concentrations be remedied, and adopt proposed corrective measures which can eliminate the serious suspicion regarding the compliance of the concentration with competition rules (Articles 50, 51, and 53 of the PRCA-1). In the valid statutory regulation, the supervision procedure under the PRCA-1 is thus, in itself, essentially not regulated as a punitive procedure. Supervision over the legality of the decision-making of the Agency in this procedure is granted to the Supreme Court (Article 56 of the PRCA-1), which decides in special judicial proceedings in which the provisions of the Act regulating proceedings for the judicial review of administrative acts apply *mutatis mutandis* insofar as the PRCA-1 itself does not contain certain special provisions that regulate those proceedings differently.
37. In the minor offence procedure, the Agency imposes a fine as a repressive measure for general, special-preventive, and retributive purposes (therefore, it is a punitive sanction). The amount of the fine that it may impose is high. In minor offence procedures,

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48 For instance, from the first and second indent of the first paragraph of Article 73 of the PRCA-1 it proceeds that the conclusion of a restrictive agreement and the abuse of a dominant position, therefore restrictive conduct under Articles 6 and 9 of the PRCA-1, also constitute minor offences.

judicial control, which includes a request for judicial protection before the competent court, under the provisions of the MOA-1, is guaranteed against the decisions of the Agency. It seems that the supervision procedure and the minor offence procedure under the PRCA-1 are formally separated procedures. However, they are both conducted by the same authority (the Agency), they refer to the same state of the facts,<sup>49</sup> and evidence acquired in the search procedure (also on the basis of the search order), which is a phase of the supervision procedure, will also regularly and expectedly be used in the minor offence procedure.<sup>50</sup> Moreover, they may even find their way into criminal proceedings.<sup>51</sup> In instances where the Agency, when exercising its authorisations under Article 29 of the PRCA-1, also establishes elements of a minor offence, the search will thus continue in the minor offence procedure – therefore in a punitive procedure – and the evidence acquired therein will possibly even serve as the basis for initiating criminal proceedings. Therefore, it is not that relevant whether the procedure which the applicant halted before having filed the request is in itself a punitive procedure<sup>52</sup> – what is decisive is that the data and evidence acquired in the search conducted on the basis of the authorisations under Article 29 of the PRCA-1 will subsequently serve as the basis of all the stated procedures. Most often this will be the minor offence procedure which is carried out *ex officio* by the Agency. Therefore, the stated authorisations of the Agency are to be interpreted as authorisations given to a state authority in order to carry out a punitive procedure and, with regard to the possible reuse of the acquired evidence in the criminal proceedings before the competent court, also to conduct criminal proceedings. Efficient execution of the supervision procedure under the PRCA-1 during the search is namely also a necessary condition for successfully imposing sanctions on the legal entity which by violating competition rules committed a minor offence<sup>53</sup> and possibly also a criminal offence.<sup>54</sup>

49 See the preceding note.

50 As a general rule, the supervision procedure precedes the minor offence procedure. Extensive data on the functioning of the company are gathered therein and the company is thereby also warned that the public authority is seeking evidence of its unlawful conduct. If such evidence is subsequently not used in the minor offence procedure, it is difficult to imagine how the Agency would obtain equivalent (or any) evidence that would be sufficient for the imposition of a punitive sanction.

51 In Article 225, the Penal Code (Official Gazette RS No. 51/12 – official consolidated text – PC-1) regulates the criminal offence of the unlawful restriction of competition that is committed by whoever, contrary to the rules that regulate the protection of competition, violates, while exercising a business activity, the prohibition of restrictive agreements between companies, abuses the dominant position of one or more companies, or creates a prohibited concentration of companies and thus prevents or significantly distorts competition in the Republic of Slovenia or on the EU market or on a significant part thereof, or significantly influences trade between Member States which results in a significant pecuniary advantage for such company or companies or in a significant pecuniary loss for another company.

52 With regard to the current legal regulation presented, this is not a punitive procedure, despite the allegation of the applicant to the contrary.

53 These minor offences are comparatively distinctly grave and serious, which is reflected in the prescribed fines under Articles 73 and 74 of the PRCA-1.

54 The Constitutional Court has, for instance with regard to the privilege against self-incrimination, in Decision

*d) Assessment of Consistency with the Constitutional Rights to Spatial and Communication Privacy*

38. As is regulated by Articles 28 and 29 of the PRCA-1, the search corresponds in terms of its content to the notion of a search as is referred to by the Constitution in the second paragraph of Article 36. Such a search represents an invasive interference with the right of the companies against which the procedure under the first paragraph of Article 36 of the Constitution is being conducted. With regard to the intensity of the search, it entails an interference with the narrowest sphere of the right to spatial privacy. Therefore, the constitutional requirement of a prior court order under the second paragraph of Article 36 of the Constitution must apply in order to limit the search. With regard to the authorisation of the Agency to also search all data carriers and communication contained therein, the search also entails an interference with the right of companies determined by the first paragraph of Article 37 of the Constitution. Therefore, the challenged regulation entails an interference with the rights that protect the spatial and communication aspect of the privacy of legal entities. At this point it is necessary to again draw attention (see Paragraphs 17 and 20 of the reasoning of this Decision) to the fact that even though these constitutional rights of legal entities are protected by the Constitution, they are protected less intensely than the privacy of natural persons. The constitution-framer did not make use of this value-based starting point under Articles 36 and 37 of the Constitution to set milder fundamental formal conditions for interferences of the state with these two constitutional rights of legal entities. A lower degree of protection of legal entities could thus be reflected – in comparison with natural persons – especially in milder conditions for ordering the measure (with regard to the degree of suspicion, reasons for the measure, etc.) both on the abstract level and in concrete procedures, in the possibility to order more invasive and lengthy measures, etc. Such lowering of such constitutional protection cannot, however, be reflected in dispensing with the requirement of a court order – especially because of the purpose due to which this constitutional requirement was set. The purpose of prior authorisation, adopted by an independent and unbiased court, to interfere with this constitutional right is, as was underlined above (see Paragraph 29 of the reasoning of this Decision), to prevent abuses and to ensure respect for the equal legal treatment of all subjects. Also legal entities must be protected from arbitrary interferences by the state.
39. The Constitution envisages the court order as one of the conditions for the admissibility of both interferences whereby the only admissible exception therefrom is determined by the fifth paragraph of Article 36 of the Constitution.<sup>55</sup> The first sentence

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No. Up-1293/08 already adopted the position that its scope encompasses all the procedures in which *de facto* a criminal investigation is conducted under the guise of an inspection or supervision procedure and procedures in which the activity of officials is directed towards collecting data for subsequent criminal proceedings.

- 55 The stated constitutional provision allows that a law determine the detailed conditions under which an official may enter the dwelling of another person or other premises and in such place exceptionally without the presence of witnesses conduct a search, if such is absolutely necessary for the direct apprehension of a person who has committed a criminal offence or to protect people or property.

of the first paragraph of Article 28 of the PRCA-1 is not a statutory provision which under this authorisation of the constitution-framer would regulate the conditions for the urgent arrest of criminal offenders and for protecting people and property in dwellings and on other premises of other persons in a more detailed manner. Therefore, the fifth paragraph of Article 36 of the Constitution is not relevant for the constitutional review in the case at hand. What is decisive is that the first paragraph of Article 28 of the PRCA-1 determines that the measures which interfere with the spatial privacy of companies are ordered by the Agency, not a court, including when such measures are ordered and executed against the will of legal entities.<sup>56</sup> This is inconsistent with the express requirement under the second paragraph of Article 36 of the Constitution, which requires a prior court order in such instances. When exercising these authorisations, the Agency will – by the nature of the matter and with regard to the degree of their invasiveness which allows the Agency to conduct a complete search of business premises and the objects thereon – also interfere with the narrower circle of the spatial privacy of the legal entity. Therefore, it is necessary to concur with the applicant that the challenged provision, inadmissibly and inconsistently with the second paragraph of Article 36 of the Constitution, limits the constitutional right determined by the first paragraph of Article 36 of the Constitution and is thus inconsistent therewith.

40. The challenged statutory provision also allows interferences by authorised persons with the right that is guaranteed also to legal entities by the first paragraph of Article 37 of the Constitution. With regard to what is stated in Paragraphs 27 and 36 of the reasoning of this Decision, it is necessary to realise that interferences with that right by the exercise of the authorisations of the Agency determined by Article 29 of the PRCA-1 pursue a constitutionally admissible aim. Under the notion of criminal proceedings under the second paragraph of Article 37 of the Constitution, it is namely possible to also include, on the basis of the reasons stated in the mentioned paragraphs of the reasoning of this Decision, the procedure which the Agency conducts during the search, the constitutional admissibility of which is the subject of this review. However, the regulation that allows the Agency to carry out a search without a prior court order, which is expressly required by the second paragraph of Article 37 of the Constitution when interferences with communication privacy are at issue, is inconsistent with the stated provision and thus also with the right under the first paragraph of Article 37 of the Constitution.

*e) Determination of the Unconstitutionality and the Manner of the Implementation of the Decision*

41. Under the challenged statutory provision, it is admissible for the Agency, by exercising the authorisations under Article 29 of the PRCA-1, to interfere with the spa-

56 If a company disallows entry onto its premises, obstructs such, or disallows access to its business books or other documentation, obstructs such, obstructs the search in any other way, or if such is justifiably expected, the Agency can enter the premises or access business books or other documentation against the company's will with the assistance of the police. The costs of the entry or access and possible damage are to be covered by the company (the first paragraph of Article 31 of the PRCA-1).

tial and communication privacy of a legal entity without having, regarding such measures against the will of the legal entity, the prior authorisation of the judicial authority. With regard to the statutory regulation of such measures, the legislature could, in conformity with the positions in this Decision, determine some lower standards for the protection of the constitutional rights to privacy of legal entities (see Paragraph 38 of the reasoning of this Decision), but it would thereby have to take into consideration that in instances where the search interferes with the spatial and communication privacy of legal entities against their will, it should not dispense with the requirement of a prior court order. From this point of view, the PRCA-1 does not contain the regulation that the Constitution requires for ensuring the mentioned constitutional rights of legal entities. Therefore, in conformity with the first paragraph of Article 48 of the CCA, the Constitutional Court determined the challenged statutory provision to be unconstitutional and imposed on the legislature a time limit for remedying the unconstitutionality (Points 1 and 2 of the operative provisions). With regard to the presented starting points, the statutory regulation must at the same time respect the stated constitutional rights of legal entities<sup>57</sup> and ensure protection of the important constitutional values based on constitutional provisions, especially on those that prohibit the pursuit of commercial activities contrary to the public interest (the second sentence of the second paragraph of Article 74 of the Constitution), that prohibit unfair competition practices and practices which restrict competition in a manner contrary to the law (the third paragraph of Article 74 of the Constitution), and that require the effectiveness of Articles 101 and 102 of the TFEU (the third sentence of Article 3a of the Constitution) to be ensured. The legislature must adopt a complex legal regulation in order to ensure a balance between the mentioned constitutional values. Therefore, in conformity with the second paragraph of Article 40 of the CCA, the Constitutional Court decided that until the established unconstitutionality is remedied, the first sentence of the first paragraph of Article 28 of the PRCA-1 shall continue to apply (Point 3 of the operative provisions). This entails that the Agency has had and still has (until the established unconstitutionality is remedied) a lawful basis for conducting appropriate searches in the PRCA-1, which will also have to be taken into consideration by the competent court when assessing the constitutionality and legality of the Agency's work.

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57 With regard to the regulation of inspections conducted by the European Commission on the basis of EU law, when the national law in the case of a company's resistance [against the carrying out of an inspection] requires a prior court order (such a situation is allowed by the sixth and the seventh paragraphs of Article 20 of Regulation No. 1/2003), the legislature will have to take into consideration also the distribution of competences between the European Commission and the national court under the eighth paragraph of Article 20 of Regulation No. 1/2003. See also the Judgment of the Court of Justice of the European Union in *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*.

## B – IV

### Assessment of Articles 54, 56, 57, 59, and 61 of the PRCA-1

#### *a) Consistency with the Right to Appeal*

42. The applicant alleges the inconsistency of Articles 54, 56, 57, 59, and 61 of the PRCA-1 from Chapter 4 of Part V of the PRCA-1 (Judicial Protection) with the right to legal remedies under Article 25 of the Constitution. The applicant is of the opinion that judicial protection can, in conformity with the mentioned right, be attained only in proceedings where the court has full jurisdiction, in which the Administrative Court – the court of first instance – would assess both legal and factual questions, in which the parties would not be precluded from stating new facts and evidence, and in which the right to an appeal would be guaranteed against decisions of the court of first instance.
43. From the right to legal remedies guaranteed by Article 25 of the Constitution (the right to appeal or to any other legal remedy) there proceeds the obligation of the legislature to respect the principle of appellate review, the essential content of which is that the authority of second instance can assess the decision of the authority of first instance from the viewpoint of all questions necessary for deciding on rights and obligations.<sup>58</sup> The “any other” legal remedy in the sense referred to in Article 25 of the Constitution can also be a legal remedy by which the judicial proceedings are initiated, if such corresponds to the stated constitutional requirements.<sup>59</sup>
44. The Constitutional Court has already adopted the position that, under certain conditions,<sup>60</sup> a request to review the decision of a specialised state authority in judicial proceedings can assume the function of a legal remedy.<sup>61</sup> If in judicial proceedings that at the same time function as a legal remedy it is allowed to state all the legal and factual aspects of the case, such a regulation is not inconsistent with Article 25 of the Constitution. The challenged provisions ensure such judicial decision-making in proceedings before the Supreme Court. The Supreme Court can, in the framework of the reasons for the claim, verify without limitations the correctness and completeness of the establishment of the state of the facts as was established by the Agency (the Supreme Court is not bound by this), even though it cannot in such manner correct with finality the established errors and decide on the matter by a judgment. In the judicial protection proceedings under the PRCA-1, the Supreme Court has sufficient authorisations to verify a decision of the Agency from the viewpoint of all issues that are important for deciding on a right or obligation, or with regard to the existence of factual, material, or procedural errors.

58 Order of the Constitutional Court No. U-I-309/94, dated 16 February 1996 (OdlUS V, 21).

59 See Decision of the Constitutional Court No. U-I-219/03 and No. U-I-56/06, dated 15 March 2007 (Official Gazette RS No. 29/07, and OdlUS XVI, 21).

60 If the legal remedy before the court still ensures the fundamental purpose of the appellate review, as is guaranteed by the right under Article 25 of the Constitution – i.e. that the legal remedy is, by its nature, as efficient as an appeal against a decision of the specialised authority would be.

61 Decision of the Constitutional Court No. U-I-219/03.

The Supreme Court then substantively<sup>62</sup> (on the basis of a substantive analysis and assessment) decides on the correctness of the challenged act of the Agency regardless of the fact whether it rejects the action for not being substantiated, abrogates the challenged act and remands the case to the Agency for a renewed procedure, abrogates the challenged act and decides itself on the matter by a judgment, by an order declares the act of the Agency to be null, or, if the Agency remains silent, orders what administrative act it is to issue, or, if the decision has not been served, orders it to serve the decision (see Articles 63 to 65 and 67 to 69 of the AJRAA-1). Therefore, Articles 54, 56, and 59 do not limit the right to appeal and are not inconsistent with it. As the right to a legal remedy is already ensured in the case at issue, the regulation, which does not allow an appeal against a decision by the Supreme Court (Article 61 of the PRCA-1), is also not inconsistent with the stated provision of the Constitution, as it does not guarantee a further right to legal remedy after such has already been invoked and is thus exhausted.<sup>63</sup>

*b) Consistency with the Right to Judicial Protection*

45. Insofar as the applicant alleges that judicial proceedings should be regulated such that they unfold as so-called proceedings where the court has full jurisdiction, its allegations are to be interpreted as finding fault with the inconsistency with the first paragraph of Article 23 of the Constitution. As long as the decision of the Agency is reviewed from all factual and legal aspects that the legal entity has the right to invoke in proceedings before the Supreme Court, as is explained in the preceding paragraph of the reasoning herein, the statutory regulation does not interfere with the right to judicial protection under the first paragraph of Article 23 of the Constitution. A different position would namely entail that also the statutory regulation of the AJRAA-1, which regulates judicial protection in a comparable manner, is unconstitutional from the viewpoint of the mentioned right. Regulation of the manner of exercise of the right to judicial protection in these instances falls within the legislature's sphere of discretion. If the legislature decides to establish a special state authority that is to conduct appropriate procedures in which constitutional procedural guarantees are respected, and allows judicial protection against its decisions in a manner *mutatis mutandis* equal to the requirements under the first paragraph of Article 157 of the Constitution, such a regulation would not interfere with the right to judicial protection under the first paragraph of Article 23 of the Constitution.

*c) Consistency with the Right to the Equal Protection of Rights*

46. The applicant's allegations that in proceedings before the Supreme Court a legal entity cannot state new facts and evidence, entail alleging an inconsistency of Article 57 of the PRCA-1 with Article 22 of the Constitution. In conformity with the lat-

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62 Of course, only on the basis of a legal action which fulfils the substantive prerequisites for carrying out the assessment.

63 Compare with paragraph 50 of Decision of the Constitutional Court No. U-I-219/03.

ter provision, everyone enjoys the equal protection of rights in proceedings before a court and before other state authorities, local community authorities, and bearers of public authority that decide on his or her rights, duties, or legal interests. This right guarantees, among other things, the right of a party to make a statement and thus the entitlement that the party may state facts and propose evidence to its benefit. This ensures the right to adversarial proceedings, on the basis of which the court must regard the party as an active participant in the proceedings and enable it an effective defence of its rights and thus the possibility to actively influence the decision in matters that interfere with its rights and interests.<sup>64</sup> By Decision No. U-I-219/03, the Constitutional Court already adopted the position that a regulation which limits the right of a party to make a statement (i.e. the right to state facts and to propose evidence to its benefit) to a certain period during the course of the procedure entails an interference with the right under Article 22 of the Constitution. For the same reasons, also Article 57 of the PRCA-1 interferes with this human right of parties to competition procedures.

47. Human rights may only be limited in instances determined by the Constitution in order for the rights of others to be protected or for reasons in the public benefit (the third paragraph of Article 15 of the Constitution). If the legislature pursues a constitutionally admissible aim and if the limitation is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with those principles that prohibit excessive measures of the state (the general principle of proportionality), the limitation of the human right is admissible under the established constitutional case law.<sup>65</sup>
48. The aims of the prescribed measure proceed from the reply of the National Assembly, from the opinion of the Government, and from the opinion of the Agency. The constitutionally admissible aims that are pursued by the challenged limitation of the human right to the equal protection of rights include ensuring free and fair competition, a fast and efficient procedure for exercising supervision over violations of competition, ensuring the efficient execution of the obligations of the Republic of Slovenia under Articles 101 and 102 of the TFEU, and the suspension of the “centre of gravity” of the decision-making of the Agency as a specialised authority on matters regarding the protection of competition. As the regulation under Article 57 of the PRCA-1 can accelerate the judicial control proceedings and at the same time ensure that in proceedings only those facts can be established that had been established or were at least stated by a party in the procedure before the Agency, as the most suitable and specialised authority for that purpose, the preclusion of stating new facts and proposing new evidence at issue is an appropriate measure for attaining the stated aims.
49. In order to attain these aims in the judicial control proceedings over the decisions of the Agency adopted in procedures for the protection of competition, it is necessary

<sup>64</sup> Decision of the Constitutional Court No. U-I-146/07, dated 13 November 2008 (Official Gazette RS No. 111/08, and OdlUS XVII, 59).

<sup>65</sup> See Decision of the Constitutional Court No. U-I-18/02, dated 24 October 2003 (Official Gazette RS No. 108/03, and OdlUS XII, 86), Paragraph 25 of the reasoning.

to prevent the possibility of stating new facts and proposing new evidence as late as in the judicial proceedings. It is thereby necessary to take into consideration that while assessing the necessity of a certain measure, the Constitutional Court assesses whether the measure is necessary for the desired aim to be attained as successfully and to such a degree as is possible for that measure. Stated differently, another measure (that interferes more mildly or even does not interfere with human rights) can undermine the necessity of a stricter measure only if it is in no manner less efficient than it. In the case at issue, it is important that the introduction of the authorisation of the court to assess, in an individual case, whether the plaintiff had justifiably stated certain facts only as late as in the legal action, obviously cannot in an equally successful manner ensure the pursued aim of fast, efficient, and economical implementation of control over respect for the legal regulation of competition. The need of the Supreme Court to deal with (sometimes) complex admissibility questions regarding the subsequent submission of procedural documentation can namely make judicial proceedings more complicated and could also prolong them. Even more obvious is the necessity of the preclusion of stating new facts and proposing new evidence in order to prevent the separation of the factual basis of the dispute from the state of the facts that was outlined in the procedure before the Agency, which is an authority specialised for the protection of competition.

50. Whether the weight of the consequences of the examined measure is proportionate to the weight of the pursued aim depends above all on whether the party had sufficient opportunities to make a statement on all the relevant aspects of the case, whereby the party itself must contribute to the acceleration of the procedure. In the procedure before the Agency, the party has sufficient possibilities to suggest appropriate facts by means of which it challenges the accusations of the Agency regarding the existence of prohibited conduct under the PRCA-1, to prove these facts with appropriate motions for evidence, to present its legal positions, and to state its position in general with regard to all legally relevant aspects of the case. If the PRCA-1 does not state otherwise, the GAPA is applicable in the decision-making procedure of the Agency (the second paragraph of Article 15 of the PRCA-1), which in Article 9 states the principle of hearing parties.<sup>66</sup> Also the special regulation under the PRCA-1 guarantees adversarial proceedings.<sup>67</sup> It is especially important that the company against which the search was carried out can submit comments on the report on the search within fifteen days following its service (Article 34 of the PRCA-1) and that

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66 The first paragraph of Article 9 of the GAPA determines that before a decision is issued the party must be given the possibility to make a statement on all the facts and circumstances relevant for the decision. The third paragraph of Article 9 of the GAPA determines that the authority cannot base its decision on facts with regard to which all the parties were not given the possibility to make a statement thereon, except in instances determined by law.

67 Article 19 of the PRCA-1 determines that in order for the right to a defence to be ensured, the decision of the Agency must not be based on facts and evidence with regard to which the company against which the procedure is being conducted and the party submitting notice of a concentration were not given the possibility to make a statement thereon.

before a decision that is negative for the party is adopted, the party must be provided a summary of the relevant facts, which includes findings on the facts and evidence important for the decision. The party has the right to make a statement, within an appropriate period of time, on the summary of the relevant facts (Article 36 of the PRCA-1). The PRCA-1 even includes certain special procedural possibilities enabling proactivity, whereby the party can prevent the establishment of the existence of restrictive conduct or the adoption of a decision on the prohibition of a concentration due to an inconsistency with competition rules (the commitments referred to in Article 39 of the PRCA-1 and corrective measures under Article 51 of the PRCA-1). Article 57 of the PRCA-1 does not limit the parties when stating facts and evidence to their benefit, to such an extent that the weight of the interference with the right to the equal protection of rights would be disproportionate with the pursued aims. For this reason, it is not inconsistent with Article 22 of the Constitution.

51. With regard to all of the above, Articles 54, 56, 57, 59, and 61 of the PRCA-1 are not inconsistent with the Constitution (Point 4 of the operative provisions).

### C

52. The Constitutional Court reached this decision on the basis of Articles 21 and 48 and the second paragraph of Article 40 of the CCA, and the second indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS Nos. 86/07, 54/10, and 56/11), composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. Judge Dr Dunja Jadek Pensa was disqualified from deciding on the case. Points 1 to 3 of the operative provisions were adopted by seven votes against one; Judge Mozetič voted against. Point 4 of the operative provisions was adopted unanimously. Judge Mozetič submitted a partially dissenting opinion. Judge Zobec submitted a concurring opinion.

*Dr Ernest Petrič*  
*President*

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#### **PARTIALLY DISSENTING OPINION OF JUDGE MAG. MIROSLAV MOZETIČ**

1. I voted against the decision that the first sentence of the first paragraph of Article 28 of the Prevention of Restriction of Competition Act (hereinafter referred to as the PRCA-1) is inconsistent with the Constitution, which does not entail that I do not agree with some of the positions that are expressed in the reasoning of the Decision. Therefore, in this partly dissenting opinion I wish to explain with what I agree and with what I do not.
2. Briefly, in one sentence and very roughly and generally: I agree that also legal entities that exercise a business activity and that are subject to supervision under the PRCA-1 enjoy a certain degree of the expected privacy determined by Article 35 of the Consi-

tution; however, I do not agree with the position that they also enjoy constitutional protection under Articles 36 and 37 of the Constitution.

3. I entirely agree with the positions expressed in Paragraphs 13 to 16 of the Decision that essentially summarize the hitherto constitutional case law of the Constitutional Court. The Constitution undoubtedly ensures a high level of protection to an individual (to everyone) that enables him or her to “establish a sphere of his or her own intimate functioning in which he or she is allowed to decide him- or herself which interferences with it he or she will allow”. In addition, such requires protection wherever the person “justifiably expects to be left undisturbed” [...] and that “he or she will not be exposed to the eyes of the public”, and requires also “free and uncontrolled communication and thus the protection of the confidentiality of relations into which the individual – when communicating – enters.” Human privacy is a more or less complete whole of his or her behaviours and involvements, feelings, and relations, for which it is characteristic and essential that the person shapes and maintains it alone or alone with those near to him or her with whom he or she lives in intimate community, and that he or she lives in such community with a sense of being protected against intrusion by the public or any other undesired person (Decision of the Constitutional Court No. Up-32/94). The Constitution guarantees the protection of human privacy in all its aspects, especially the aspects of spatial (Article 36), communication (Article 37), and information privacy (Article 38). The constitutional protection of privacy stems from human – the individual’s – dignity and freedom. Also the right to privacy is not an absolute right, but interferences with it are only admissible under strict constitutional and statutory conditions.
4. I agree that it is not possible to refuse a certain degree of privacy also to legal entities, including spatial and communication privacy. Legal entities exercise certain activities that they certainly have an interest in not exercising in the public view and in the state not supervising at any time, arbitrarily, and unjustly. Such an expectation certainly proceeds from the right to free economic initiative (the first paragraph of Article 74 of the Constitution), as well as from the freedom of action (Article 35 of the Constitution). It is clear that legal entities *per se* do not perform any activity, as they are an artificial form, and that it is natural persons – individuals – that are the ones who lead and manage legal entities and perform their activities. I am of the opinion, though, that it is not possible to acknowledge that also legal entities perform their activities and the tasks that their activities and management comprise, and that it is not possible to attribute rights to them which otherwise individuals enjoy, even though in fact it is individuals who perform the stated activities.<sup>1</sup>
5. As already stated, proceeding from their free economic initiative and freedom of action, legal entities can perform various activities. They are free to do so, but they must not perform activities contrary to the public interest. The purpose of establishing a legal entity under commercial law is not connected to implementing the

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1 It is not disputable that individuals enjoy, also inside legal entities, a certain degree of protection of privacy under Articles 35 to 38 of the Constitution.

innermost and most intimate – protected from unwanted view – sphere of people's relations, as people establish such relations in families, within their circle of relatives, in groups of friends, i.e. in less formally defined formations. Legal entities are always oriented outwards, towards the society. Due to this outward orientation, their interests and conduct come into collision with the interests of the state and of other legal subjects. The density of the regulation – i.e. the presence of legal rules – with regard to relations into which legal entities enter, is always greater than with regard to informal relations into which people or natural persons enter. While the personal (at least non-business) relations of people are often only limited by the autonomy of their participants, legal entities under commercial law must at all times respect a series of limitations from the fields of labour relations, safety at work, environmental protection, tax and accounting regulations, consumer protection, reporting to supervisory bodies, public control, the fulfilment of subsidy conditions, etc. Due to the strongly expressed public interest in the transparent, correct, and lawful functioning of legal entities of the mentioned type, the need of the state to interfere with their internal sphere is greater and stronger than its need to interfere with natural persons' internal sphere. This is especially true in a modern regulatory state that asserts the public interest in all the operational fields of legal entities, especially in the commercial field. However, the public interest cannot be efficiently enforced and ensured without supervision over legal entities. Such supervision requires the possibility of reasonable access to the information and data that are elements of the internal sphere of legal entities that are subject to supervision by various public law regulators. A legal entity under commercial law is aware and must be aware of these facts since its establishment – the level of its legitimate expectation of privacy, which in my opinion is not entirely comparable [with that of natural persons], is thus significantly lower than that of natural persons.

6. I am therefore of the opinion that due to their nature and purpose of establishment, legal entities under commercial law cannot justifiably expect the same level of protection from interferences with premises and communication as natural persons can. I am convinced that they should be refused protection under Articles 36 and 37 of the Constitution, just as they have already been refused protection under Article 38 of the Constitution (Decision of the Constitutional Court No. U-I-84/03). Therefore, I am of the opinion that the right to privacy can only be recognised to legal entities under commercial law under Article 35 of the Constitution. The legitimate expectation of legal entities under commercial law does not consist of the fact that the state will not supervise, through its bodies, specifically the Agency, whether they act consistently with the public interest and in conformity with the rules. The sole legitimate expectation that legal entities have is that the state will not arbitrarily interfere with their operations. It concerns protection against arbitrary interferences. This means, above all, that authorisations for interferences with the privacy of legal entities must be clearly and specifically prescribed by law, that they have to be related to the purpose of the supervision prescribed by the law, and they must respect the principle of proportionality. Judicial protection must also be ensured.

7. From here onwards I mostly disagree. With regard to my position that [with regard to privacy] legal entities only enjoy the right determined by Article 35 of the Constitution, a test of the constitutionality of Articles 28 and 29 of the PRCA-1 with that Article would have to be carried out.
8. As the Constitutional Court adopted the position that legal entities also enjoy the rights determined by Articles 36 and 37 of the Constitution, due to the high level of protection of such rights granted to individuals, it had to take a position on the question whether these rights are to be attributed to the same extent also to legal entities. In my opinion, the Constitutional Court placed this level too high. On the other hand, however, there arises the question whether entry itself onto the “non-public” part of business premises against the legal entity’s will does not entail an interference with Article 36 of the Constitution. In addition, there also arose a problem regarding the interpretation of the second paragraph of Article 37 of the Constitution, which determines that it is possible to interfere with the privacy of correspondence and other means of communication where such is prescribed by law and only with a court order where such is necessary for the institution or course of criminal proceedings. Until now, theory held that interferences are only possible in criminal proceedings, not in minor offence procedures.<sup>2</sup> The Minor Offences Act (hereinafter referred to as the MOA-1) is also in line with such view, as it does not allow interferences with the privacy of correspondence and other means of communication.<sup>3</sup> By means of interpretation, the Constitutional Court has now broadened the term “criminal proceedings” also to minor offence procedures if what is at issue are minor offences which by their nature and the weight of the sanctions are comparable to criminal offences. Is thereby the path paved to interferences with communication privacy also in minor offence procedures? Probably not entirely, but at least in those cases when what is at issue is the search and seizure of electronic and connected devices and carriers of electronic data (the eighth indent of the first paragraph of Article 67 of the MOA-1) and in procedures in which the state authority seizes entire sources of documentation, including business correspondence. I do agree, however, that such an interpretation was necessary, otherwise it would be impossible for the Agency to collect the most important data necessary for its work. Despite this fact, the question is still open whether the Agency may interfere with communication privacy without having started a minor offence procedure beforehand. The Agency’s primary function is to exercise supervision and then also to carry out the minor offence procedure. However, the supervision procedure is not a minor offence (punitive) procedure.
9. The biggest problem of the PRCA-1 is obviously that it separates the supervisory procedure from the minor offence procedure. For the supervision procedure, the

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2 G. Klemenčič in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia: Supplement to the Commentary – A], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2011, p. 547.

3 See Article 67 of the MOA-1.

General Administrative Procedure Act is used subsidiarily, judicial protection is guaranteed before the Supreme Court and the MOA-1 is used for the minor offence procedure. In practice, I believe, it is impossible for these two procedures to be separated. The supervision initiated by the Agency finishes, not always, but as a general rule, with the finding that the supervised [legal] entity acted contrary to Articles 6 or 9 of the PRCA-1. Such finding is followed by supervisory sanctions and a fine. It entails that the supervision procedure finishes, as a general rule, with the minor offence procedure, in which a fine is imposed. With regard to this, the Constitutional Court states: “In the minor offence procedure, the Agency imposes a fine as a repressive measure for general, special-preventive, and retributive purposes (therefore it is a punitive sanction). The amount of the fine that it may impose is high. In minor offence procedures, judicial control, which includes a request for judicial protection before the competent court, under the provisions of the MOA-1, is guaranteed against the decisions of the Agency. It seems that the supervision procedure and the minor offence procedure under the PRCA-1 are formally separated procedures. However, they are both conducted by the same authority (the Agency), they refer to the same state of the facts and evidence acquired in the search procedure (also on the basis of the search order), which is a phase of the supervision procedure, will also regularly and expectedly be used in the minor offence procedure. Moreover, they may even find their way into criminal proceedings. In instances where the Agency, when exercising its authorisations under Article 29 of the PRCA-1, also establishes elements of a minor offence, the search will thus continue in the minor offence procedure – therefore in a punitive procedure – and the evidence acquired therein will possibly even serve as the basis for initiating criminal proceedings. Therefore, it is not that relevant whether the procedure which the applicant halted before having filed the request is in itself a punitive procedure – what is decisive is that the data and evidence acquired in the search conducted on the basis of the authorisations under Article 29 of the PRCA-1 will subsequently serve as the basis of all the stated procedures. Most often this will be the minor offence procedure which is carried out *ex officio* by the Agency. Therefore, the stated authorisations of the Agency are to be interpreted as authorisations given to a state authority in order to carry out a punitive procedure and, with regard to the possible reuse of the acquired evidence in the criminal proceedings before the competent court, also to conduct criminal proceedings. Efficient execution of the supervision procedure under the PRCA-1 during the search is namely also a necessary condition for successfully imposing sanctions on the legal entity which by violating competition rules committed a minor offence and possibly also a criminal offence.”

10. As soon as the authorisations of the Agency are to be interpreted as authorisations granted to a state authority to carry out a punitive procedure, it is clear that from the moment when the conditions for the initiation of a minor offence procedure are met it is necessary to act in accordance with the MOA-1. Such entails that the provisions of the Criminal Procedure Act apply *mutatis mutandis* for ordering a house or

personal search, for the seizure and inspection of electronic devices and connected devices and carriers of electronic data, and for interferences with the privacy of correspondence and other means of communication (Articles 58 and 67 of the MOA-1).

11. It is the responsibility of the legislature to ensure that supervision under the PRCA-1 will still be effective and to determine how it is to be regulated so that in addition to ensuring a high level of protection of the spatial and communication privacy of legal entities that perform an economic activity it will still be able to attain its aim, which does not lie primarily in imposing sanctions, but in ensuring healthy and fair competition between companies, which as a result above all protects consumers.

*Mag. Miroslav Mozetič*

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#### **CONCURRING OPINION OF JUDGE JAN ZOBEC**

1. In this concurring opinion I wish to emphasise, above all, my perspective on the broadening of human rights into the sphere of corporations. Let me state at the outset that I have some reservations with regard to this matter. In regulated and substantively functioning constitutional democracies based on the rule of law, human rights are not primarily jeopardised so much by the state and its domineering apparatus as they are jeopardised by organised (international) crime, terrorism, and corporations with anonymous and (even transnationally) intertwined capital that is therefore difficult or impossible to trace. It is completely ordinary that a corporation has its management in one country, its production in another (where standards for the protection of human rights are lower), is supplied with raw materials and components from a third one, its shareholders are in still other countries, and its products are sold worldwide, while its registered office and profits are to be found in some tax haven. The inexhaustible power and capacity of the state to produce mass evil, which was demonstrated during the Second World War and by the expansion of communist dictatorships in its aftermath, are today demonstrated by other non-governmental institutions and entities. Already more than 230 years ago, John Adams reached the conclusion that when economic power becomes denser and concentrated in the hands of a small group of individuals, also the political power consequently flows towards them and away from the people, which eventually results in oligarchy and tyranny. Or, as phrased by Andrew Clapham, the emergence of new, fragmented centres of power like associations, interest groups, political parties, trade unions, corporations, multinational corporations, and quasi-official bodies entails that today an individual perceives power, repression, and alienation in a multitude of different new bodies and institutions. Such social “development” requires that the definition of the public sphere be accordingly adapted – so as to include these new entities, institutions, and bodies, together with their activities.<sup>1</sup>

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1 Cf. A. Clapham, *Human Rights in the Private Sphere*, Oxford University Press, Oxford 1996, p. 137.

2. Legal entities, as the greatest legal abstraction, are the first of the instruments that enable what Adams draws attention to – especially when capital is detached from its original holders, liberates itself, and starts to live a life of its life (which is what happens in the majority of corporations). The position of Susan Strange, who underlines the need to conceptualise the power that is beyond the political power and which necessarily includes the economic power and who concludes therefrom that markets are more important than states,<sup>2</sup> is demonstrated by the current situation of the debt crisis that is destroying national economies and together with them the public stability of countries. Subsequently, human rights, the protection of which – and especially also their content – depends on the economic power of the state, are also being destroyed.<sup>3</sup> Therefore, it would be difficult for me to contribute my vote to a decision that recognised human rights to legal entities without specifically underlining that the constitutional (and not human) rights of legal entities are protected for the sake of individuals, free human beings, and not for the sake of legal entities, which are nothing other than a virtual product of abstract legal thought.
3. Due to the increase in their influence on states, national economies, important social sub-systems (including the media that significantly influence the shaping of public opinion), and consequently on the lives of individuals and their capacity and suitability to be connected into different influential economic and political interest networks, corporations and specifically multi- and transnational corporations are becoming centres of power which attain or exceed the power of individual states.<sup>4</sup> The classic approach under which also these (capital) subjects have rights equal to those of individuals and that are in a horizontal (equal) relation with them, while against the state they are only powerless subjects which need protection from the state, a possible violator of human rights, is the least questionable due to all these generally known properties which render these subjects comparable with the state with regard to their power and factual influence. I dare to say that in order to assess the interferences of corporations (especially transnational ones), the vertical approach is more suitable than the (classic) horizontal approach. Therefore, I agree with the position that the inclusion of these subjects – at least corporations in majority state ownership) – into the notion of the public sphere should be considered.<sup>5</sup> I also think

2 See S. Strange, *The Retreat of the State, The Diffusion of Power in the World Economy*, Cambridge University Press, Cambridge 1996, p. 16 *et seq.*

3 In this regard, the situation in Cyprus and Portugal and the most recent decision of the Portuguese Constitutional Court are instructive, by which it was determined that four of the nine disputed austerity measures which refer to retired persons and public officials were unconstitutional, whereby the state finances will be deprived of EUR 1.5 billion, which entails that the state will not be eligible for its EUR 78 billion bailout from the IMF and the ESM. The Decision of the Court is accessible at: <http://www.tribunalconstitucional.pt/tc/acordaos/20130187.html>.

4 In extreme cases, transnational corporations even assume some attributes of a state. Cf. S. R. Ratner, *Corporations and Human Rights – A Theory of Legal Responsibility*, *The Yale Law Journal*, No. 111; 2001, pp. 500, 524 *et seq.*

5 This is the direction in which also the case law of the German Federal Constitutional Court is developing (cf. the Judgment in the case Fraport 1BvR 699/06, dated 22 February 2011).

that a new balance in the state–corporation relation should be sought, as well as a different methodological approach for resolving conflicts between them, especially when the aim of state interferences with their rights is the protection of individuals' human rights (for instance, those of workers, consumers, a certain category of the population, etc.) or, as in the case at issue, the effective supervision and prevention of conduct which limits the competition, the prevention of damage to the economy and consumers, the effective fulfilment of the state's obligations under EU law, and laying the foundations of economic development.<sup>6</sup>

4. It is true that the human right to free economic initiative is implemented through commercial legal entities. For the majority of corporations it is also true, however, that contact with the human substratum, which is the original holder of this human right, is extremely weak, often also undiscoverable, unrecognisable, and lost. As the right determined by the first paragraph of Article 74 of the Constitution is recognised to legal entities only because (and insomuch as) individuals exercise their human right to free economic initiative through it, it also seems logical to me that the constitutional charge of this right of commercial legal entities is weaker the more individuals – as the real, right, or, if you prefer, ultimate holders of this human right – are distant from the respective legal entity. Therefore, the more this legal abstraction – and, on the other hand, the economic, capital, social, and political reality – liberates itself and moves away from its human substratum (for instance by the state entering into deciding on the proprietorial structure) due to which it even enjoys some (those more constitutional) rights, the weaker the protection of its constitutional rights. They are namely nothing but mere measures for the implementation of the human right to free economic initiative, which is, as an emanation of human dignity and freedom, a goal in itself. The original and the real holder of the right to free economic initiative is the individual, the individual human being – not some imaginary legal form.
5. Such a starting point is correctly reflected by some parts of Paragraphs 18, 20, and 38 of the reasoning of the Decision – those which specifically underline what is essential in my opinion: the rights to spatial and communication privacy are nonetheless guaranteed by the Constitution, but less intensely than the privacy of natural persons is protected. I am of the opinion that they are even essentially less protected and also not unconditionally – they are not ends in themselves, but are only one of the instruments for the implementation of the human right to free economic initiative. I think it should be underlined in Paragraph 18 of the reasoning that some of the rights that the Constitution guarantees to natural persons as human rights are, nonetheless, to be recognised also to legal entities as constitutionally guaranteed rights – but not because legal entities and their respective con-

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6 Only free competition enables full exercise of constitutionally protected free economic initiative, while free and fair competition is also the objective of Articles 101 and 102 of the TFEU, which means that it is a value which is directly guaranteed in the founding treaties of the European integration and must therefore also be regarded as one of the fundamental values of Slovene constitutional law.

stitutional rights are as such ends in themselves, but because through them natural persons' human rights are protected. What is equally important is also the position that Paragraph 20 of the reasoning finishes with: "As legal entities are artificial forms which are constitutionally protected in order for the sphere of individuals' freedom to be widened and protected, the level of their protection can from the outset be lower than for natural persons."

6. Precisely for this reason it is difficult for me to concur with the conclusion with which the next paragraph of the reasoning ends, whereby the Constitutional Court says that in the narrowest circle of spatial privacy also a legal entity can expect the same constitutional protection of spatial privacy as a natural person. In my opinion, it cannot. A legal entity cannot expect such already because legal entities are purpose-made and therefore instrumental forms – companies are means for exercising the individual's right to free economic initiative. The means (economic legal entities), however, do not equal the aim (the individual and his right to free economic initiative). As legal entities are purpose-made, the range and scope of their rights (in the case at issue, regarding spatial and communication privacy), which only serve their (constitutionally protected) purpose, is also determined by this purpose – however not because of the legal entity, an imaginary legal abstraction, but because of its human substratum. Only that is the true bearer of the human right that it implements in a corporate manner through the legal entity. The protection of spatial and communication privacy thus only has constitutional legitimacy in that it protects the aim – the individual, his liberty, his dignity, and, with regard to companies, his right to free economic initiative (which is implemented in a corporate manner through this purpose-made form). Even if we say that legal entities enjoy constitutional protection of privacy, their right to privacy is instrumental – it is intended for the exercise of the purpose of the legal entity and its human substratum and is limited thereby.<sup>7</sup> Therefore, also the scope of protection of a religious community's private sphere is something completely different than the protection of some hypermarket corporation in predominantly state ownership.
7. If that is my opinion, perhaps someone could wonder why I voted in favour of the Decision in the first place. If Articles 36 and 37 only protect the spatial and communication aspect of individuals' privacy, while legal entities only enjoy constitutional protection as purpose-made forms through which some human rights and freedoms are exercised (free economic initiative, freedom of religion, the right of association, etc.), then the only human right that can be constitutionally protected is that one

7 Such proceeds from Paragraph 20 of the reasoning of the Decision, where the Constitutional Court says: "It is not possible to imagine how a legal entity could plan its activities and attain its objectives in an undisturbed manner if it did not have the possibility to protect the fact of and data on its activities from (arbitrary) interferences by the state or from interferences by other individuals, or if it was not guaranteed a certain space safe from unwanted intrusions, and the possibility of safe and private communications, including at a distance." In my opinion, the privacy of the legal entity is only protected through the purpose of the legal entity, i.e. it existing as a means for ensuring free economic initiative. Thereby, also the content and the scope of the individual legal entity's protected privacy are determined.

whose instrument is an individual legal entity. When legal entities are at issue, this right is that which is determined by Article 74 of the Constitution, and not also the constitutional guarantees determined by Articles 36 and 37 of the Constitution that protect an individual's personal matters which he or she wishes to remain hidden and which by the nature of the matter or with regard to moral conceptions, or which with regard to societal customs are regarded as hidden – whereby the subject of protection are not premises, technical measures, and communication as such, and also not an individual's personal matters, but the individual and his privacy.

8. However, it is precisely for this reason that I support the Decision. The disputed measures namely do not allow only interferences with the legal entity (to which, because it only represents a means, I do not feel unconditional legal empathy), but they also enable intrusions into individuals' privacy – the privacy of those individuals who work for the legal entity that is subject to a search. The legal entity namely functions through individuals who are obliged to spend an important part of their lives on its premises. Its communication is also not carried out by some imaginary legal abstraction, but by individuals who act on its behalf (partners, management, employees, etc.). And even though what is at issue are business premises and business communication where, due to the openness of these premises and the outward-oriented communication, the expected privacy is essentially lower than in a domestic environment (where the individual has exclusive authority over the space of the dwelling and over all materials in it), it is not possible to entirely and in advance exclude certain aspects of an individual's privacy both with regard to the premises where he or she performs his or her work (profession) and with regard to his or her business or professional communication. The business premises of legal entities are, to a certain extent, also the private space of their employees (even though to a much lesser extent than dwellings, which are hidden from public view and where everyone can justly expect to be left undisturbed), and business communication can also mix with private communication.<sup>8</sup> If employees spend more than eight hours on the premises of the legal entity daily, for instance in their offices, it is understandable that they cannot leave all objects pertaining to privacy at home – they bring some of them “to work” and can leave them there (in a drawer, on a shelf, on a computer, etc.). The mixing, overlapping, and blending of what is professional and what is private happens especially in unincorporated companies. In order to prevent the occurrence of abuses and arbitrariness where, in the framework of the search of a company, the search of an individual's private possessions would in fact be conducted, I believe it right for there to exist prior judicial control of such actions. Such control is an effective safeguard against arbitrary interfer-

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8 Cf. Order of the German Federal Constitutional Court 1 BvR 1611/96 and 1 BvR 805/98, dated 9 October 2002, Para. 34. Cf. also *Niemietz v. Germany*, dated 16 December 1992, from which there likewise proceeds an important emphasis that the right to private life includes, to a certain extent, the right to establish and to develop relations with other people, from which it is not possible to exclude professional or business activities, especially because it is not always possible to clearly delimit an individual's activities with regard to which sphere they pertain to.

ences by the state and at the same time it cannot entail a considerable impediment to the effectiveness of the Agency's work. Here also, with the legal construct of the constitutional rights of the imaginary legal form, we in fact protect specific individuals and their tangible and "living" rights to privacy – without thereby seriously hindering the effectiveness of preventing trusts and abuses of a dominant position. For such reason, I voted for the Decision in spite of my disagreement with the conceptual approach on which the Decision is based.

*Jan Zobec*

U-I-40/12

11 April 2013

**DECISION**

At a session held on 13 February 2014 in proceedings to decide upon the constitutional complaint of Igor Benedik, Kranj, represented by Mag. Mitja Jelenič Novak, attorney in Ljubljana, the Constitutional Court

*decided as follows:*

The constitutional complaint against Judgment of the Supreme Court No. I Ips 216/2010, dated 20 January 2011, in conjunction with Judgment of the Higher Court in Ljubljana No. II Kp 425/2009, dated 4 November 2009, and Judgment of the District Court in Ljubljana No. K 79/2008, dated 5 December 2008, is dismissed.

*Reasoning***A**

1. The complainant was found guilty of the criminal offense of the possession and distribution of pornographic material determined by the third paragraph of Article 187 of the Penal Code (Official Gazette RS, No. 95/04 – official consolidated text – hereinafter referred to as the PC) in conjunction with the first paragraph of Article 7 of the Penal Code (Official Gazette RS, No. 55/08, 66/08 – corr., 39/09, and 91/11) by the judgment of the District Court in Kranj. He was handed a suspended sentence; however, the Higher Court in Ljubljana amended the judgment with regard to the criminal sanction and pronounced a six-month prison sentence on the complainant. The Supreme Court dismissed his request for the protection of legality.
2. The complainant alleges a violation of the rights determined by Articles 37 and 38 of the Constitution, since the judgment was allegedly based on evidence obtained in violation of the right to communication privacy. He states that the Swiss law enforcement authorities conducted a systematic review of the content of communications by Razorback network users without there being a reasonable suspicion regarding any of the users or at least reasonable grounds for suspicion that they own or exchange child pornography, and that therefore an appropriate court order to obtain such data should

have been issued. The complainant also alleges that the Police obtained the data on who the user of a certain dynamic IP address was<sup>1</sup> first by means of a request of the Police under the third paragraph of Article 149.b of the Criminal Procedure Act (Official Gazette RS, Nos. 96/04 – official consolidated text, and 101/05 – hereinafter referred to as the CrPA), and subsequently obtained the same data also on the basis of the order of the investigating judge issued under the first paragraph of Article 149.b of the CrPA.<sup>2</sup> In the view of the complainant, a prior court order should have been issued also for these data, since such entail both personal data as well as traffic data in electronic communications networks, and in addition, an individual has a legitimate expectation of privacy with regard to a dynamic IP address.<sup>3</sup> The complainant alleges that the Police should have obtained a court order also for a review of the files on the computer that was seized during the house search. As the Police did not have a court order for any of the three investigative actions, the complainant states that the evidence was obtained in violation of Articles 37 and 38 of the Constitution, therefore, the judgment should not be based on this evidence and such should be removed from the file.

3. By Order of the Panel No. Up-540/11, dated 25 October 2010, the Constitutional Court accepted the constitutional complaint for consideration. Pursuant to the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA), the Supreme Court was notified of the acceptance of the constitutional complaint.
4. On the basis of Article 5 of the CCA, the Constitutional Court requested that the office of the Information Commissioner [hereinafter referred to as the Information Commissioner], who publicly expressed its position regarding the issue of the transmission of data on subscribers of electronic communication services at the request of the Police, issue a more detailed explanation of its opinion.<sup>4</sup> In its comprehensive reply it explained that in its view the key issue is whether access to data on the identity of the communicating individual falls within the scope of communication privacy and is therefore regulated by the strict conditions determined by the second paragraph of Article 37 of the Constitution. It argues that law enforcement authorities do not care who the subscriber or user of a particular means of communication is, but

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1 An IP address is a number that precisely determines a device connected to the internet (the abbreviation IP stands for Internet Protocol).

2 At the time of obtaining the data regarding the IP address and its user (20 February 2006 and 7 June 2006) the cited Criminal Procedure Act was in force, but the wording of Article 149.b thereof remained unchanged until the Act Amending the Criminal Procedure Act (Official Gazette RS, No. 91/11) came into force.

3 IP addresses are assigned as either a static or a dynamic address. The allocation of a static IP address entails continuous use of a single IP address, while the allocation of a dynamic address entails the random allocation of a new/different IP address upon every connection to the internet.

4 E.g. in their Opinion on the Transmission of Data Regarding Dynamic IP Addresses to the Police, No. 0712-259/2009/2, dated 11 June 2009, and similarly also in the appeal to the deputy groups, dated 4 October 2012, available at: <https://www.ip-rs.si/novice/detajl/apel-informacijskega-pooblastenca-k-previdnosti-glede-poo-blastil-za-posege-v-komunikacijsko-zasebn/?cHash=d89468d16600c1ae9be3cd80e9b23275>, and in Opinion No. 0712-1/2012/2854, dated 4 June 2013.

are interested in who actually communicated with such. The reason for obtaining the identity of an individual is precisely that he communicated by means of more or less publicly accessible websites. Therefore, the Information Commissioner deems that it is necessary to change the rhetoric on the admissibility of obtaining data regarding individuals with a given IP address, be it static or dynamic, towards a discussion of what information is actually sought. In its opinion, it is impossible to separate traffic data from subscriber data as traffic data alone does not make any sense if one does not ascertain who the person behind these data is, and the Information Commissioner deems such to be an extremely important element of communication privacy. It also opines that communication privacy entails not only the content of the communication, but also the facts and circumstances related to the communication, which also include information on who communicated when and with whom. It also highlighted that the provisions of the Electronic Communications Act (Official Gazette RS, No. 13/07 – official consolidated text, 110/09, and 33/11) in force at the time in question, which are in its opinion in accordance with the second paragraph of Article 37 of the Constitution, require a court order regarding all data related to electronic communications, irrespective whether such relates to traffic or identification data (e.g. who is using a certain IP address or telephone number). In its view, the third paragraph of Article 149.b of the CrPA, which requires only a written request of the Police to obtain data on who was communicating, is constitutionally problematic. Its criticism expressed publicly regarding the draft proposal of the seventh paragraph of Article 166 of the new Electronic Communications Act (Official Gazette RS, No. 109/12 and 110/13 – hereinafter referred to as ECA-1), which initially required only a written request of a state body for access to data on a subscriber of electronic communication services, must also be understood in this light.<sup>5</sup> The Information Commissioner also highlights the issue that it has not yet dealt with in its opinions, namely whether an individual who publicly discloses the content of his or her communication (e.g. an individual who expresses his or her opinion publicly to a more or less wide circle of readers on the web) continues to enjoy the protection determined by Article 37 of the Constitution regarding traffic data.

5. The opinion of the Information Commissioner was sent to the complainant, who did not respond.
6. In the framework of deciding on the constitutional complaint, the Constitutional Court inspected court file No. K 79/2008 of the District Court in Kranj.

### **B – I**

7. In the constitutional complaint the complainant states that the judgment is based on evidence obtained in violation of Articles 37 and 38 of the Constitution, but the substance of his submissions claiming that the Police should have obtained a court order for all three investigative actions only refers to the violation of Article 37 of the

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<sup>5</sup> In the procedure for adopting the new ECA-1 the wording of the seventh paragraph of Article 166 was later rejected, therefore the disputed paragraph does not exist in the current ECA-1.

Constitution. Based on the above, the Constitutional Court reviewed the judgment in the light of Article 37 of the Constitution.

## B – II

### **Review of the objections regarding access to the complainant's IP address by the Swiss Police**

8. The complainant opposes the standpoint of the Supreme Court that the dissemination of child pornography via the internet by using the eMule application (and in this way providing content to all interested parties) cannot be defined as circumstances and facts related to the private communication of a particular computer user. In the assessment of the Supreme Court, such a manner of communication, given the general accessibility of websites and the fact that the Police could check the data without special interventions in internet traffic and only on the basis of monitoring those clients that shared the controversial content, enables a practically unidentifiable number of random contacts, therefore one cannot speak of private communication protected by Article 37 of the Constitution. The complainant alleges that the information on the dynamic IP address is a *sui generis* identification datum that exists in the space between personal and traffic data and its holder legitimately expects privacy thereof, therefore it cannot be obtained without a court order. With respect to these claims, the Constitutional Court reviewed whether the stated standpoint of the Supreme Court is in accordance with Article 37 of the Constitution.
9. The component of privacy that concerns the freedom of communication is protected twice by the Constitution: in Article 35, which sets out the general rule that everyone has the right to privacy and that privacy is inviolable, and in particular in the first paragraph of Article 37, which provides for the privacy of correspondence and other means of communication.<sup>6</sup> Under the latter paragraph the Constitution guarantees free and uncontrolled communication and therewith the confidentiality of relationships an individual enters into when communicating. The conditions for restrictions of the right to the privacy of correspondence and other means of communication are determined by the second paragraph of Article 37 of the Constitution, namely a restriction of the freedom of communication is admissible if:
  - (1) it is prescribed by law,
  - (2) it is allowed on the basis of a court order,
  - (3) the duration of the interference is explicitly limited, and
  - (4) if such is necessary for the institution or course of criminal proceedings or for reasons of national security.
10. In the framework of the right to respect for private and family life, the right to communication privacy is also determined by the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94

<sup>6</sup> Cf. Decision of the Constitutional Court No. U-I-25/95, dated 27 November 1997 (Official Gazette RS, No. 5/98, and OdlUS VI, 158).

– hereinafter referred to as the ECHR) in Article 8<sup>7</sup> and the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the ICCPR) in Article 17.<sup>8</sup> It follows from the settled case law of the European Court of Human Rights (hereinafter referred to as the ECtHR) that protection under Article 8 of the ECHR is afforded not only to the content of the message but also the circumstances and facts related to the communication.<sup>9</sup> The ECtHR dealt with the right to respect for one's private life in relation to online communication in the judgment in the case *K.U. v. Finland* from the perspective of the victim.<sup>10</sup> It decided that Finland did not adequately protect the right to respect for the applicant's private life as the confidentiality requirement had been given precedence over his physical and moral integrity, and consequently had violated the applicant's right determined by Article 8 of the ECHR.<sup>11</sup>

11. The second paragraph of Article 37 of the Constitution provides a higher level of protection than Article 8 of the ECHR as it requires a court order for any interference with the right to communication privacy.<sup>12</sup> The constitutional review of the case must therefore be performed on the basis of the Constitution. The right to communication privacy determined by the first paragraph of Article 37 of the Constitution primarily protects the content of the communicated message. Therefore, it ensures protection of the individual's interest that no one will gain knowledge of the content of the message transmitted through any means that enable the exchange and dissemination of such data without his or her consent, as well as the interest of individuals to decide freely to

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7 Article 8 of the ECHR determines that: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

8 Article 17 of the ICCPR determines that: "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks."

9 Cf. judgment in the case *Malone v. The United Kingdom*, dated 2 August 1984, para. 84; the same in the judgment in the case *P.G. and J.H. v. The United Kingdom*, dated 25 September 2001, para. 42.

10 In the cited judgment, dated 2 December 2008, the ECtHR reviewed a case where an unknown perpetrator posted an ad on an Internet dating site posing as the 12-year old applicant, announcing that he was looking for an intimate relationship with a boy of his age or older to show him the way. The Police requested the identity of the holder of the IP address directly from the service provider, but unsuccessfully. Subsequently, a court also refused to issue a court order since there was no explicit legal provision authorising the disclosure of the holder due to such criminal offenses. The actual perpetrator was thus never found.

11 In the cited judgment the ECtHR emphasised that the freedom of expression and confidentiality of communications are important considerations that must be respected also on the internet, but such protection cannot be absolute. In instances such as in the case at issue, the physical and moral integrity of a minor is at stake, which requires that the state acts especially diligently and sets up a system that efficiently deters the commission of criminal offences. In the view of the ECtHR, on such occasions the freedom of expression and confidentiality of communications must yield to the prevention of crime and the protection of the rights of others.

12 Cf. in detail, Decision of the Constitutional Court No. U-I-40/12, dated 11 April 2013 (Official Gazette RS, No. 39/13).

whom, to what extent, how, and under what conditions they will transmit a particular message.<sup>13</sup> In addition to the message content, the circumstances and facts related to the communication are also protected. In accordance with this view, in Decision No. Up-106/05, dated 2 October 2008 (Official Gazette RS, No. 100/08, and OdlUS XVII, 84) the Constitutional Court extended the protection provided by Article 37 of the Constitution also to such data regarding telephone calls that by their nature constitute an integral part of communication so that such data cannot be obtained without a court order.<sup>14</sup> The mentioned Decision refers otherwise to telephone communication, but the same conclusion can be applied *mutatis mutandis* to other types of communication at a distance. The crucial constitutional review test for the review of the Constitutional Court whether a particular communication is protected under Article 37 of the Constitution is the test of the legitimate expectation of privacy.<sup>15</sup>

12. Communication via the internet takes place, in principle, in an anonymous form, which is essential for the free development of personality, freedom of speech, and the expression of ideas, and, consequently, for the development of a free and democratic society. The privacy of communication protected by the strict conditions determined by the second paragraph of Article 37 of the Constitution is therefore a very important human right that is becoming increasingly important due to technological advances and the related growing possibilities of monitoring such. It entails individuals' legitimate expectation that the state will leave them alone also in their communication through modern communication channels and that they do not necessary have to defend themselves for what they do, say, write or think. If there is a suspicion of a criminal offense the Police must have the ability to identify the individuals who have participated in a certain communication related to an alleged criminal offense, because the perpetrators are harder to trace due to this principle of anonymity on the internet. The conditions under which the Police can carry out investigative actions and whether they need a court order, however, depend on whether such entail an interference with the right to communication privacy.
13. As was pointed out above, in addition to the content of communications, Article 37 of the Constitution also protect traffic data. Traffic data signifies any data processed for the transmission of communications in an electronic communications network or for the billing thereof.<sup>16</sup> Such entails that the IP address is a traffic datum. The

13 Similarly, G. Klemenčič in: L. Šturm (ed.), *Komentar Ustave RS – Dopolnitev komentarja – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, p. 522.

14 These are so-called traffic data, e.g. regarding the last calls made and unanswered calls evident from the phone memory.

15 Cf. Decision of the Constitutional Court No. U-I-25/95.

16 Such are, for example, data relating to the routing, duration, time or volume of messages, the protocol used, the location of the terminal equipment of the sender or the recipient, the beginning, end, and duration of a connection, and similar. Cf. Point 25 of Article 3 of the Electronic Communications Act (Official Gazette RS, No. 43/04), which was in force at the time the data was accessed, but the current ECA-1 defines traffic data, *mutatis mutandis*, in the same manner (Point 45 of Article 3).

Constitutional Court must therefore answer the question whether the complainant legitimately expected privacy regarding this datum.

14. Two factors must be weighed in relation to this review: the expectation of privacy regarding the IP address and the legitimacy of this expectation, where the latter must be of such nature that the society is willing to accept it as legitimate.<sup>17</sup> The complainant in the case at issue communicated with other users of the Razorback network by using the eMule application to exchange various files, including those that contained child pornography.<sup>18</sup> With regard to the general anonymity of internet users and also the content of the files, the Constitutional Court has no doubt that the complainant expected that his communications would remain private, and he also certainly expected that his identity would not be disclosed. The question therefore is whether such expectation of privacy was legitimate. The complainant has not established that the IP address through which he accessed the internet was hidden in any way, and thus invisible to other users, or that access to the Razorback network (and thus to the content of the files) was in any way restricted, for example by passwords or other means. Namely, that by such conduct he as a user had clearly expressed his intention that he wanted to keep his communications and identity private or that he legitimately expected privacy therewith. In other words, the subject of protection afforded by Article 37 of the Constitution is communication regarding which the individual legitimately expects privacy and makes that clear to the outside world. In contrast, in the complainant's case anyone interested in exchanging such could have accessed the contested files, and the complainant has not demonstrated that his IP address was in any way concealed or inaccessible by other users of this network. This leads to the conclusion that this entailed an open line of communication with a previously undetermined circle of strangers using the internet worldwide who have shown interest in sharing certain files, while at the same time access to the IP addresses of other users was not limited to users of this network. Therefore, in the view of the Constitutional Court, the complainant's expectation of privacy was not legitimate; that which a person knowingly exposes to the public, even if from a home computer and the shelter of his or her own home, cannot be a subject of the protection afforded by Article 37 of the Constitution. In view of the foregoing, the contested standpoint of the Supreme Court does not raise concerns regarding constitutional law. Obtaining the data regarding the complainant's dynamic IP address does not interfere with his right to communication privacy determined by the first paragraph of Article 37 of the Constitution taking into account all the circumstances of the case, therefore a court order was not necessary to access it.<sup>19</sup> By his conduct

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17 Cf. Decision of the Constitutional Court No. Up-3381/07, dated 4 March 2010 (Official Gazette RS, No. 25/10).

18 In criminal law theory, the term "child pornography" is gradually being abandoned and the term "child sexual abuse images or materials" is increasingly being used. However, given that the ordinary courts in these proceedings used the term "child pornography" and that the same term is used in the Penal Code, the Constitutional Court also used it in this Decision for reasons of clarity.

19 Cf. also Decision of the Austrian Constitutional Court No. B 1031/11, dated 29 June 2012, in which the Court dealt with a case in which the complainant chatted in an online chat (chatroom) and one of other participants

the complainant himself waived his right to privacy and therefore could not have a legitimate expectation of privacy therewith.

15. As a result of the decision that the conduct of the Police did not constitute an interference with the applicant's communication privacy determined by the first paragraph of Article 37 of the Constitution, the Constitutional Court also points out that it did not need to answer the question of whether it is always necessary to assess the admissibility of interferences in communication privacy strictly according to the provisions of the Constitution and not taking into the account that the interferences were the result of the conduct of the competent authorities of other states that might be bound by different conditions as regards the protection of individual human rights.

**Review of the objections regarding access to data  
on the user of a certain IP address**

16. The complainant also challenges the standpoint of the Supreme Court that by its request to the service provider under the third paragraph of Article 149.b of the CrPA the Police did not acquire traffic data, but only data regarding a particular user of a determined means of communication. In the view of the Supreme Court, it is irrelevant from this respect whether the IP address was static or dynamic, as the obtained data did not reveal anything more than what was requested, i.e. only the data regarding the user of the computer through which an individual accessed the internet. The complainant argues that the data regarding the user of a dynamic IP address is at the same time personal and traffic data, which entails that the Police can obtain it only on the basis of a court order. As the Police obtained the data regarding the user on the basis of a request, the complainant opines that the evidence was obtained in violation of Article 37 of the Constitution.
17. In the case at issue, on 7 June 2006, on the basis of the third paragraph of Article 149.b of the CrPA,<sup>20</sup> the Police sent a request to the service provider for data regarding the user to whom IP address 195.210.223.200 was assigned on 20 February 2006

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had a suspicion of a criminal offense. The other participant filed a criminal complaint with the Police and gave them the web address of the chatroom and the alias (nickname) of the complainant. The Police first obtained the data on the IP address used for the communication and subsequently the data on the user (name, surname, and address) of this IP address without a court order. The Court decided, on the basis of similar constitutional requirements as those resulting from the second paragraph of Article 37 of the Constitution, that if security authorities legally obtain the content of a message from communication available to the public or communication that is closed to the public but the content is transmitted to them by one of the participants in this communication, such communication is not a subject of protection afforded by the secrecy of communications.

- 20 The third paragraph of Article 149.b of the CrPA determined the following: "If there are grounds for suspicion that a criminal offense for which the perpetrator is prosecuted *ex officio* was committed or is about to be committed and it is necessary for the discovery of the offense or the perpetrator to obtain data regarding the owner or subscriber of a particular means of communication in the electronic communications traffic that are not published in directories of subscribers and regarding the period within which such means was or is in use, the Police may request in writing from the electronic communications networks service provider such data even without the consent of the individual to whom such data refer."

at 13:28. In the response, they received data regarding the user's name, surname, and address, while the time of the communication set to the nearest second was already known.<sup>21</sup> Then on 14 December 2006 the Police also obtained an order issued by the investigating judge on the basis of the first paragraph 149.b of the CrPA<sup>22</sup> and the service provider also provided the traffic data on the basis of this order.<sup>23</sup> The main issue for the Constitutional Court at this point is therefore whether obtaining the data regarding the identity of the user of a determined IP address falls within the framework of communication privacy.

18. In accordance with the position of the Constitutional Court in Decision No. Up-106/05, Article 37 of the Constitution also protects traffic data, i.e. data regarding, for example, who, when, with whom, and how often someone communicated. The identity of the communicating individual is one of the important aspects of communication privacy, therefore it is necessary to obtain a court order for its disclosure in accordance with the second paragraph of Article 37 of the Constitution. Despite this standpoint, the Constitutional Court decided that the complainant's allegation of a violation of Article 37 of the Constitution is unfounded in the case at issue. By his conduct, the complainant has himself waived protection of his privacy by publicly revealing both his own IP address as well as the content of his communications, and therefore can no longer rely on it as regards the disclosure of his identity. Since by such he also waived the legitimate expectation of privacy, the data regarding the identity of the IP address user no longer enjoyed protection in terms of communication privacy, but only in terms of information privacy determined by Article 38 of the Constitution. Therefore, by obtaining the data on the name, surname, and address of the user of the dynamic IP address through which the complainant communicated the Police did not interfere with his communication privacy and therefore did not require a court order to disclose his identity.<sup>24</sup> In view of the foregoing, the contested position of the Supreme Court is not inconsistent with Article 37 of the Constitution, and the complainant's complaints in this part are unfounded.

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21 The subscriber or the party to the contract with the service provider was the father of the complainant.

22 The first paragraph of Article 149.b of the CrPA determined the following: "If there are grounds for suspicion that a criminal offense for which the perpetrator is prosecuted *ex officio* was committed, is being committed, is about to be committed or organised and it is necessary for the discovery of the offense or the perpetrator to obtain data regarding traffic in an electronic communications network, the investigating judge may, on the basis of a reasoned proposal of the state attorney, order that the electronic communications networks service provider provide data regarding the participants, the circumstances, and facts of electronic communications traffic, such as the following: the number or other form of identification of the users of the electronic communications service, the type, date, time, and duration of the call or other electronic communications service, the amount of data transferred, and the place from which electronic communication was carried out."

23 The complainant's allegation that the Police obtained the same data first on the basis of their own request and subsequently also on the basis of the order of the investigating judge is therefore clearly not substantiated.

24 The issue whether traffic data, i.e. the circumstances and facts related to communication, encompasses the name, surname, and address of the person communicating via a certain, already known IP address was dealt with also by the Austrian Constitutional Court. In the above-cited Decision No. B 1031/11, dated 29 June 2012, it held, *inter alia*, that the Police may obtain data on who the user of a specified IP address is without a court order.

### **Review of the objections regarding the review of the computer files found on the complainant's computer**

19. The complainant's final objection refers to the issue of whether the Police should have a specific court order for the review of the computer files on the complainant's computer. In this regard, the complainant objects to the standpoint of the Supreme Court that an additional court order is not required for such review, because the Police seized the computers on the basis of a search order and the computers were first sealed and subsequently also inspected and the files were copied in the presence of the complainant.
20. In accordance with Decision of the Constitutional Court No. Up-106/05, a review of data stored on an electronic device entails an interference with an individual's communication privacy determined by Article 37 of the Constitution.<sup>25</sup> This entails that such data storage media cannot be reviewed without a court order.<sup>26</sup>
21. In the case at issue, following a motion of the Police, dated 10 January 2007, the investigating judge issued a search order for a house search of the complainant's apartment on 12 January 2007 and the search was carried out on 25 February 2007.<sup>27</sup> It clearly follows from the motion of the Police for the search order that the Police wanted to review in particular the hard disks of computers and any other data storage media. When deciding whether to issue the order, the investigating judge was therefore aware of the fact that during the house search the Police would seize computer equipment and that they would also review such equipment. The foregoing is also clear from the search order, from which it follows that it was issued precisely with the intent to review the data stored on the computer and other data storage media (CDs and DVDs). Such entails that the interference with communication privacy was allowed by a judge by a court order, and despite the absence of detailed statutory regulation, in accordance with the constitutional guarantees the Police also allowed the complainant to be present in both instances when his computer was reviewed. In view of the foregoing, the contested standpoint of the Supreme Court is in accordance with the requirements of the second paragraph of Article 37 of the Constitution. The search order for the house search was issued with the intent to seize and review electronic data storage media, and the complainant was present in both instances of the review of the computers and electronic data. The Constitutional Court therefore decided that the review of the files on the complainant's computer did not violate his right to communication privacy.
22. Taking into account all the arguments, there is no violation of the right to the protection of the privacy of correspondence and other means of communication de-

<sup>25</sup> Cf. also G. Klemenčič in: L. Šturm (ed.), *ibidem*, p. 543.

<sup>26</sup> Given the rapid development of communication technologies, such are no longer just personal computers, but also a variety of electronic devices that can store data.

<sup>27</sup> Investigative actions were therefore carried out at a time when the CrPA did not have specific provisions on the inspection of electronic devices. Articles 219a and 223a were in fact introduced in the wording of the Act only by the Act Amending the Criminal Procedure Act (Official Gazette RS, No. 77/09), which came into force 17 October 2009.

terminated by Article 37 of the Constitution, therefore the Constitutional Court dismissed the constitutional complaint.

### C

23. The Constitutional Court reached this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The Decision was reached by seven votes against two. Judges Jadek Pensa and Sovdat voted against and submitted dissenting opinions.

*Mag. Miroslav Mozetič*  
*President*

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#### DISSENTING SEPARATE OPINION OF JUDGE DR JADRANKA SOVDAT

1. The development of information technology and the internet has reached such a magnitude in the last two decades that it legitimately begs the question whether the legal regulation of specific issues associated therewith is able to follow this development. The world of information technology is often incomparable with the world as we know it in the physical form. On the one hand, we benefit from all the advantages that this technology has brought. On the other hand, *inter alia*, the question arises whether when communicating using computer technology by means of the internet we need to relinquish (at least partially) communication privacy. Are we, as a free people, willing to relinquish it and come to terms with this? If we are not willing to relinquish this, under what conditions are interferences in this right admissible in order to be able to speak of the effective protection of the right to communication privacy, which is an integral part of one of the core human rights, namely the right to privacy? All these questions could arise regarding this Decision. The answers offered therein therefore go far beyond the importance of deciding just this particular case.
2. The Decision is based on three standpoints regarding respect for the right to communication privacy determined by the first paragraph of Article 37 of the Constitution.
  - 1) According to the first standpoint (Point 14 of the reasoning of the Decision), the complainant could not legitimately expect privacy in communication by using an online network that anyone could access; he exposed himself to the public, therefore this communication cannot be protected by the first paragraph of Article 37 of the Constitution.
  - 2) According to the second standpoint (Point 18 of the reasoning of the Decision), by waiving the protection of the privacy of the communication content, the complainant also waived the expectation of privacy regarding the disclosure of his identity, and therefore could no longer expect communication privacy with regard to the data on who the person behind the few digits of the dynamic IP address is.

- 3) According to the third standpoint (Point 21 of the reasoning of the Decision), after obtaining a court order for a house search, from which it follows that such is to be conducted precisely with the intent to review the data stored on the computer and other data storage media, the Police do not need an additional court order to perform a review of the mentioned media, naturally necessarily in the presence of the individual who was using the computer and its peripherals.
3. The conclusion that the Swiss Police did not need a court order to obtain a dynamic IP address thus follows from the first standpoint in this case. The conclusion that the Slovene Police did not need a court order to obtain the data on the identity of the person to whom a certain IP address was assigned when communicating on the internet follows from the second standpoint. The logical conclusion that with one order a judge can allow entry to premises, the seizure of computer equipment, and a review of the content of online communication follows from the third standpoint. I agree with the third standpoint and the arguments related to it. I have some concerns regarding the first standpoint in relation to the circumstances of the case, even though I agree with its essential basis. I, however, cannot agree with the second standpoint, which I find crucial for the decision in this case; therefore I voted against the Decision.
4. In relation to the first standpoint. I agree, of course, with the established constitutional standpoint that the essential starting point for the protection of communication privacy is a legitimate expectation of privacy and that communication privacy protects an individual regarding both the content of the communication as well as the circumstances and facts related to communication (for the latter, the term traffic data is also used). The resulting continuation is therefore logical: if I communicate with an undetermined circle of people, such can be compared with the public; consequently, I cannot legitimately expect privacy regarding the communication. I concur. Namely, had I sent a draft of this separate opinion to journalists from my official e-mail address (which clearly also establishes my “real” name), it would be absolutely clear that I cannot expect privacy either regarding the content of the communication or in terms of its traffic data, including data on who I am as the person communicating and with whom I communicated. It therefore follows logically from this standpoint that in this case the Swiss Police did not need a court order to obtain the data regarding the content of the communication and the traffic data, and thus also regarding the dynamic IP address number. It is, however, true that not much is known about the manner by which the Swiss Police gained access to these data. Therefore, the question arises whether the Constitutional Court should already in this case deal more with the issue of the use of evidence obtained abroad in criminal proceedings before the courts of the Republic of Slovenia. The Constitutional Court did state in Point 15 of the reasoning of the Decision that despite reviewing the case according to the Constitution it did not definitively take a position regarding the issue of by what criteria the admissibility of the use of such evidence must be assessed with regard to the protection of human rights.<sup>1</sup> It will certainly have the opportunity

<sup>1</sup> Regarding this issue, see also also K. Šugman Stubbs and P. Gorkič, *Teritorialne meje ustavne zahteve po sodni*

to do so with respect to one of the constitutional complaints which had been accepted for consideration some time ago precisely for this purpose. I did not deal in depth with the mentioned issue, as the key reasons for my dissent with the Decision lie in the second standpoint.

5. Namely, I cannot agree with the argument that brought my colleagues to the decision that after the Slovene Police were notified of the content of the communication as well as its time and dynamic IP address number, the Police did not need a court order to obtain data on what person this IP address was assigned to. We can certainly arrive at such a standpoint from the starting point that the protection of the communication privacy of traffic data is always connected with the protection of the privacy of the content of the communication – as long as an individual enjoys protection of communication privacy regarding the content of communication, he enjoys such protection also with regard to all the traffic data of this communication. When this protection can no longer be expected with regard to the content – because it was already exposed to the public – such allegedly also entails that there is no expectation of privacy with regard to the traffic data of this communication. This, in my opinion, consequently, leads to the standpoint that with regard to traffic data an individual does not enjoy independent protection of communication privacy or protection separate from the content of communication. Therefore, I cannot agree with this standpoint. The individual in this case namely did not appear in public under his own name, it was the few digits of the dynamic IP address that appeared in public.
6. If we agree that the Swiss Police could obtain the number of a dynamic IP address without a court order, it must still be taken into account, however, that the IP address was expressed in the form of a couple digits, but it did not entail the identification of the person who was communicating. In my opinion, if the Slovene Police had wanted to identify the person that the dynamic IP address represented, they would therefore need to obtain a court order, as clearly follows from the second paragraph of Article 37 of the Constitution. Since they did not have a court order, there was a violation of Article 37 of the Constitution. With regard to this, the following question could arise: Is there a constitutional obligation to exclude the evidence obtained by this violation of the complainant's right to communication privacy (as required by the complainant), and what in this context is the meaning of the evidence obtained on the basis of the issued court order? Sooner or later, the Constitutional Court will probably have to deal with the issue of whether the exclusion of evidence established by the Criminal Procedure Act (Official Gazette of RS, No. 101/05 - hereinafter referred to as the CrPA)<sup>2</sup> in the second paragraph of Article 18 has a constitutionally absolute effect.<sup>3</sup> I

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*odločbi: dva primera*, [Territorial Limitations of the Constitutional Requirement for a Judicial Decision: Two Examples], *Pravna praksa*, Nos. 40-41 (2013), Annex, pp. II-V.

2 The citation is in accordance with the circumstances of this case.

3 An excellent basis for further constitutional discussion of this issue was recently presented by Assistant Professor Dr Gorkič; See P. Gorkič, *Načelo sorazmernosti in izločanje nezakonitih dokazov v slovenskem pravu: drugi del* [The Principle of Proportionality and the Exclusion of Illegal Evidence in Slovene Law: Part II], *Pravna praksa*, No. 5 (2014), Annex, pp. II-VIII. The article has already attracted a first response; see also M. Šošič,

did not, however, deal in depth with this issue due to the adopted decision.

7. In this case, the question could also be raised whether at the time the relevant Police conduct took place there existed a statutory regulation on the basis of which internet service providers could store the data that they provided to the Police. If there was no statutory basis for their storage for specific purposes, the contested decision was controversial already from the viewpoint of the first paragraph of Article 38 of the Constitution. The complainant did assert a violation of this right, but did not focus the constitutional complaint with regard to this issue. Nevertheless, the first rule that holds for all interventions in human rights before a review of their constitutional admissibility even begins is the following: the interference must be determined by law. The Constitutional Court avoided a review of the alleged violation of the rights determined by the first paragraph of Article 38 of the Constitution (Point 7 of the reasoning of the Decision). This can be questionable since the complaint alleging a violation of the first paragraph of Article 37 of the Constitution was rejected. Above all, it seems important to me to emphasise that the legal situation regarding the supply of traffic data that is retained by service providers is different today. It is different to such an extent that, according to the provisions of Articles 166 and 168 of the Electronic Communications Act (Official Gazette RS, No. 109/12 – hereinafter referred to as ECA-1), the service provider must not give the Police access to the data stored on the basis of this Act (it is precisely this Act that regulates the legal basis for their storage) without a court order. On the one hand, the Police must have the possibility to effectively detect criminal offences, but, on the other, they must be limited by the requirement that they exercise their statutory powers by respecting human rights and fundamental freedoms. Such must hold in a state governed by the rule of law that respects human rights and fundamental freedoms and ensures their protection (the first paragraph of Article 5 of the Constitution). In accordance with this, in the process of detecting a criminal offense the Police may interfere with the communication privacy of an individual in relation to the traffic data of communication, but under the conditions determined by the Constitution in the second paragraph of Article 37; the first among them is precisely the requirement of there being a judicial review of the actions of the Police.
8. In case No. U-I-65/13, in which the procedure for the review of the constitutionality of certain provisions of the ECA-1 was initiated by a request of the Information Commissioner (who contested the obligation to retain [traffic data]), we stayed the proceedings by the Constitutional Court Order dated 8 October 2013 pending the decision of the Court of Justice of the European Union on the validity of the Directive that was implemented by the ECA-1 regarding the mandatory retention of traffic data by service providers (*inter alia* for the purpose of detecting serious criminal offences).<sup>4</sup>

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*Nekaj argumentov proti utilitaristični doktrini izločanja dokazov* [Some Arguments against the Doctrine on the Utilitarian Exclusion of Evidence], Pravna praksa, No. 8 (2014), pp. 15-16.

4 At the time this order was adopted, the two proceedings before the European Court of Justice, initiated by an Irish court and the Austrian Constitutional Court (the proceedings in Cases C-293/12 and C-594/12) that were of the same nature were already so far along that if the Constitutional Court had referred a question for a preliminary ruling it could not have been answered during these proceedings.

We are still waiting for the decision of the Court of Justice of the European Union. The opinion of the Advocate General is, however, already available. Clearly, we cannot know whether the Court of Justice of the European Union will follow it, but it seems important to me on its own merit. In his Opinion, Advocate General Villalón, the former President of the Spanish Constitutional Court, pointed out the right to privacy protected by Article 7 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012), and specifically emphasised that the Directive should, if it is to remain in force, also define the fundamental principles which are to govern the determination of the minimum guarantees for access to the data collected and retained and their use, which the Directive left to be regulated by the Member States. He highlighted as necessary among these principles precisely the requirement that any access to the data should be subject to review by the judicial (or at least) independent authorities.<sup>5</sup> Despite the fact that our regulation as determined by the second paragraph of Article 37 of the Constitution is one of the strictest, this indicates that such are in fact serious interferences with communication privacy – the requirement of a court order stems precisely from this in order to prevent abuse. The ECA-1 already meets this requirement and in relation to the third paragraph of Article 145.b of the CrPA is clearly a subsequent and more specific regulation. By the nature of things, subsequent and more specific statutory provisions repeal earlier statutory provisions regulating the same subject matter, no matter in which statute they are formally enacted. The Police, who must act lawfully, must therefore consider the ECA-1 as the applicable law. The service providers must also act in accordance with this Act when providing traffic data to the Police, otherwise also they would be acting illegally. Therefore, I am afraid that the message of this Decision is exactly contrary to the already achieved level of human rights protection that the legislature established with the ECA-1.

9. The Constitutional Court did not build its arguments why this case does not entail a violation of the right to communication privacy on the reasoning of the Supreme Court based on Article 145.b of the CrPA. This is good, because otherwise it would convey the message to the legislature that in the future the regulation contained in this provision would not be constitutionally disputable. The Constitutional Court has, on the contrary, clearly stated that the identity of the individual communicating is one of the important aspects of communication privacy, therefore it is necessary to obtain a court order for its disclosure in accordance with the second paragraph of Article 37 of the Constitution (Point 18 of the reasoning of the Decision). Only when an individual publicly discloses his communication, such that the content of the communication is no longer confidential, can he no longer expect protection under Article 37 of the Constitution even with regard to his identity, which was concealed (by a combination of digits) and was not as such exposed to the public. Although I do not agree with the standpoint that by leaving a digital trail of computer-based communication (a dynamic IP address) an individual already waived (in this part)

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5 Opinion of Advocate General Pedro Cruz Villalón, presented 12 December 2013, in Cases C-293/12 and C-594/12.

his right to privacy, I would like to emphasise that this standpoint is fundamentally different from the standpoint of the Supreme Court and is less dangerous in terms of the protection of an individual's right to communication privacy with regard to the traffic data of communication than the standpoint of the Supreme Court.

10. The Supreme Court namely held that the Police had not obtained traffic data in an electronic communications network, but only data regarding a particular user of a particular means of communication. This entails that the Supreme Court took the traffic data out of the communication and reviewed it completely independently – regardless of the communication. When you do that, of course, the name and surname of the person and their address remain the only personal data that are not protected by communication privacy. Acting in such manner, we can quickly arrive at a situation where only the communication content is protected, while traffic data on the communication will not be afforded any protection at all, as they can easily be removed one by one from the communication and dealt with as “only” a personal datum. However, this in my opinion cannot be done, because this is essentially a denial of the fundamental logic of the protection of the right to communication privacy, which in its essence protects the expected privacy regarding who communicated with whom (the personal element), when (the temporal element), and about what (the element regarding the content). In my opinion, all these fundamental elements of communication are of equal importance and should all be constitutionally protected. It is therefore good that the Constitutional Court did not follow the standpoint of the Supreme Court regarding the reasons why in this case there was no violation of communication privacy. In this respect, I agree with the Information Commissioner, who on our request gave an opinion regarding the observations in this case. The Police, of course, as they state, “do not care who the owner of a means of communication is, but are interested in identifying the user who communicated, and precisely because he or she communicated with someone, no matter how the question sent [by the Police] to the service providers was formulated,” “[t]he trigger for obtaining the identity of an individual on the basis of data from the service provider is namely precisely in the communication, otherwise they would not be looking for the individual [...],” “these data (who communicated and with whom) actually have a greater weight than the time of the communication alone” and even “the content of the communication also has no special value if we do not know who communicated with whom.” Therefore, the Information Commissioner considers that it is impossible to separate the traffic data from the subscriber data, which in its very essence constitutes an opposite logic to the one determined by the third paragraph of Article 145.b of the CrPA.
11. Given the above, it seems important to me to emphasise that the message of this Decision is not the same as was the message of the Supreme Court judgment, according to which the Police can usually have access to the data stored by internet service providers regarding who was using a particular IP address without a court order. The message of this Decision is different: the Police could request data on whom a particular IP address has been assigned to without a court order just because an individual cannot expect privacy regarding this data due to his or her public communica-

tion. This is precisely the point regarding which I do not agree with my colleagues who voted for the Decision. In my opinion, he or she could have expected privacy, as we all may expect it. That is why in order to interfere with such communication privacy the Police must obtain a court order in accordance with the second paragraph of Article 37 of the Constitution. If a reasonable suspicion that such a serious offense as the one at issue in the present case was committed is established, there is absolutely no reason why the judiciary would not issue such a court order. A court order, without which today, in my opinion, the service providers in any case cannot provide data to the Police in accordance with the provisions of the ECA-1 regarding online communication, is a guarantee ensuring communication privacy on the internet, which we should not just relinquish. The judge must, of course, carefully assess before issuing a court order whether the Police have proved all the conditions for justifying an interference with the right determined by the first paragraph of Article 37 of the Constitution; in this responsible role they act as guarantors of human rights and independent supervisors of the actions of the executive branch of power.

*Dr Jadranka Sovdat*

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#### **DISSENTING SEPARATE OPINION OF JUDGE DR DUNJA JADEK PENSA**

1. I wish to explain in this opinion why I could not agree with the majority that the complainant himself waived the protection of his privacy by engaging in an established mode of communication and, therefore, can no longer rely on his privacy when it comes to the disclosure of his identity.<sup>1</sup> This standpoint is in my opinion questionable, since it states that the anonymity of a particular type of electronic communication does not exist in relation to the Police. This is because
  - (1) the Police are entitled to have access at their own discretion to data that identifies a person who can be connected to a specific communication on the basis of retained traffic data<sup>2</sup> and
  - (2) such entails that the Police investigation thereof is not bound by the conditions determined by the second paragraph of Article 37 of the Constitution.
2. There is no doubt that interferences in the constitutionally guaranteed inviolability of privacy may be legitimate in instances where there are values of a higher rank that are affected. These are justified precisely by a legitimate concern for the values of a higher rank than the inviolability of the privacy of an individual and the matching obligation of the state to protect these values “more” than the privacy of an individual. However, if such entails an interference with communication privacy, the Constitution limits the interferences to individual instances in which

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1 Cf. Point 18 of the majority’s Decision.

2 Such was the case at issue: the Police obtained data that linked the dynamic IP address to a certain person from the service provider on the basis of a letter.

- (1) this possibility is specifically determined in a law,
- (2) there are facts demonstrating that such is “necessary for the institution or course of criminal proceedings or for reasons of national security,”
- (3) the admissibility of the interference (whose effect is the hollowing-out of the constitutionally guaranteed privacy of correspondence for a limited period of time) is decided on by a court (compare with the second paragraph of Article 37 of the Constitution),
- (4) the court must, of course, verify before issuing an order whether constitutional guarantees are fulfilled in each particular case.

The purpose of the constitutional guarantees under which there may be an interference with communication privacy is two-fold. Firstly, at the constitutional level such reinforces the integrity of the privacy of correspondence (the first paragraph of Article 37 of the Constitution), thereby strengthening confidence in the expectation of privacy in this area of life. The wording of the second paragraph of Article 37 of the Constitution namely also determines that only if the conditions for the interference with communication privacy written hereunder are satisfied may “the protection of the privacy of correspondence and other means of communication [...] be suspended for a set time.” And secondly, the constitutional guarantees are intended to avoid excessive interference or perhaps even abuses by the executive branch of power (the Police) when interfering with communication privacy. Let me put this briefly. The first paragraph of Article 37 of the Constitution ensures the inviolability of communication privacy; the second paragraph defines the boundaries of this inviolability. The inviolability of communication privacy and its boundaries constitute a meaningful whole. In addition, both are equally important for building a legitimate expectation of communication privacy in the country.

3. If we ourselves expose our communication to the public, the content is no longer private. In such a case, we (logically) cannot rely on communication privacy nor (consequently) expect privacy and the application of the guarantees provided by objective law (also) for strengthening the expectations of communication privacy in society. I therefore agree with the majority position that the data the complainant himself disclosed to the public in one way or another (i.e. by public disclosure of the content of controversial internet communications,<sup>3</sup> and the disclosure of the dynamic IP address<sup>4</sup> that identifies the website and which could be assigned at a given time due to the connection) by itself cannot be a subject of the protection afforded by Article 37 of the Constitution. Where do I see a problem?
4. None of the data publicly disclosed by the complainant disclosed his identity. The dilemma of the anonymity of the communication at issue struck me as crucial as

3 The position regarding the public disclosure of the content of the communication is based on the finding that anyone could access the disputed files (*cf.* Point 14 of the reasoning of the majority Decision).

4 The position of the majority Decision on the complainant’s public disclosure of the dynamic IP address is based on (1) the finding that the content of the communication is publicly available, and (2) the absence of his statements regarding the concealment of the dynamic IP address from which this communication was made (*cf.* Point 14 of the reasoning of the majority Decision).

the possibility of the Police to monitor (*ex post*) electronic communication between individuals finally buries the idea that this is an area in which the state will “leave individuals alone”; that is the point where the veil of anonymity is lifted and Police monitoring concentrates on a specific person to whom certain communication can be attributed to (*ex post*) on the basis of stored data on electronic communication. From this viewpoint, anonymity is the only thing that prevents the Police from linking a particular communication with a particular person. In my opinion (an explanation follows below), this point coincides with the moment of disclosure of the link between a dynamic IP address and an individual who is identified on the basis of his or her name and address, which in the opinion of the majority are protected only as personal data.<sup>5</sup> Let me add at this point that an individual distancing him- or herself from thoughts expressed in some manner (for example, by using a pseudonym) is not unusual. The motives of an individual for maintaining anonymity are, of course, diverse. They may be legitimate (as such is, for example, explicitly expressed in intellectual property law<sup>6</sup>) or not (such as, for example, intimidation by anonymous threats).

5. The standpoint of the majority summarised at the outset is justified, as I understand it, by the manner of communication. According to this standpoint, the manner of communication established in the present case by itself negates privacy and the legitimate expectation of privacy, including the legitimate expectation of the anonymity of communication.
6. I could not agree with this key standpoint. I believe, namely, that it is necessary to look for the answer to the question of whether the manner of communication established in the present case negates (in general and always) the existence of an objectively legitimate expectation of privacy (including the guaranteed anonymity of communication) from the viewpoint (standard) of a reasonable and adequately informed individual, taking into account all the circumstances of the case. Among “all” the circumstances of the case are first of all the provisions of objective law that govern the protection of the confidentiality of the traffic data of electronic communications at the relevant time. This is because the purpose of these provisions, as I understand it, is the message the legislature gives beforehand to individuals:
  - (1) it either assures them that the state will “leave them alone” in the area of electronic communications,<sup>7</sup>
  - (2) or gives a prior warning that they will not be “left alone,” in other words that in relation to the Police, the privacy of this type of communication is not inviolable.

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5 The Constitutional Court did not carry out a review of the constitutional complaint in the light of Article 38 of the Constitution (*cf.* Point 7 of the reasoning of the majority Decision).

6 *Cf.* the third paragraph of Article 7 of the Berne Convention for the Protection of Literary and Artistic Works (Official Gazette SFRY, MP, No. 14/75, Official Gazette RS, MP, No. 9/92); *cf.* also the second paragraph of Article 18 of the Copyright and Related Rights Act (Official Gazette RS, No. 16/07 – official consolidated text, *et seq.*).

7 It is evident that the Constitution does not require that the confidentiality of such communications be ensured in an absolute manner, and that the regulation therefore may contain conditions under which it is permissible to interfere with the confidentiality of such communications. However, these conditions must be in conformity with the second paragraph of Article 37 of the Constitution.

Such regulation is then the one that, in my view, from the perspective of the user of electronic communication, can justify (1) either the existence of an objective expectation of privacy, including the anonymity of electronic communications (2) or the negation of such expectation.

7. At the time the data at issue were obtained (i.e. in August 2006) the Electronic Communications Act (Official Gazette RS, No. 43/04 and 86/04 – hereinafter referred to as the ECA) was in force. In the ECA service providers were obliged to erase (and *not* store)<sup>8</sup> the traffic data processed and stored by the service provider as soon as they were no longer necessary for the transmission of messages (the first paragraph of Article 104 of the ECA). As was stated in the draft of this act, all forms of supervision, including storage, were prohibited and the duty to erase the traffic data was imposed precisely in order to protect the confidentiality of communications.<sup>9</sup> On the basis of explicit statutory provisions, confidentiality also applied to traffic data (Point 2 of the first paragraph of Article 103 of the ECA); it covered all users of communication services, not only persons who had concluded a contract for the procurement of such services (Article 101 of the ECA); it bound the service provider and anyone who was involved in carrying out the service provider's activities. An interference with this inviolability of the confidentiality of communications, which was protected on an abstract level, was allowed by the lawful interception of communications on the basis of an *order issued by the competent authority* (Article 107 of the ECA). The letter from the Police that was the basis for obtaining the required data in the present case does not fall, as I understand it, under the category of a competent authority. Since the legal order must be consistent, I assign a character of specificity to the regulation in the ECA of the conditions under which the Police were allowed to access the data on electronic communications (specifically, obtaining an *order issued by the competent authority*). Therefore, even if the third paragraph of Article 149.b of the Criminal Procedure Act (Official Gazette RS, Nos. 96/04 – official consolidated text, and 101/05 – hereinafter referred to as the CrPA) might be interpreted in a manner that follows from the judgment of the Supreme Court, it should not be applied in the field regulated by the ECA. I would like to add that the first Article of the ECA also explicitly stated that this is the act regulating “the protection of the privacy and confidentiality of electronic communications.” The legal order would be duplicitous if, on the one hand, it ensured in the law the confidentiality of electronic communications, including, as I understand it, the protection of the anonymity of participants, building high standard guarantees in this regard for the protection of confidentiality in the state, while on the other hand tolerating disrespect for these standards or even allowing Police supervision of electronic communications beyond these standards. Let me add that the service provider, who is a private entity, was not obligated under the first paragraph of Article 145 of the CrPA to report criminal offenses when informed of them or otherwise after gaining knowledge of them. It was,

8 Data retention was ordered by the Amendments to the Electronic Communications Act Act that entered into force on 27 December 2006 (Official Gazette RS, No. 129/06 - hereinafter referred to as the ECA-A).

9 Gazette of the National Assembly, No. 26/04, p. 91

however, obliged to comply with the provisions of the ECA regarding the protection of the confidentiality of electronic communications, which of course includes strict compliance with the conditions under which the Police were exceptionally allowed to access the data regarding such communication.

8. With regard to the summarised guarantees of objective law on the protection of the confidentiality of electronic communication, taking into account the criterion of a reasonable and adequately informed individual, I could not attribute to the manner of communication, as was established in the present case, the meaning of a sufficient reason for denying the expectation of privacy, albeit only with regard to the anonymity of users of the services of internet providers. I did not find in the objective law also applicable to the manner of communication at issue certain grounds for denying the expectation of the anonymity of the established manner of communication. Quite the contrary. Therefore, in my opinion the established manner of communication is not a reason that would undermine by itself the user's legitimate expectation of the anonymity of communication.
9. The traffic datum – the dynamic IP address that was assigned randomly at a given moment – as I understand it, reveals how the internet was used on some computer, because it is inextricably attached to a specific connection. Subsequent attribution of these data to persons identified through an evaluation (of also other stored data on individual specific connections)<sup>10</sup> builds a meaningful whole with this datum, which is, technically speaking, functioning as a connection “at a distance.” This is because only the two data jointly communicate how the internet was used in a non-anonymised way, i.e. regarding internet use in connection with an identified person. This essential circumstance in my opinion negates the notion of the neutrality of the datum regarding a specific user of services for a certain (known) dynamic IP address that the Police sought through the service provider. Namely, the neutrality of the datum in terms of denying its ability to communicate nothing more than the name and address of a certain person (who has a subscription contract with the service provider). Precisely because this datum is inseparably attached exactly to a specific communication, the traffic datum is attributed to the field of communication privacy protection.<sup>11</sup> The Police, as I understand it, did not ask for data that would be accessible in any personal data filing system kept by the service provider. To my knowledge, such a filing system does not exist. Therefore, I could not agree with the separation of a specific internet connection, designated with a certain dynamic IP address, from the person that can be identified by using the data stored by the service provider. This is all the more so as, to my knowledge, this identification is, due to randomly assigned dynamic IP addresses, carried out at the service provider by accessing other stored traffic data (for which it was not claimed that they became pub-

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10 Cf. in this respect, Judgment of the German Federal Constitutional Court 1 BvR 1299/05, dated 24 January 2012.

11 Cf. in this respect, Constitutional Court Decision No. Up-106/05, dated 2 October 2008 (Official Gazette RS, No. 100/08, and OdlUS XVII, 84), and Judgment of the German Federal Constitutional Court 1 BvR 1299/05. In Case No. B 1031/11, dated 29 June 2012, the Austrian Constitutional Court adopted the position that the confidentiality of communication at a distance only protects the content of the message, while telecommunications traffic data are not a subject of communication privacy.

licly accessible due to the manner of communication).

10. Even if the service provider communicated to the Police “only” the data identifying a person who has a subscription contract with it, by doing so, as I understand it, the service provider in fact communicated (to put it simply) traffic data in an electronic communications network regarding this person. The Police also, as I have already explained, wanted to determine more than just the name and surname of a certain person who had concluded a contract. Since, as I understand it, they asked for traffic data associated with a particular person they would have to proceed according to the first paragraph of Article 149.b of the CrPA and obtain an order from the investigating judge. Let me repeat that according to the ECA the Police were not authorised to have access to any data on electronic communications without “an order of the competent authority.” The interpretation of the third paragraph of Article 149.b of the CrPA according to which the Police were allowed to inquire about such on the basis of their own written request, because such was intended merely to obtain the data regarding the owner of a particular means of communication for electronic communications traffic that just were not made public is, in my opinion, therefore erroneous. Let me repeat. It is erroneous because such was not merely intended to obtain data regarding the owner of a particular means of communication for electronic communications traffic that just were not made public, and as it is contrary to completely clear provisions of the ECA. In addition, because the Police did not obtain an order from the competent authority in this case, one of the pieces of evidence was, in my opinion, obtained in violation of the law, and a different standpoint would also violate Article 37 of the Constitution.
11. At this point of the decision-making process the following two questions occurred to me: (1) whether due to the circumstance of the violation of the integrity of the right determined by the first paragraph of Article 37 of the Constitution the duty to exclude the evidence obtained by the violation automatically arises, and (2) what is the significance of the described shortcomings for other subsequently obtained evidence that was, as opines the majority and I agree therewith, obtained without a violation of the law and the Constitution. The circumstances of the case at issue put the dilemma implied in these two questions at the forefront for me.<sup>12</sup> I regret that in this case the Constitutional Court did not pronounce a standpoint regarding this dilemma.
12. *The conclusion:* The characteristics of the environment that enable (and encourage) modern electronic communication in today’s stage of development offer favourable opportunities for electronic communication to serve as a tool of control exerted by the state, its bodies, but also by unauthorised individuals to the extent that the communication reveals much more regarding the participants than just the data identifying the participants of the communication. Regarding this, two points seem clear.

12 For more detail regarding this dilemma, see P. Gorkič, *Načelo sorazmernosti in izločanje nezakonitih dokazov v slovenskem pravu: drugi del* [The Principle of Proportionality and the Exclusion of Illegal Evidence in Slovene Law: Part II], *Pravna praksa*, No. 5 (2014), Annex, pp. II-VIII. Cf. also M. Šošič, *Nekaj argumentov proti utilitaristični doktrini izločanja dokazov* [Some Arguments against the Doctrine on the Utilitarian Exclusion of Evidence], *Pravna praksa*, No. 8 (2014), p. 15.

Firstly, access to this type of communication and the possibility of surveilling it (by the state or as well by unauthorised individuals), both facilitated by technical progress, seriously endanger the idea that such communication is at all (still) private; if the effectiveness of surveillance is proportional to the amount of data stored and to the easy availability of such data to law enforcement bodies, the expectation of the privacy of such communications is inversely proportional to it. And secondly, if it is to prevail that the communication between individuals taking place on the internet in today's stage of development is to be considered private, the law should in my opinion clearly and consistently restrict the possibility of the surveillance of such communication to instances where it is established that there are values of a higher rank that are affected. It is precisely the limitations of surveillance that can justify surveillance and the limitation of surveillance can build the expectation that an individual, despite the real possibilities of the surveillance of this area of one's life, will be "left alone". Namely, that which can be monitored cannot reasonably be regarded as private. A social consensus regarding the correct (legal) framework for the possibility of (i) the retention of data to facilitate subsequent monitoring (*inter alia*) of electronic communication, and (ii) access to the stored data is thus still being sought. As I understand it, the starting point of today's debates remains the effort to maintain the expectation of the privacy of such communication, *inter alia*, by restricting the access to such communication by way of [requiring] approval by an independent body, possibly the court,<sup>13</sup> as our Constitution (already) guarantees in the second paragraph of Article 37.

*Dr Dunja Jadek Pensa*

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13 Cf. Opinion of Advocate General Pedro Cruz Villalón in Cases C-293/12 and C-594/12, dated 12 December 2013.

Decision No. **U-I-92/01**, dated 28 February 2002

### DECISION

At a session held on 28 February 2002 in proceedings to review constitutionality initiated upon the petition of Edvard Krajnc, Vojnik, and Mag. Matevž Krivic, Medvode, following a public hearing held on 17 January 2002, the Constitutional Court

*decided as follows:*

1. The fourteenth indent of Article 6 of the Population, Household, and Housing Census in the Republic of Slovenia 2001 Act (Official Gazette RS, Nos. 66/2000 and 26/01) is not inconsistent with the Constitution.
2. Articles 10, 11, 12, 13, 15, 24, 25, 28, and 29 of the Population, Household and Housing Census in the Republic of Slovenia 2001 Act are not inconsistent with the Constitution.
3. Articles 5 and 23 of the Population, Household and Housing Census in the Republic of Slovenia 2001 Act are abrogated, except for the part of the first paragraph of Article 23, which reads as follows: "Data collected by census may only be used for statistical purposes".
4. The abrogation referred to in the previous point shall take effect on the next day following the publication of this Decision in the Official Gazette of the Republic of Slovenia.

*Reasoning*

### A

1. The petitioner, Edvard Krajnc (hereinafter referred to as the first petitioner), challenges the third paragraph of Article 5 of the Act amending the Population, Household, and Housing Census in the Republic of Slovenia 2001 Act (Official Gazette RS, No. 26/01 – hereinafter referred to as the PHHC1A-A),<sup>1</sup> as it is inconsistent with Article

<sup>1</sup> This refers to Article 6 of the Act on the Population, Household, and Housing Census in the Republic of Slovenia 2001 (Official Gazette RS, No. 66/2000). By the challenged provision of the PHHC1A-A, the collection of data regarding religion was also introduced in Article 6 of the Act on the Population, Household, and

7, and the first and second paragraphs of Article 41 of the Constitution. The first petitioner claims that, in view of the constitutional definition of the separation of the state and religious communities, and the constitutionally guaranteed freedom of professing religious or other beliefs, the challenged provision of the Act, which provides that religious and personal data is collected, is unconstitutional. He claims that the state is prohibited from asking individuals about these beliefs or from collecting data on these beliefs on the basis of the second paragraph of Article 41 of the Constitution, which guarantees that no one shall be obliged to declare his religious or other beliefs, in conjunction with the first paragraph of Article 7 of the Constitution.

2. The first petitioner believes that there is a serious risk that religious communities could interpret the challenged provision of the Act to mean that the Constitution does not provide for a separation between religious communities and the state, and that they could interpret the obtained data to suit their current needs.
3. The petitioner, Mag. Matevž Krivic (hereinafter referred to as the second petitioner), challenges the same provision of the Act. He questions whether inquiring about religious belief is at all reasonable since the respondents are not obliged to respond to such a question. Therefore, in his opinion, data obtained in such a manner is not of interest or relevance for the statistical purposes of the state. Furthermore, he believes that people in general, especially the average person, consider the census to be obligatory and decreed by the government, and so it is not possible to entirely eliminate the intentional or unintentional “pressure” on those being questioned, although the Act provides that individuals must be informed that they have the right to not answer. He also alleges that, since the question focuses on religious beliefs despite only enquiries on (legal) affiliation with a religious community being permitted, it is incorrectly formulated.
4. The second petitioner initially also alleged that the question on national (ethnic) origin (thirteenth indent of Article 6 of the PHHC1A) is constitutionally disputable. At the public hearing, he declared that his petition was not to be understood as a challenge to the constitutionality of the thirteenth indent of Article 6 of the PHHC1A. In the subsequent written submission, he explicitly stated that he did not challenge its constitutionality.
5. Moreover, in his petition, the second petitioner also referred to Articles 3, 5, 6, 7, 8, 9, 11, 12, 13, 15, 23, 24, 25, 28, and 29 of the PHHC1A as being constitutionally disputable. At the public hearing, he stated that he does not challenge Articles 3, 6, 7, 8 or 9. However, he alleged that Article 10 was constitutionally disputable. He states that the challenged provisions (particularly those of Articles 11, 12, 13, 15, 24, 25, 28, and 29) are vague, incomplete, that they enable personal data from various databases to be integrated, and that they do not provide for the appropriate protection of personal data. In his opinion, Articles 5 and 23 enable the collection of data to be used for other databases or other purposes (to establish a building and housing register and a household register),

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Housing Census in the Republic of Slovenia of 2001 (Official Gazette RS, No. 66/2000 and 26/01 – hereinafter referred to as the PHHC1A, indent 14). For reference purposes, the numbering of the articles determined in the PHHC1A is used below.

thereby allowing personal data to be abused or used for undetermined purposes, and rendering its protection impossible. Therefore, the constitutional right to protection of personal data (Article 38 of the Constitution) is, in his opinion, violated.

6. The National Assembly replied to both petitions; it believes that they are unfounded. It is argued that the PHHC1A fully respects the provisions of the first and second paragraphs of Article 41 of the Constitution (regarding the question about religion) and Article 61 of the Constitution (regarding the question about national ethnic origin). In reference thereto, the National Assembly cites Articles 10 and 35 of the PHHC1A in particular. Furthermore, it argues that the provisions of Article 3 of the Personal Data Protection Act (Official Gazette RS, Nos. 59/99 etc. – hereinafter referred to as the PDPA) regarding the protection of the particularly sensitive data were also taken into account. Moreover, the National Assembly believes that the provisions of the PHHC1A, which allow the Statistical Office of the Republic of Slovenia (hereinafter referred to as the Office) to use data from other official and administrative databases for the purposes of the census, are consistent with Article 38 of the Constitution. In reviewing such, the PDPA must also be taken into account, since it regulates in detail the processing of personal data, and the conditions under which the collected data may be used for other purposes. The National Assembly consequently believes that it is entirely constitutional for the census to be used not only for the collection of statistical data but also data for other purposes, as provided by law.
7. In its opinion, the Government states that the petitions are unfounded. As for the disputed questions, it states that data regarding religious beliefs and national origin is relevant and necessary for state statistical purposes. It states that statistical research is carried out not only in the interests of the state, but also as an internationally recommended state activity and part of the obligations that arose upon the process of accession to the European Union. The view of the Government is that the results of the state's statistics analysis and censuses are useful not only for the state, public sector, and international community, but also for the private sector and for individuals and their associations (for civil society institutions). In the Government's opinion, the integration of public records is a tradition in Slovenia; through this integration process the principle of efficiency and economy in the processing of data is implemented. As a result, specific data is not collected separately for each purpose – the data that has already been collected is used for various purposes. At the public hearing, the Government's representative submitted a draft form for carrying out the census.

#### **B – I**

8. The Constitutional Court accepted the petitions for consideration. As the conditions provided in the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA) were met, it proceeded to decide on the merits of the case.
9. Regarding the initial allegations of the second petitioner, the Constitutional Court also discussed the constitutionality of the thirteenth indent of Article 6 of the PHHC1A at the public hearing. Since the petitioner had explicitly stated that he did not

challenge this provision, and the Constitutional Court had determined that the conditions provided in Article 30 of the CCA were not met, it did not review the constitutionality of the thirteenth indent of Article 6 of the PHHC1A.

## B – II

10. The first petitioner states that the fourteenth indent of Article 6 of the PHHC1A, which was introduced by the third paragraph of Article 5 of the PHHC1A-A, is inconsistent with Article 7 of the Constitution (the principle of separation of the state and religious communities). The petitioner does not provide reasoning as to why the challenged provision is inconsistent with the first paragraph of Article 7 of the Constitution. He simply alleges that religious communities may manipulate the challenged provisions of the Act to serve the benefit of their immediate interests and needs, which could endanger the actual meaning of the provision of the first paragraph of Article 7 of the Constitution.
11. The first paragraph of Article 7 of the Constitution provides that the state and religious communities are separate. This provision of the Constitution includes only a general principle of separation of the state and religious communities (see Decision of the Constitutional Court No. U-I-68/98, dated 22 November 2001, Official Gazette RS, No. 101/01). Scholars consider in particular that the key elements of the separation of the state and religious communities are the autonomy of religious communities (in their own areas), the secularisation of public life, and state neutrality towards religious communities.<sup>2</sup> A religiously and ideologically neutral state is therefore impartial, neither supporting nor hindering religion and other ideologies.<sup>3</sup> However, it does not follow from the principle of the separation of the state and religious communities that the state should have no interest in data on the religious beliefs of its inhabitants. In view of the legislature's intention<sup>4</sup> regarding the collection of such data – for statistical purposes – and considering the provisions on processing and protection of such data, the conclusion could be drawn that the challenged provision does not violate the principle of the separation of the state and religious communities.
12. The challenged provision of the PHHC1A does not regulate the relationship between the state and religious communities, does not interfere with their relationships, and does not refer directly thereto. If the petitioner was concerned about the possible

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2 J. Šinkovec: *Pravice in svobode* [Rights and Freedoms], Official Gazette RS, Ljubljana 1997, p. 226. The neutrality of the state towards religious communities means, in terms of the constitutional interpretation of the US Supreme Court, that the state is prohibited from giving preference to any religion over another, or in general giving preference to any religion over any other belief. J. M. Shaman, *Constitutional Interpretation, Illusion and Reality*, London 2001, p. 155.

3 M. Orehar, *Svoboda religije proti ločitvi države in religije* [Freedom of Religion Versus Separation of State and Religion], *Zbornik Cerkev in država*, edited by L. Šturm, Nova revija 2000, p. 27.

4 It cannot be overlooked that the US Supreme Court, which otherwise in principle does not consider the legislature's intention when reviewing the constitutionality of statutes, considers such intention when reviewing the constitutionality of the principles of the separation of the state and religious communities. J. M. Shaman, *op. cit.*, p. 155.

subsequent interpretation of census data by religious communities, it is the view of the Constitutional Court that such interpretation of data, which is entirely private in terms of separation of the state and religious communities, does not in itself interfere with the first paragraph of Article 7 of the Constitution. The data will eventually be made public. It is clear that the same data may be interpreted differently and this is an everyday occurrence for practically all data. The mere possibility of the collected data being interpreted differently does not mean that the Act, which regulates the collection of such data, is unconstitutional. The issue of unconstitutionality regarding the manner and purpose of the collection of specific data refers to the review of constitutionality in terms of Article 41 of the Constitution, and does not refer to consistency with Article 7 of the Constitution. The challenged provision of the PHHC1A is therefore not inconsistent with Article 7 of the Constitution.

### B – III

13. The petitioners challenge the aforementioned provision of the Act on the grounds that it interferes with the constitutional right to freedom of conscience referred to in the first and second paragraphs of Article 41 of the Constitution. The petitioners infer from this constitutionally guaranteed right that individuals are not obliged to declare their religious beliefs, and that the state may not inquire about their religious beliefs or even whether they wish to declare the same. The unconstitutionality of the challenged provision of the Act, in their opinion, lies in the fact that it even provides for the possibility of posing such question. In the opinion of the petitioners, posing a question on religious beliefs is, in itself, unconstitutional (and inconsistent with the second paragraph of Article 41 of the Constitution), as it interferes with freedom of conscience. It is argued that the second paragraph of Article 41 of the Constitution prohibits the state from posing such questions and collecting such data.
14. The first and second paragraphs of Article 41 of the Constitution read as follows: “Religious and other beliefs may be freely professed in private and public life. No one shall be obliged to declare his religious or other beliefs.”
15. Article 41 of the Constitution (freedom of conscience) protects the freedom to declare religious and other beliefs. It is a fundamental human right and freedom that is also related to other constitutional rights, such as the right to personal dignity and safety (Article 34 of the Constitution), the protection of the right to privacy and personality rights (Article 35 of the Constitution), the protection of personal data (Article 38 of the Constitution), freedom of expression (Article 39 of the Constitution), the right of assembly and association (Article 42 of the Constitution), and the rights and duties of parents (Article 54 of the Constitution).
16. The United Nations Universal Declaration of Human Rights from 1948 (hereinafter referred to as the UN Universal Declaration)<sup>5</sup> guarantees everyone the right to freedom of thought, conscience and religion (Article 18). In accordance with the UN

5 *Človekove pravice* [Human Rights], Zbirka mednarodnih dokumentov, Part I, Univerzalni dokumenti, Društvo za ZN za Republiko Slovenijo, Ljubljana, 1995, pp. 1–7.

Universal Declaration, this right includes freedom to have or accept a religion or belief of their own choosing, and the freedom, either alone or in community with others and in public or private, to manifest one's religion or belief through worship, observance, practice and teaching. Following the model of the UN Universal Declaration, the right to freedom of thought, conscience and religion is also guaranteed by Article 9 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) and Article 18 of the International Covenant on Civil and Political Rights (Official Gazette SFRY [Socialist Federal Republic of Yugoslavia], No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the Covenant).

17. From freedom of religion (first paragraph of Article 41 of the Constitution and Article 9 of ECHR)<sup>6</sup> and the aforementioned provisions of the Constitution and binding instruments of international law (Article 8 of the Constitution), three distinct entitlements also arise for individuals: the right to profess any religion; the right to change one's religion; and the right not to have a religion<sup>7</sup> (Decision No. U-I-68/98). Freedom of religion guarantees that individuals, either alone or in community with others, in public or private, freely manifest their religion or belief in teaching, observance, worship and practice,<sup>8</sup> which is defined in a foreign legal theory as positive freedom of religion.<sup>9</sup> On the other hand, freedom of religion guarantees individuals the right not to profess their religion, or whether they follow one at all, which foreign legal theory defines as negative freedom of religion.<sup>10</sup> Freedom of religion as a *forum internum* includes the right to religious affiliation or non-affiliation, the right to change religion and the right to choose religion freely.
18. The state may not interfere with freedom of conscience.<sup>11</sup> This above all means that it may not require anyone, either directly or indirectly, to accept a certain religious or other belief, and it may not use coercive measures or offer privileges for affiliation or non-affiliation with a specific religious or other belief. If the state did so, such conduct would constitute an interference with freedom of conscience and religion.

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6 Article 9 of the ECHR (Freedom of Thought, Conscience and Religion) reads as follows:

- (1) Everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change one's religion or belief, and the freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief through worship, teaching, practice and observance.
- (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations that are prescribed by law and necessary in a democratic society for the interests of public safety, to protect public order, health and morals, or to protect the rights and freedoms of others."

7 R. St. J. Macdonald *et al.*, The European System for the Protection of Human Rights, 1993, p. 452.

8 See the first paragraph of Article 9 of the ECHR and Article 18 of the Universal Declaration of Human Rights.

9 Müller – Volbeler J., *Positive und negative Religionsfreiheit*, JZ 20/1995, p. 998.

10 *Ibidem*.

11 The third paragraph of Article 18 of the Covenant provides that the freedom to manifest one's religion or beliefs may be subject only to such limitations that are prescribed by law and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The second paragraph of Article 9 of the ECHR also contains similar admissibility of limitations. See Note 6 above.

19. The second paragraph of Article 41 of the Constitution explicitly provides that no one shall be obliged to declare his religious or other beliefs. If there is no obligation to declare religious or other beliefs, this means that it is not permissible to force one to do so. Furthermore, Article 18 of the Covenant explicitly determines that no one may be coerced into having their freedom restricted in terms of having or adopting a religion or belief. The use of coercion to change a person's religious beliefs or force a person into revealing their religious beliefs would interfere with freedom of conscience.<sup>12</sup>

A statute which determines that individuals are obliged to declare their religious beliefs would violate freedom of conscience and would therefore be unconstitutional (i.e. inconsistent with the second paragraph of Article 41 of the Constitution).<sup>13</sup>

20. According to the aforementioned criteria, it is necessary to review whether the challenged provision of the PHHC1A interferes with freedom of conscience, particularly the negative aspect of this freedom, i.e. that no one is obliged to declare their religious beliefs.

21. It follows from the challenged provision that data on the religion of the respondents is also collected by census; however, other provisions of the Act must also be taken into account. In accordance with the first paragraph of Article 10, data is generally collected directly from individuals (first paragraph of Article 10). Data concerning absent household members may also be provided by the household member who is the most familiar with such data, whereas for children aged 15 years or younger, such data may be provided by one of the parents, adoptive parents or guardians (first sentence of the second paragraph of Article 10). All of the data, except for the data on religion, may be collected from the parents, adoptive parents or guardians, or other household members. Such data must be provided in person by persons aged 14 years or older, or may be provided by other persons, but only with the written approval of the person absent during the census (second sentence of the second paragraph of Article 10). The provision of Article 10 of the PHHC1A guarantees that data on religion is collected only with the written approval of persons aged 14 years or older.

The written approval of a person absent during the census must be accompanied by the absent person's written declaration of his religion. If there is no written declaration regarding his religion and no written approval for providing such data, the persons collecting data may not require such data from other adult household members or collect it even if adult household members wish to provide such. Persons who might be absent at the time the census is conducted can avoid any possible abuse and pressure by family members, which the second petitioner alleges could pose a risk, if they inform the person collecting data that they themselves will answer the census questions and provide the required data. Article 35 provides that data on religious affiliation that is collected contrary to the second and third paragraphs of Article 10 of the PHHC1A is a minor offence punishable by a fine. This ensures that the respondents will be free to decide whether to freely declare their religious beliefs or even to answer this question at all.

12 MacDonald *et al.*, 1993, p. 453.

13 See Decision of the Constitutional Court No. U-I-68/98.

22. The second petitioner claims that this provision, in so far as it refers to minors, violates the right to freedom of conscience. This question could only arise in relation to minors younger than 14 years of age, as the parents, adoptive parents or guardians may only provide data on behalf of these minors. This provision is not constitutionally disputable. The Constitution itself provides that children enjoy human rights and fundamental freedoms, including the right to freedom of conscience, consistent with their age and maturity (Article 56 of the Constitution). Furthermore, it imposes on parents the right and duty to maintain, educate and raise their children (first paragraph of Article 54). These issues are regulated similarly in terms of content in the Convention on the Rights of the Child, particularly Articles 5 and 14 thereof (Official Gazette SFRY, MP, No. 15/90, and Official Gazette RS, No. 35/92, MP, No. 9/92). The third paragraph of Article 41 of the Constitution specifically emphasises that parents have the right to provide their children with religious and moral upbringing in accordance with their beliefs; this upbringing must be consistent with their age and maturity. Parents may influence their children's religious beliefs before the child has reached 14 years of age, which is certainly not set too high. However, this provision does not mean that parents, adoptive parents or guardians may not leave their children to decide on these issues or that they may not discuss these issues with them before answering the question. A regulation which prevents parents from raising their children as they see fit could also represent an interference with family relations. Mature parents do not require inference from the state in order to raise their children to think independently. The same also applies to religious upbringing. Therefore, the reasoning which *a priori* considers the question regarding religion as the reason for family disagreements is a reflection of an intolerant attitude towards this question. Moreover, the second petitioner did not substantiate why the determined age limit was set too high.
23. The challenged statutory provision does not force individuals (either directly or indirectly) to declare their religious beliefs or to disclose their religious beliefs if they do not wish to do so. However, the question arises as to whether an interference with the right determined in the second paragraph of Article 41 of the Constitution occurs when the state uses a census to ask individuals about their religious beliefs, even though they are not obliged to answer such a question.
24. The provisions which protect human dignity, personality rights, a person's privacy, and safety, and which prohibit interference with the above-listed rights, hold a special position among human rights and fundamental freedoms. In accordance with the principle that everything which is not explicitly permitted is prohibited in this area, the Constitution prohibits interferences with the above-listed rights, except for those which are explicitly permitted. Individuals may be deprived of the right to privacy only when and where this right collides with the statutorily demonstrated stronger interest of others (Decision No. U-I-25/95, dated 27 November 1997, Official Gazette RS, No. 5/98, and OdlUS VI, 158). One of the aspects of a person's privacy is also religious or other beliefs, which enjoy special protection pursuant to Article 41 of the Constitution.

25. For the purpose of protecting the right to privacy, the Constitution explicitly guarantees the protection of personal data (first paragraph of Article 38). Information technology substantially facilitates the processing of data and information; however, through its expansion into all areas of life, it increases the risk of individuals no longer having the opportunity to decide for themselves when, how, and the extent to which their personal information will be provided to others. In order to prevent such risk, the Constitution (1) prohibits the use of personal data contrary to the purpose for which it was collected, (2) subjects the collection, processing, designated use, supervision, and protection of the confidentiality of personal data to statutory regulation, and (3) grants everyone the right to access the collected personal data that relates to them, and the right to judicial protection in the event of any misuse of such data. According to the settled Constitutional Court case law, interferences are permitted provided that they are consistent with the principle of proportionality. This means that the limitation must be required and necessary in order to reach the pursued, constitutionally legitimate aim, and must be in proportion to the importance of such aim (third paragraph of Article 15 of the Constitution).
26. The Convention on the Protection of Individuals Regarding the Automatic Processing of Data (Official Gazette RS, No. 11/94, MP, No. 3/94 – hereinafter referred to as the CDP) determines similar requirements. In addition to the requirement that personal data must be collected and processed fairly and lawfully, the CDP also requires the adoption of measures which guarantee that personal data be stored for definitive and lawful purposes, and that only such data be processed which is appropriate, suitable and not exaggerated in view of the purpose of its collection (Article 5 in conjunction with Article 4). The CDP determines even stricter conditions for personal data which refer to racial origin, political, religious or other beliefs, medical condition, sexual preference, and criminal judgments (including convictions). According to Article 6 of CDP, such data may not be processed automatically if national legislation does not determine appropriate protection thereof.
27. It follows from the aforementioned provisions of the Constitution and CDP that each instance of the collection and processing of personal data represents an interference with the constitutional right to protection of privacy and with the right of individuals to keep their personal data private if they do not wish others to have access to such (information privacy). However, the right to information privacy is not unlimited or absolute. Therefore, individuals must accept restrictions of or allow interferences with their information privacy in the overriding general interest, provided that the constitutionally determined conditions have been fulfilled. Interference is permitted if a statute precisely defines which data may be collected and processed, the purpose for which it may be used, and prescribes control over the collection, processing, and use, as well as protection of the confidentiality of the collected personal data. According to the settled case law of the Constitutional Court, interference is allowed provided that it is in compliance with the principle of proportionality. This means that the limitation must be required and necessary in order to reach the pursued, constitutionally legitimate aim, and must be in proportion to the importance of such aim (third paragraph of Article 15 of the Constitution).

28. The census shall be conducted in a manner such that respondents must correctly and fully answer specific questions contained in the census questionnaire without being obliged to answer the question on religion (first paragraph of Article 10 of the PHHC1A). A specimen census questionnaire, which was submitted at the public hearing by the Government's representative, has shown that respondents may choose the answer: "I do not wish to answer this question". Although they are not obliged to answer the question about religion, individuals are nevertheless, by the question alone, put in a position where they must decide whether or not to answer it, and their answer or the fact that they did not wish to answer the question will be noted on the census questionnaire. This means that census data will also be collected on the proportion of respondents who did not wish to answer the question about religion. This fact was also confirmed at the public hearing by the Government's representative, who stated that the fact that the specific number of individuals who choose not to answer the question also represents data. Each respondent will be required to at least provide information as to whether they are willing to answer the question about religion. Therefore, the very fact that the individual is asked about religion in a census must be considered an interference with the right referred to in the second paragraph of Article 41 of the Constitution. However, a review must be conducted on whether such interference was admissible in the present case.
29. On the basis of the second paragraph of Article 38 of the Constitution, the collection, processing, designated use, supervision, and protection of the confidentiality of personal data shall be provided by law. Article 23 of the PHHC1A provides that data determined by statute, except for the data required for establishing the buildings and housing registers,<sup>14</sup> shall be collected and used only for statistical purposes.
30. According to the provisions of the National Statistics Act (Official Gazette RS, No. 45/95 etc. – hereinafter referred to as the NSA, third paragraph of Article 33), the purpose of statistics is to provide and demonstrate aggregate data on mass phenomena. The purpose of the collection and use of data determined by the PHHC1A is not constitutionally disputable. However, the question arises in this regard as to whether a purpose determined in such manner is imprecise, generalised or undefined since it does not guarantee that the data is linked to a specific and predetermined purpose. The answer to the aforementioned question must be based on the role and meaning of statistics for national policy.<sup>15</sup> Ensuring social, economic, and cultural development is a fundamental and permanent task of the state. Comprehensive and continuous information which is as precise and up to date as possible is required in order to carry out these tasks. Censuses (Article 26 of the NSA lists them as an example of comprehensive periodic statistical research) represent a milestone in the history of every state, since a comparison of the results of consecutive censuses creates an image of the development

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14 The Constitutional Court has separately evaluated the admissibility of the use of the data collected for this purpose (see chapter B – V of the present reasoning).

15 The second paragraph of Article 1 of the NSA determines that, through national statistics, the bodies and public administration organisations, the private sector, and the public are provided with data on conditions and trends in the areas of the economy, demographics, society, the environment, and natural resources.

of the population over the decades and centuries. It is at the heart of statistics that data, following statistical processing, is used for various purposes and tasks which are not specifically predetermined. Data collected by census is a fundamental aid to the state in decision-making in numerous areas and when predicting future development. This data is therefore used to plan the number and location of various institutions (kindergartens, schools, hospitals, homes for the elderly) and to evaluate future public transport requirements; it is also used for housing construction, employment programs and numerous other areas. The collected data also serves as a basis for numerous other research projects and studies. Therefore, with regard to data collection for statistical purposes, it is not possible to require the data to be narrowly and specifically linked to a specific purpose. Consequently, specific data is collected, processed, and stored for possible subsequent usage. The requirement for the purpose to be described specifically (precisely) and the strict prohibition of the collection of personal data for possible subsequent usage, may only apply to the collection of data for non-statistical purposes (in case of which the purpose of such collection and use are precisely determined in advance), and may not apply to the collection of data by census that creates a database for further statistical research as well as a database for policy planning based on reliable findings on the number and social structure of the population.<sup>16</sup>

31. Owing to the nature of the collection of data for statistical purposes, it is not possible to predetermine all the ways in which the collected data will be used and integrated. When reviewing whether specific data is appropriate, account must be taken of the specific purpose for which it may be used. The collection of data on religion is appropriate and necessary in order to reach a statutorily determined purpose, i.e. to provide aggregate data on mass phenomena within the society. As the census is conducted for statistical purposes and this purpose cannot be interpreted strictly, and furthermore as data is collected, processed, and stored for possible subsequent usage not only for the needs of the state authorities or organisations of public importance, but also for the needs of the economy and the general public, the assessment as to whether the collection of the aforementioned data is necessary also cannot be narrow. It is appropriate that the census collects data which is not only important for further economic development and planning, but also data on the structure of the population from a cultural, historical, and sociological perspective. A census is usually conducted every ten years, meaning that such data also becomes important for historical and other socially useful and necessary studies. In the present review, the Constitutional Court cannot ignore the fact that this period is also the first decade of Slovenia's independence as a sovereign state. From a historical perspective, this period almost entirely coincides with the period in which democratic social order was introduced in Slovenia. These circumstances give the data obtained by this census a particularly significant meaning. More specifically, it presents not only an opportunity to preserve periodic verifications of data of the same kind as that which was

<sup>16</sup> A similar conclusion was also reached by the Constitutional Court of Germany regarding census, BVerfGE 65, 1; see the reasoning of the decision, Para. II, 2b.

collected in the previous census in 1991, but also an opportunity for the state to store the obtained data as part of its national heritage for future verifications and studies.

32. The Constitutional Court is not required to review whether it would be more appropriate if the question referred to “affiliation with a religious community”, as alleged by the second petitioner, who substantiates his viewpoint with the fact that it is only permitted to inquire about facts and not (personal) beliefs. It is possible to confirm the petitioner’s viewpoint in so far as it refers to the questions which respondents are obliged to answer, and that if they refuse to do so they can even be criminally sanctioned. However, as has been stressed several times before, respondents are not obliged to answer the question about religion.<sup>17</sup> Furthermore, it cannot be deemed crucial for the present review whether or not data on religion is collected by censuses in other countries. Owing to the nature of the collection of data for statistical purposes, the Constitutional Court also cannot review the extent to which the collected data is reliable, or the extent to which, or for what statistical purposes, it will be appropriate to process such.
33. However, the question arises as to whether it would be possible to collect data on religion in a different manner which would represent less of an interference with the constitutional rights of the persons affected. A similar question regarding interference with information privacy may arise in relation to all the data collected by census. Since the constitutionality of the collection of other data is not the subject of review in the present case, the Constitutional Court was not required to provide an answer to this question. However, when reviewing the question regarding religion and taking, as a starting-point, that it is clear that the collection of data by census cannot in itself be inconsistent with the Constitution, the Constitutional Court also had to consider the fact that much of the other data included in the PHHC1A can also be collected by other methods. Without doubt, there are other methods of statistical research or data collection which are conducted anonymously and on the basis of samples. The Government also acknowledged this fact in its opinion. However, these methods cannot replace a census as a complete database, and are predisposed to containing errors. A census includes the entire population and not just a selected sample. The way in which the data obtained from the collected sample is extrapolated to the entire population is a particular problem. Such extrapolation can be subjected to substantially greater manipulation than the interpretation of data collected from the entire population. There is no perfect alternative to a census. This is also acknowledged by the positions of the Economic and Social Council of the United Nations, dated 19 July 1995, which recommended that the member states of the UN carry out a census of the population and housing, and thereby respect international and regional recommendations.<sup>18</sup> A census is usually conducted

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17 The Constitutional Court of Germany also decided similarly. It found that the duty to provide accurate data on “legal affiliation or non-affiliation with a religious community” does not interfere with the right to expression as it concerns the provision of facts, which has nothing to do with forming an opinion (see Para. B. I. of the reasoning of the decision of the Constitutional Court of Germany).

18 *Priporočila za popise prebivalstva in stanovanj okoli leta 2000 v državah članicah Ekonomske komisije Združenih narodov za Evropo, Statistični urad Republike Slovenije, 1999* [The Recommendations for the Censuses of Population and Housing conducted in around the year 2000 in the Member States of the United Nations Economic Com-

every ten years, which also gives the collected data historical significance. Furthermore, data on phenomena that are not widespread among the population cannot be obtained by research conducted on a selected sample. Therefore, the collection of data by other methods is not yet an appropriate alternative to collecting data by census.

34. Collecting data on religion by census also does not represent a disproportionate interference with the protection of information privacy in the narrower sense. The right of individuals to refuse to answer such a question, and the duty of the persons collecting data to inform individuals of this right, are guaranteed. Furthermore, it is guaranteed that data regarding the religion of persons older than 14 years of age who are not present at the time the census is carried out may be collected only on the basis of their written consent (Article 10 of the PHHC1A). This ensures that individuals decide themselves whether or not to allow the interference with their privacy, i.e. whether to provide such data or not (see Paragraph 21 of the present reasoning). It is of course clear that the census must be conducted in a manner such that individuals are free to decide whether or not they will answer these questions. It must be ensured that the personal data collected by census be used exclusively for statistical purposes and that it is stored in anonymous form. This applies to all data collected by census. Provided that the census is conducted in this manner, individuals are in a position similar to that of interviewees who take part in a study as part of a sample. The PHHC1A guarantees such position.<sup>19</sup> In the present case, while reviewing whether the question about religion interferes to a disproportionately severe extent with the right to protection of information privacy, the Constitutional Court was also required to take into consideration the fact that some religious communities, as forms of association for expressing religion or ideology with others, also wanted data regarding religion to be collected by census, and that none of the religious communities were opposed to this. Such preference represents an element of the positive aspect of freedom of religion for religious communities. It is true that this cannot represent a constitutional basis and that it would therefore be constitutionally necessary to also establish such data by census; however, it is an important factor in assessing whether the Constitutional Court can abrogate the provision which envisages collecting such data after the legislature had already decided that the state shall collect such. The positive aspect of freedom of religion is *inter alia* expressed in the requirement that the state, and thereby the Constitutional Court, when deciding on a matter, must guarantee tolerance between the followers of different beliefs.

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mission for Europe, Statistical Office of the Republic of Slovenia, 1999] (*Metodološko gradivo* [Methodology Papers], No. 7). The recommendation classifies the census into core and non-core topics. The core topics should be collected by all states, whereas the collection of non-core topics (which include data on national origin, language and religion) is left to the decision of each individual state (p. 12). Regarding the question of religion, the report states that those states which collect such data usually inquire about formal membership of a church or religious community, participation in the life of the church or religious community, and religious beliefs. The recommendation states that if only one question is posed, the question should be about formal membership of a church or a religious community, but that the answer "none" should also be permitted (p. 26).

19 See Chapter B – VI of the reasoning of the present decision.

## B – IV

35. Since the nature of the collection of data for statistical purposes is such that it is not possible to define in advance all the possibilities for the use and integration of the collected data, it must be ensured that individuals do not become a casualty of such data in its collection and processing. It must primarily be ensured that the collected data and its integration with data from other databases cannot be used to piece together the personality of an individual. In order to ensure the right to information privacy, special measures for carrying out and organizing the collection and processing of data are also required due to the fact that there is a risk that the data could be ascribed to individuals during collection, and partly also during storage. At the same time, a regulation is required that will ensure deletion of the data required to aid the census process (i.e. identifiers) and which could easily enable deanonymisation (e.g. name, address and identification number) and deletion of the list of persons who carry out the census. In order to protect the right to information privacy, it is necessary to protect the data obtained for statistical purposes as a secret for as long as the data is or can be linked to a specific person. Furthermore, it must be ensured that data collected for statistical purposes be used only for these purposes, which means above all that such data may not be provided to other users in a form which could enable the identification of the persons to whom it refers. It is equally crucial to re-establish data anonymity as soon as it is possible to do so, and to implement measures which prevent the re-personalisation of data.
36. The second petitioner believes that the provisions of the PHHC1A do not guarantee such. It is alleged that Articles 10 to 13 are unconstitutional as they allow the collection of personal data not only from the census respondent but also from other persons (from other household members), and from all the existing official and administrative databases of the public and private sectors. Furthermore, he claims that the provisions of Articles 24, 25, 28, and 29 do not suffice for the effective protection and security of the collected personal data, as they ensure protection only in a declaratory fashion.
37. The PDPA, the application of which is also explicitly provided by the PHHC1A, provides that personal data is, as a general rule, collected directly from individuals (first paragraph of Article 8). A statute may determine in specific cases that personal data also be collected from other persons, or obtained from existing databases of personal data, in the event of which also the person or database, the type of personal data, and the manner in which the data is to be collected must be determined by such statute; furthermore, the purpose for which the data was collected must also be taken into account (second paragraph of Article 8). Particularly sensitive data, which also includes data regarding religion, may be collected from other persons or obtained or integrated from the existing databases only with the written consent of the individual to whom such data refers. Written consent is not required if the data is intended for use for statistical or scientific research purposes in a manner that does not allow for individuals to be identified (third paragraph of Article 8).
38. Articles 11, 12, 13, and 28 of the PHHC1A regulate the collection and integration of personal data from various databases that contain personal data. It is alleged that the

forementioned articles are unconstitutional because the Act does not provide effective measures to ensure the effective protection and security of the collected data. As stated in Paragraph 37 of the present reasoning, these provisions originate from the provisions of Article 8 of the PDPA. The obligation of the Office to apply the provisions of the PDPA is also imposed by the second paragraph of Article 32 of the NSA.<sup>20</sup> The PHHC1A therefore determines the type of personal data and the databases from which data may be collected. It follows from Article 11 that only data which is necessary in order to conduct the census may be collected. Such data is determined by Article 6 of the PHHC1A, which determines which data may be collected by census. Data controllers of personal data databases are obliged to supply such data to the Office; however they are not obliged to provide all the data that they keep in their databases – only data which is necessary for conducting the census.

39. It is only possible to collect data by census that is determined by the PHHC1A and for the purpose determined by the PHHC1A, and can be collected either directly from individuals, or from other persons (close members of the household), or from other databases that contain personal data. By integrating data collected in such a manner, the Office creates a post-census database (collection) (Article 28 of the PHHC1A). The PHHC1A determines that the protection and security of personal data collected in this manner is ensured in accordance with the statute which regulates the protection of personal data (Articles 24 and 25). The provision, which is the same in terms of content, can also be found in the NSA, which applies to all statistical research carried out by the Office (first paragraph of Articles 41 and 42).
40. First, Article 9 of the PDPA, which provides that personal data may be processed only for the purposes determined by the statute, must be taken into account. The PHHC1A determines that data collected by census be used for statistical purposes. The third paragraph of Article 33 of the NSA determines that the statistical purpose is the provision and production of aggregate data on mass phenomena. Data collected by census may therefore not be used for other purposes. From this, it can be inferred that there is a prohibition on the publication of personal data (Article 29 of the PHHC1A) and a prohibition on providing data from statistical registers to users (also from a database created according to Article 28 of the PHHC1A) in a form and in such a manner to enable the identification of the persons to whom the data refers (second paragraph of Article 33 of the NSA). Data collected by the census may therefore be published and provided to other users only in aggregate form (Article 30 of the PHHC1A), i.e. in a form and manner which precludes the identification of the persons to whom the data refers (fifth paragraph of Article 34 of the NSA).
41. The provisions according to which all data collected by census is an official secret and according to which it is the duty of all persons who take part in conducting the census to protect all data as an official secret (Articles 26 and 27 of the PHHC1A), as well as

20 The second paragraph of Article 32 of the NSA reads as follows: “The conditions for the collection, use and integration of personal data from various collections thereof are determined by the statute which regulates personal data protection or information privacy protection.”

the criminal provisions for violations in relation to official secrets, are also important for personal data protection. Article 43 of the NSA provides the same *mutatis mutandis*. Article 48 of the NSA, which determines that administrative and other state authorities, local community authorities, providers of public services, and bearers of public authority may not use statistical data to determine the rights and obligations of the persons to whom such data refers, is also important for the protection of individuals.

42. The PHHC1A obligates the Office and all persons conducting the census to determine, in accordance with the PDPA, appropriate measures for the protection of personal data and ensure that such measures be respected (Article 24). Pursuant to the provisions of Article 13 of the PDPA, these are mainly organisational and logicaltechnical procedures and measures, which protect personal data, prevent data from being destroyed, accidentally or intentionally and without authorisation, altered or lost and processed without authorisation, in the following manner: by securing the premises, equipment and system software; by protecting the applied software through which personal data is processed; by preventing unauthorised access to personal data during its transmission; and by enabling a subsequent determination of when particular data was used or entered into the database of personal data, and by whom. Procedures and measures for the protection of personal data are prescribed by the Office (Article 15 of the PHHC1A).
43. The provision of the first paragraph of Article 10 of the PDPA, which provides that personal data may be stored for only as long as required to achieve the purpose for which it was processed, is important in order to ensure the protection of personal data or the right to information privacy. The PHHC1A does not contain any explicit provisions in relation to the duration of storing the collected personal data. It only determines the purpose for which the data is collected and the timeframe within which it must be processed and made accessible to the public, naturally only in an aggregate form. Therefore, Article 31 determines that the Office is obliged to publish full and detailed results of the census within two years of the completion thereof. Upon the expiration of this time limit, the purpose of the census is achieved. The second paragraph of Article 10 of the PDPA provides that, after fulfilling the purpose for which the personal data is processed, it must be deleted from the database or access to it must be blocked, unless otherwise provided by law for a specific type of personal data, and must therefore be taken into account in order to answer the question as to how long personal data may be stored. Point 9.1 of the Recommendation similarly provides that, in every research project, it must be determined as precisely as possible whether data will be deleted upon completion of the project and, if so, which data will be deleted, which data will be stored in anonymous form, and which data will be stored in the form it was collected, and under what conditions. The PHHC1A does not determine whether personal data is deleted or access to it blocked, or which personal data is deleted, blocked or stored in the form in which it was collected. This therefore represents a legal gap which may be filled by interpretation. The purpose of processing personal data collected by census is achieved when this data is published in aggregate form after its processing (Articles 30 and 31 of the

PHHC1A). Pursuant to the first paragraph of Article 10 of the PDPA, personal data may be stored only as long as this is necessary to achieve such purpose. When the purpose is achieved it is deleted from the database of personal data or access to it is blocked (second paragraph of Article 10 of the PDPA), unless otherwise provided by statute. A statute which might provide otherwise is the PHHC1A. More specifically, the PHHC1A could have explicitly determined the duration and manner in which personal data is stored. As it did not provide such, Article 10 of the PDPA must be applied. It follows from Article 31 of the PHHC1A that the Office must complete the processing of the collected personal data within two years after the completed census. By publishing the census results, the purpose of processing data collected by the census is achieved. The Office must therefore comply with the second paragraph of Article 10 of the PDPA upon the expiration of the two year time-limit determined in Article 31 of the PHHC1A.

44. Given the aforementioned, the challenged provisions of Articles 11 to 13, 15, 24, 25, 28, and 29 are not inconsistent with the Constitution. The protection of personal data collected by census is ensured to an appropriate degree if the other provisions of the PHHC1A and NSA, and particularly the provisions of the PDPA, are respected.

#### **B – V**

45. The second petitioner challenges Article 5 and the part of Article 23 of the PHHC1A which refers to the definition of a special (additional) purpose for the collection of census data, i.e. for the purpose of establishing the building and housing register and the household register. Article 5 determines that buildings are given identification numbers for the purpose of establishing the building and housing register; Article 23 specifies the data which will be used for establishing the building and housing register and the household register. In the petitioner's opinion, it is inadmissible to use the collected data for other purposes, especially for carrying out administrative tasks.
46. Article 23 of the PHHC1A provides that census data which is collected for statistical purposes and which is precisely specified in the second paragraph of Article 23 may also be used for the purpose of establishing the aforementioned administrative databases. The establishment of the building and housing register and the household register does not fall within the competence of the Office. This is evident from the fourth paragraph of Article 23 of the PHHC1A. The housing register is regulated by the Housing Act (Official Gazette RS, No. 18/91 etc. – hereinafter referred to as the HA), whereas the household register is regulated by the Residence Registration Act (Official Gazette RS, No. 9/01 – hereinafter referred to as RRA). The aforementioned acts include provisions regarding the data which is collected in the registers, and provisions regarding the database controllers. This refers to the databases required by administrative bodies for carrying out their administrative tasks.
47. Pursuant to the third paragraph of Article 19 of the RRA, the household register is kept in the framework of the permanent residence register. This register contains certain data which is anyway kept in the permanent residence register. The provisions of Article 18 of the RRA regulate the function of the database controller of

the permanent residence register, the purpose and the method of data collection and processing, storage, designated use, and provision of data to other users. Under the conditions determined in the RRA and taking into account the provisions of the PDPA, the seventh paragraph of Article 18 of the RRA permits extensive access to personal data which is kept in the permanent residence register and other registers (e.g. the household register) to those using such data for the purpose of carrying out administrative and other tasks.

48. Pursuant to Article 10 of the HA, the housing register is kept for the municipality area. The register is kept and maintained by the municipality (Article 97 of HA). The state keeps a central housing register, maintains a complete information system in relation to housing and ensures its development (Article 75 of the HA). Furthermore, Article 10 of the HA determines which data is collected and in what manner, and regulates the access of users to such data.
49. The question is whether it is allowed to provide other users with personal data that can be ascribed to individual, which was obtained for statistical purposes in order for them to carry out administrative and other tasks, and whether the provision of such data entails an interference with the right to information privacy.
50. The aforementioned is clearly contrary to the principles and purpose of national statistics, as determined by the NSA. The purpose of national statistics is to provide various users (first paragraph of Article 1 of the NSA) with data in aggregate form on mass phenomena in different areas of life. The purpose of national statistics is not to provide data to state authorities, local community authorities or bearers of public authorities for the performance of their administrative or other tasks. Therefore, in several places, particularly the second paragraph of Article 33, the NSA determines that the Office may not provide data from statistical registers to users in a form and manner which allows the individuals to whom the data refers to be identified (also provided by the fifth paragraph of Article 34). Furthermore, the NSA determines that data from statistical registers may only be used for statistical purposes. Thereby, trust in the objectivity, impartiality, and independence of national statistics is ensured (first paragraph of Article 2 of the NSA). In this way, it is possible for national statistics to have access to all sources of data in order to provide for aggregate (de-individualised) data, and individuals are guaranteed protection of their right to information privacy. It is evident from the legislative materials of the NSA adoption procedure that the legislature wanted to enact the principle of the separation of statistics from the performance of administrative tasks. In these legislative materials, explicit reference is made to the fact that national statistics collects data and uses such data exclusively for statistical purposes. However, for the purpose of performance of administrative tasks the state must collect data itself.<sup>21</sup>
51. The regulation in the PHHC1A which allows for data collected by census for statistical purposes to also be used for other purposes is inconsistent with the Constitution (second paragraph of Article 38). The collection, processing, designated use,

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21 Gazette of the National Assembly of the Republic of Slovenia, No. 32/93, pp. 69 and 70.

supervision, and protection of the confidentiality of personal data is regulated by law. The fundamental requirement, which follows from the principles of a state governed by the rule of law, is that the law must be clear and comprehensible to every citizen. The simultaneous collection of data, together or in parallel, for various purposes with different requirements, conditions and with different possibilities how the collected data may be integrated and used, may result in vagueness and doubts over the purposes for which the data will be used. The collection and use of data for statistical purposes is entirely different from the collection of data for the purpose of carrying out administrative tasks. Therefore it does matter whether data which is collected for statistical purposes and should only be used for statistical purposes is also used for the purpose of carrying out administrative tasks. The purpose of data collection and use should be clearly and specifically determined when collecting data in order to carry out administrative tasks. Thus, it should be clear from the law as to what the specific purpose for using the data is, and who will be able to use it. The purpose may not be specified in general but so as to be clear for which administrative and other tasks the data will be used. Such requirement also follows from Article 48 of the NSA, which determines that statistical data may not be used to determine the rights and obligations of individuals to which such data refers (similarly to point 4.1 of the Recommendation). Furthermore, it is not sufficiently clear from the provisions of the PHHC1A as to what the connection is with the statute regulating this area, which should constitute the legal basis for establishing the aforementioned registers and should regulate all the issues that are defined in the second paragraph of Article 38 of the Constitution. Therefore, the provision that data collected by census may be used for no more than two years after the census (fourth paragraph of Article 23 of the PHHC1A) also indicates that the legislature wanted to enable the use of the collected data in order to establish the aforementioned registers if need be and if the competent ministries so decided. This method of collecting and using personal data collected for statistical purposes does not guarantee the protection of information privacy, as it does not meet the requirements determined in Paragraph 35 of the present reasoning. Furthermore, it is evident from the draft PHHC1A-A, which argued for the collection of specific data in order to establish the building and housing register, that such data is envisaged to be collected for possible subsequent usage. It reads as follows: "There is an ongoing discussion among the competent institutions regarding the concept of creating a building and housing register and the activities that are required before such register is established. These entail the physical identification of housing units or other partial units in multi-housing buildings, meaning that every apartment is affixed with a plate with a serial identifier which is connected to a superior code (a house number and the connection to the centroid). Such identification would enable everyone who collects any data regarding apartments, their maintenance or inhabitants, to "hang" such data or bind them to physically permanently maintained identifiers. The result is the model of the core of identifiers of buildings and housing registers which will enable the periodic receipt of data from the various

operating databases related to the apartments. In order to do this, it is necessary for the Government to adopt a decree specifying the manner in which the identifiers of buildings and housing, and the connection between identifiers used for different databases, are to be determined.”

52. The provisions of Article 23 of the PHHC1A which also permit the use of data collected by census for other purposes and not only for the statistical purposes for which it is collected, and the provision of Article 5 of the PHHC1A, do not guarantee protection of the right to information privacy and are therefore inconsistent with Article 38 of the Constitution. Consequently, the Constitutional Court abrogated that part of these provisions.

### C

53. The Constitutional Court adopted this Decision on the basis of Articles 21 and 43 of the CCA and the sixth indent of Article 52 of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia (Official Gazette RS, No. 49/98), composed of: Dr Dragica Wedam-Lukić, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Lojze Janko, Dr Ciril Ribičič, Dr Mirjam Škrk, Franc Testen, and Dr Lojze Ude. Point 1 of the operative provisions was adopted by five votes to three. Judges Fišer, Ribičič, and Ude voted against and submitted dissenting opinions, and Judge Wedam-Lukić submitted a concurring opinion. Point 2 of the operative provisions was adopted by seven votes to one. Judge Ude voted against and submitted a dissenting opinion. Point 3 of the operative provisions was adopted by six votes to two. Judges Čebulj and Testen voted against. Judge Čebulj submitted a dissenting opinion.

*Dr Dragica Wedam-Lukić*  
*President*

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#### **DISSENTING OPINION OF JUDGE DR ČEBULJ, JOINED BY JUDGE TESTEN**

In the present case, I voted against Point 3 of the operative provisions (and consequently against Point 4), by which the Constitutional Court abrogated Articles 5 and 23 of the Population, Household and Housing Census in the Republic of Slovenia 2001 Act (hereinafter referred to as the Act).

Article 5 determined that buildings are given an identification number for the purpose of establishing the building and housing register, and Article 23 determined the data to be used for the purpose of establishing the building and housing register and the household register. In this way, the Act allowed for the data collected for the census to be used for an additional purpose. This purpose was not only to obtain the census results, but also to establish both of the aforementioned registers. The majority of the Constitutional Court judges took the view that this was inconsistent with Article 38 of the Constitution (Paragraphs 45 to 52 of the Decision’s reasoning). I do not agree with this conclusion and its reasoning.

The Constitutional Court simply notes that the establishment of both registers does not fall within the competence of the Statistical Office. It also notes that the Housing Act and the Residence Registration Act serve, respectively, as the statutory basis for establishing the registers. The aforementioned acts provide which data is kept in registers, the designated use of data, and provisions regarding the database controllers (Paragraphs 46 and 47 of the reasoning). It is, of course, a fact that such data is used for administrative purposes. However, the challenged Article 23 did not determine that such data be used for administrative purposes.

In the present review, the question was raised before the Constitutional Court as to whether it is allowed to provide other users with personal data that can be ascribed to individuals, which was obtained for statistical purposes in order to carry out administrative tasks, and whether the provision of such data represents an interference with the right to privacy (Paragraph 49 of the reasoning).

The Constitutional Court stated that the regulation in the Act which enables data collected by census for statistical purposes to also be used for other purposes is inconsistent with the second paragraph of Article 38 of the Constitution. However, in the continuation of the same part of the reasoning, at the beginning of which the aforementioned statement was written (Paragraph 51 of the reasoning), the Constitutional Court wrote: *“The collection and use of data for statistical purposes is entirely different from the collection of data for the purpose of carrying out administrative tasks. Therefore it does matter whether data which is collected for statistical purposes and should only be used for statistical purposes is also used for the purpose of carrying out administrative tasks. In such case the purpose of the collection and use of data should be clearly and specifically determined. It should therefore be clear from the law as to what the specific purpose for using the data is, and who will be able to use such. The purpose may not be specified in general but so as to be clear for which administrative and other tasks the data will be used for.”*

It follows from the above-cited quote that the Constitutional Court does not state that the use of data collected for statistical purposes for other purposes is inconsistent with the second paragraph of Article 38 of the Constitution. It is therefore not a matter of inconsistency with the part of the first paragraph of Article 38 which prohibits the use of personal data for a purpose that is different to that for which it was collected. This is not corroborated by the statement (Paragraph 50 of the reasoning) that this is contrary to the principles and purpose of statistics. In my opinion, the purposes are incompatible if the (subsequent) purpose of use is such to (be able to) change the contents or the meaning of data. However, this is not the case here.

It is alleged that an inconsistency exists only in the fact that it is not evident from the statute for which specific purposes the data will be used, and who will be allowed to use data.

Article 23 of the Act determined in detail the purpose for which the collected data may be used. It would be used for the purpose of establishing both registers. It also determined who could use them: the bodies in charge of establishing the registers. Lastly, it determined how long these bodies would be allowed to use such data: up to

two years after the completed census. With regard to the second paragraph of Article 38 of the Constitution, this suffices. This provision does not require that all the elements be determined and regulated in one single statute (in this case, the elements include: the purpose of using the data once it is contained in the registers; the users of the data that will be contained in the registers; and ensuring data protection). Furthermore, the Constitutional Court did not require such (see Paragraphs 35 to 44 of the reasoning). Whether these issues, which are regulated in the Housing Act or in the Residence Registration Act, are regulated in accordance with the requirements of Article 38 of the Constitution could be the subject of a separate constitutional review which does not influence the constitutionality of Article 23 of the Act.

*Dr Janez Čebulj*

*Franc Testen*

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**CONCURRING OPINION OF JUDGE DR WEDAM-LUKIĆ**

I voted for all the points of the operative provisions of the Decision and I also entirely agree with its supporting reasons. In this concurring opinion, I merely wish to explain some further reasons which influenced my decision.

Whilst I had no doubts regarding Points 2 and 3 of the operative provisions, I initially, however, had some difficulties in deciding whether the fact that religion is inquired about during the census (fourteenth paragraph of Article 6 of the Population, Households and Housing Census in the Republic of Slovenia 2001 Act) is consistent with the Constitution (Point 1 of the operative provisions).

During the discussion, I stressed on several occasions that the key question was which data may be collected by census: either data which the state needs in order to carry out its tasks, especially for planning future development, or data which also forms the basis for other research and studies. The question arose as to whether, with regard to Article 7 of the Constitution, data on religion could be of any importance for carrying out state tasks (in this sense, data on religious affiliation would perhaps be even more problematic). The aforementioned thesis was not supported during the discussion. The joint position was adopted that the collection of data on religion by census is not inconsistent with Article 7 of the Constitution, and that it does not represent data in which the state should have no interest and about which it should not inquire, under the condition that everyone is guaranteed the right not to answer such question. In reviewing whether this is a violation of the second paragraph of Article 41 of the Constitution (freedom of conscience) or Article 38 of the Constitution (protection of personal data), the only difference between the present majority decision and the decision defended by the minority was the fact that, in the opinion of the minority, such interference did not pass the test of proportionality in the narrower sense, since the same aim could be achieved through less stringent means:

through surveys in which anonymity would be ensured during the data collection phase, or through sample research in which more appropriate answers could be obtained by posing additional questions. I did not find such reasoning convincing. The difference between a census and a survey lies in the fact that an individual must take part in a census (even if they are not required to answer specific questions), whereas participation in a survey is not obligatory. This is also the reason why the Constitutional Court deemed that inquiring about religion by way of a census is an interference with the right of an individual to information privacy, even if answering this question is not obligatory. As stated in the reasoning of the majority decision, an important difference is also the fact that the census includes the entire population and so it is possible to detect phenomena which would be difficult or even impossible to detect through sample based research. Therefore, a census can only be likened to research conducted on the entire population and, in such case, I do not see convincing reasons to support the position that this research would entail a lesser interference with the right of the individual to information privacy. As the Constitutional Court declared in Point 2 of the operative provisions, which was upheld by all the judges but one, the Act ensures appropriate protection of data collected by census. Naturally, if the Constitutional Court had decided differently in this Point of the operative provisions, the question would have arisen as to whether the collection of other data, which the respondent is obliged to provide, also entails a disproportionate interference with the right of the individual to information privacy.

In deciding as to whether the collection of any personal data by census is admissible, I believe it is crucial that the collected data be used solely for statistical purposes and that the use of specific data regarding a specific person be rendered impossible. Therefore, I also consider the decision in Point 3 of the operative provisions to be essential, by which the Constitutional Court abrogated the provisions which allowed for some data collected by census to be used for establishing the building and housing registers. In my opinion, a census, as the most comprehensive method of data collection, passes constitutional review only under the condition that it remains within the limits determined by the fundamental purpose for which it is conducted. More specifically, any “mixing” of censuses and the collection of data for other purposes could endanger the standards which must apply to the collection of data by census in order for such to remain consistent with the Constitution.

Lastly, I would like to stress that I am aware of the fact that the question about religion (and national origin, which the Constitutional Court did not review) had already been politicised before the census was carried out, and that this fact may have influenced the reliability of the data collected. Nevertheless, I believe that experts should resolve this issue and take this into account in the interpretation of the collected data; however, this cannot be of relevance to the decision of the Constitutional Court.

*Dr Dragica Wedam-Lukić*

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**DISSENTING OPINION OF JUDGE DR UDE,  
JOINED BY JUDGE DR RIBIČIČ, EXCEPT FOR PARAGRAPH 5  
OF THIS DISSENTING OPINION**

I voted against Points 1 and 2 of the operative provisions of the Decision; at the same time, I argued in favour of the Constitutional Court reviewing the constitutionality of the question about national origin determined in the thirteenth indent of Article 6 of the PHHC1A. I provide below the reasons for my position:

1. The Constitutional Court should also review the constitutionality of the question about national origin determined in the thirteenth indent of Article 6 of the PHHC1A. After accepting the petition for consideration, the Constitutional Court held a public hearing, where it discussed in an adversarial manner the question about national origin. It is true that the petitioner, M. Krivic, explicitly stated that he did not challenge the aforementioned provision (as regards this question, his petition was unclear); however I believe this not to be a sufficient reason to take this position, which was explained in Paragraph 9 of the reasoning and according to which the Constitutional Court will not review the constitutionality of the question about national origin. Furthermore, the conditions for reviewing the question about national origin *sua sponte* on the basis of correlation, as determined in Article 30 of the Constitutional Court Act, are met. This Article provides that, according to the rule of correlation, the Constitutional Court may also review the constitutionality of other provisions of the same regulation *sua sponte* if the challenged provisions, and such other provisions the Constitutional Court itself decides to review by applying the rule of correlation, are mutually related and should this be required to resolve the case. In my opinion, the questions on religious belief and national origin are mutually related, not only because they are included in the same census but also because they are substantively related, as they refer to the personal beliefs of an individual. Often these questions even overlap. Different religions, such as Catholicism, Eastern Orthodoxy, Protestantism, and Islam, were characteristic of the former Yugoslav nations and nationalities. Although one of the petitioners (M. Krivic) believes that the constitutional regulations which refer to the right to profess religious beliefs and the right to declare national origin differ in terms of substance, I am of a different opinion. Regarding the right to freedom of conscience (Article 41 of the Constitution), it is true that the second paragraph of Article 41 of the Constitution explicitly provides that no one shall be obliged to declare his religious or other beliefs. Article 61 does not include any such explicit provision; however, it clearly follows from this constitutional provision, which reads that everyone has the right to freely express affiliation with his nation or nationality, that individuals are also not obliged to express such affiliation. It is clear that the right to “free expression of one’s affiliation with his nation or national community” also includes the right not to express such affiliation in a census. This is also how this right is treated in point 29 of the census questionnaire. Moreover, there is also no consensus in the public regarding the question whether asking individuals about

their national origin in a census is constitutionally admissible. To avoid this question when reviewing the constitutional admissibility of a census, which is generally conducted every ten years, leads to this discussion becoming merely academic.

2. In my opinion (as also established by the majority decision), every instance of the collection and processing of personal data is an interference with the constitutional right to the protection of privacy and personality rights referred to in Article 35 of the Constitution, whereas questions about religious belief and national origin also represent an interference with the constitutional right to freedom of conscience referred to in Article 41 of the Constitution and the constitutional right to expression of national affiliation referred to in Article 61 of the Constitution. However, the majority took the view that an individual must accept limitations to privacy of information and must allow interferences therewith if this is in the overriding general interest or if constitutionally determined conditions have been met. The majority decision established that interference is admissible since the (statistical) purpose of the collection, providing “aggregate” data on mass phenomena, is not disputed, and that the interference is required and necessary because this data could not otherwise be obtained (Paragraph 33 of the reasoning). In the opinion of the majority, the interference is also not disproportionate as an individual may decline to answer the question about religious belief (here I note that the constitutional decision refers only to the question about religious belief and not also to the question about national origin, which was because the majority avoided a review of the constitutionality of this question).

Owing to the fact that the questions, both of which are problematic in my opinion, concern data on an individual’s personal beliefs, which could not be collected in an appropriate statistical manner, I do not find the majority’s reasoning to be convincing. If an individual chooses not to answer the question about religious beliefs and the question about national origin, the statistical data will not be able to precisely represent these two phenomena. The statistical purpose of including both questions in the census questionnaire is therefore not achieved, and consequently such question is neither necessary nor required. The assertion that data could not otherwise be obtained (through sampling) is not true.

The statement (Paragraph 33 of the reasoning) that data on phenomena that are not widespread among the population cannot be obtained through research conducted on a selected sample is, in this case, also entirely without basis. Data on the religious beliefs and national origin of the inhabitants of the Republic of Slovenia is certainly not the kind of data which would refer to small groups. Data on religious beliefs could therefore be collected in a different manner and anonymously, within the meaning of point 2.2 of Recommendation No. R (83) 10 of the Committee of Ministers of the Council of Europe on the Protection of Personal Data Used for the Purposes of Research and Statistics. Lastly, it is worth noting that only a few other countries have included a question on religious belief in their statistical censuses.

3. In the process of preparing the questionnaire and the subsequent discussion of its contents, it became clear that both items of data were not being collected primarily for statistical purposes. The data were to be used by certain political groups and in-

stitutions to meet various objectives and to prove that their specific requests were reasonable (e.g. regarding religious education in schools, affording special rights to the members of individual nations and nationalities); furthermore, the collection of such data could also serve as a basis for exerting pressure on individual groups to declare their affiliation to a certain nation, etc. Previous debates held among the Slovene public on the constitutionality of these two questions have proven these intentions. It is clear that a statistical census is not intended for a public declaration of religion and national origin; however, regarding these two questions, this is the fate of this census in terms of its content and scope. If both questions were excluded, this would by no means entail an interference with the right to freely express one's religion in public life or to freely express affiliation with one's nation or national community. This constitutional dispute concerns the negative, and not the positive, aspects of both rights.

In my view, it is particularly important to draw attention to the fact that these two questions might be very sensitive for married persons who have different national affiliations (and thereby, usually, also different religious affiliations). In particular, pressure could be felt by their children. It is true that Article 10 of the PHHC1A contains the provision that data on religious beliefs and national origin may be provided on behalf of members of a household who are absent during the census and are 14 years old on the day the census is conducted, only if their written consent is submitted that such data be provided for the purposes of this census, along with a written statement on their nationality and religion. It is sociologically and psychologically naive to expect parents, in each case, to respect the right of a minor in their charge to free expression of his religious belief and national origin. We can only imagine the traumas that this would cause in some families. Therefore, it is difficult to discuss the proportionality of the interference, particularly since it is clear that the statistical purpose of both questions will not be achieved.

4. I would also like to draw attention to some other issues. The counting of the members of the Slovenian minority in Carinthia in Austria has always resulted in assimilation and a partial denationalisation of the Slovenian minority. After the Austrian Constitutional Court had issued a decision on the setting up of local road signs, the Governor of Carinthia, J. Haider, immediately ordered that the number of members of the Slovenian minority be counted. It is clear that this cannot be said to be the case for the situation in Slovenia. In Slovenia, the census may even serve the interests of nations and nationalities which are not in the majority. Nevertheless, it is clear that the results of such a census serve political rather than statistical interests.
5. The Constitutional Court decided on the constitutionality of Articles 10, 11, 12, 13, 15, 24, 25, 28, and 29 without having first conducted an exhaustive analysis and examination, thus deciding completely superficially by invoking the formal consistency of these provisions with the Constitution and other statutes, particularly the Personal Data Protection Act (hereinafter referred to as the PDPA). I therefore cannot agree with a dismissal of the constitutional petition regarding these Articles, even though I have been unable to conduct an exhaustive analysis myself. The majority decision

established that the legislature had respected the requirements of Article 38 of the Constitution, which: prohibits personal data from being used for a purpose contrary to that for which it is collected; states that the collection, processing, designated use, supervision, and protection of the confidentiality of personal data shall be provided by law; and provides that everyone has the right to access collected personal data that relates to them and the right to judicial protection in the event of any abuse of such data, not only regarding the provisions on the collection and integration of data from various collections (Articles 11, 12, 13, and 28 of the PHHC1A) but also regarding the determination of the period of storage (Article 10 of the PHHC1A) and regarding the provisions on the processing, storage, and provision of data (Articles 24 to 27 of the PHHC1A). The provisions which refer to the processing, storage, and provision of data (Articles 24 to 27 of the PHHC1A) only paraphrase constitutional requirements. They refer to the PDPA, specifically Article 9, which again only generally determines that personal data may only be processed for purposes determined by law. Furthermore, Article 13 of the PDPA does not include specific measures for the protection of personal data, but only refers to them as examples, and authorises all persons providing such protection to determine those measures in accordance with the PDPA. The entire statutory regulation is therefore general in nature, and does not include clearly determined obligations for the database controllers, leaving the regulation of this area to implementing regulations.

At the very least, the regulation in Articles 24 to 27 could be criticised for not fulfilling the constitutional obligation referred to in Article 38 that the collection, processing, designated use, supervision, and protection of the confidentiality of personal data shall be provided by law. Moreover, if we also consider that the automatic processing of all data is increasingly gaining ground, and that proceedings regarding the petition for the review of the constitutionality of the Central Population Register Act (which contains challenged provisions on the personal identification number of citizens (EMŠO) and that this identification number is also indicated on the census questionnaire) has been pending before the Constitutional Court for three years, it is then possible to draw the conclusion that the issues arising from the collection, processing, supervision, and protection of the confidentiality of personal data have certainly not been studied to a sufficient extent for the Constitutional Court to take a clear and precise position on all the aforementioned issues. However, it is true that the petition was also not sufficiently reasoned in this regard.

*Dr Lojze Ude*

I join the Dissenting Opinion of Judge Dr Lojze Ude, except for the Paragraph 5 herein.

*Dr Ciril Ribičič*

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## DISSENTING OPINION OF JUDGE DR FIŠER

I voted against Point 1 of the operative provisions in the present case, and hereby submit a Dissenting Opinion with regard to this part of the decision of the Constitutional Court.

1. First, I must explain that I argued in favour of the Constitutional Court reaching a decision, either way, on the constitutionality of the thirteenth (in addition to the fourteenth) indent of Article 6 of the PHHC1A regarding the question about national (ethnic) origin, notwithstanding the fact that it could be unclear whether the petition for the review of the constitutionality of the challenged statute was expressly lodged in this sense and, if so, whether it might have been subsequently withdrawn. Two fundamental arguments point in this direction: first, a public hearing on the census question about national origin, as well as several other questions, was held before the Constitutional Court. Although proceedings before the Constitutional Court indeed have many particularities, certain fundamental procedural rules cannot be ignored. The question of what precisely is being challenged in this case should be clearly determined and resolved promptly and in its entirety by the order, by which the petition is accepted in accordance with the third paragraph of Article 26 of the CCA. As soon as the proceedings are at the stage where adversarial discussion of the matter at issue may commence, it is necessary to decide on the issue that is being challenged in the proceedings. At this point, the petitioner may no longer, in principle, withdraw or amend his petition; I say “in principle”, because there are, of course, cases where such a position cannot be defended (e.g. in cases where the factual situation has fundamentally changed, and particularly in cases where the challenged regulation is brought into line with a statute or the Constitution).

Notwithstanding the aforementioned, the conditions for reviewing the question on national (ethnic) origin *sua sponte* were nevertheless fulfilled on the basis of the correlation referred to in Article 30 of the CCA, since the provisions are mutually related. In both cases, with regard to religion (in conjunction with Articles 7 and 41 of the Constitution) and national origin (naturally, in conjunction with Article 61 of the Constitution), it is a matter of dealing with particularly sensitive data. This clearly indicates the need for both of the problematic categories to be treated equally and decided upon in the same way (not necessarily equal in terms of content, although I am of a different opinion, as explained below).

2. In terms of content, I believe that the question posed during the census about religion (and the question about national origin, with some differences which are, in my opinion, irrelevant for the final decision) represents an inadmissible interference with the Constitution, primarily Article 35 therein and namely the provision which protects a person's privacy.

The rights contained in Articles 7, 41, and 61 of the Constitution have no direct or indirect connection with the census. In other words, there can be nothing added to rights and they cannot be deprived of anything by the census; the existence and exercise of these rights are in no way connected to the census or the results thereof.

Moreover, it is necessary to strictly separate the aforementioned rights, individual or group rights, their positive or negative aspects, on the one hand, from the census and its results on the other. A different standpoint would entail the abuse of the census as an institution, which would be by its nature constitutionally inadmissible.

A census is clearly a compulsory activity that is carried out by the state for some of its needs (which are not defined clearly enough, however this may be a surmountable issue in so far as it does not concern questions about personal beliefs) and which requires a high degree of cooperation of the respondents. The respondent does not gain anything therewith, neither legally nor factually. On the contrary, some violations of the duty to cooperate are even sanctioned as minor offences. In this context I will not discuss the question whether such sanctioning is truly necessary; however, I did not overlook the fact that the respondents are not prosecuted for a minor offence in relation to both discussed questions. Nevertheless, the circumstances under which the census is carried out are undoubtedly such that respondents are placed almost entirely in the position of a subject of some proceedings, which is clearly not in their interests. It is clear that this represents interference with the person's right to privacy. It is a question of whether, viewed from this perspective, the census would even pass a review of its constitutionality; it could if it were based on different premises; however, the legislature did not make any efforts whatsoever in this regard, and such premises are not even provided by the general legislation governing the national statistics. On the contrary, in the census act, the legislature made some serious errors which led to the abrogation of a part of the PHHC1A, which is referred to in Point 3 of the operative part of Decision of the Constitutional Court; however, many doubts were raised despite the fact that the remaining challenged provisions had passed the constitutional review (see Point 2 of the operative part of Decision). The fact is that the remaining census questions referred to in Article 6 of the PHHC1A were not challenged, and the conditions under which they could have been reviewed on the basis of correlation were not fulfilled.

3. When compared to the other questions referred to in Article 6 of the PHHC1A, the questions about religion and national (ethnic) origin are not questions about facts (the opening sentence of this provision uses the term "data"), but questions about the personal (subjective and intimate) beliefs of individuals. Such beliefs may represent a very difficult and delicate issue for some, for others they may be entirely straightforward, and it can be traumatic in some communities. The views held and decisions made by an individual may be completely different from the prevailing positions or expectations of their surroundings, not to mention possible interests which are not in any way connected with the beliefs of the individual. The risk of manipulation is evident; however, I agree with the position that this cannot serve as an argument against conducting a census.

In any event, this entails a clear and serious interference with the privacy of the respondents, regardless of what they declare to be their belief, and even if they choose not to answer. The difference between both groups of questions (facts, on the one hand, and personal beliefs on the other) is substantial and very important – even

crucial – for the review. First and foremost, the state should not inquire into the personal beliefs of its citizens during a census.

The state should be particularly reserved in this regard, and any interference with privacy should pass the strict test of proportionality without a shadow of a doubt (notwithstanding my general principled reservations towards such a test, which often proves to be an unreliable and unimportant aid, as in the case in question).

The Constitutional Court carried out a review on possible violations of Articles 7 and 41 of the Constitution, but only regarding the constitutionality of the question about religion. After it had established that the question entailed an interference with the right determined in the second paragraph of Article 41 of the Constitution (and I agree that it does), it attempted to carry out a test of proportionality, but modified it to a certain extent. The Constitutional Court did not review the necessity to interfere with the constitutional right, which is the first part of the test, but was satisfied with the finding that the census data had been properly collected (which is undoubtedly true). However, the difference between the necessity and appropriateness of the interference is sufficiently clear to not require separate demonstration. It makes no difference if the review of the remaining two parts yielded positive results, as such results cannot compensate for the deficiency in the first part. As a result, my conclusion differs from the majority decision: the test of proportionality was not passed in this review; therefore, to pose a question about religion is inconsistent with the Constitution.

4. I would be willing to consider whether the test would be passed if the census were to be designed and carried out in a manner that better protects the privacy of the respondents from the very outset. This could be achieved if the same level of anonymity is applied to the census as for other methods of data collection for statistical research. In this manner the obligatory nature of the census could, in my opinion, be substantially reduced. However, the opposing party should first endeavour to present any stronger existing arguments (at present, they are not evident) in support of posing these two disputable census questions on the subjective beliefs of the respondents.
5. Owing to the fact that the question represents, in my opinion, an inadmissible interference with the first paragraph of Article 41 of the Constitution, even if posed in a narrower sense, it becomes even clearer that it is contrary to Article 35 of the Constitution to have two questions which fall into the category of particularly sensitive data, further increasing the disputability of the interference which resulted therefrom.

*Dr Zvonko Fišer*

**OPINION**

At a session held on 19 November 2003 in proceedings to review the constitutionality of the Agreement between the Republic of Slovenia and the Holy See on Legal Issues regarding the consistency of the provisions of Article 1, the second paragraph of Article 2, the first paragraph of Article 3, the first paragraph of Article 10, and the second paragraph of Article 14 of this Agreement, initiated upon the proposal of the Government of the Republic of Slovenia, the Constitutional Court

*issued the following opinion:*

- I. Article 1 of the Agreement between the Republic of Slovenia and the Holy See on Legal Issues (hereinafter referred to as the Agreement), according to which the Republic of Slovenia and the Holy See confirm the principle that the state and the Catholic Church are each independent and autonomous within their own organisation and that the Catholic Church performs its activities freely under canon law, in accordance with the legal order of the Republic of Slovenia, is not inconsistent with the principle of sovereignty enshrined in Article 3 of the Constitution or with the principle of the separation of the State and religious communities enshrined in the first paragraph of Article 7 of the Constitution insofar as it is interpreted to entail that the Catholic Church will respect the legal order of the Republic of Slovenia when performing its activities in the Republic of Slovenia, as follows from Paragraphs 32 and 33 of the reasoning of this Opinion.**
- II. The constitutionally consistent interpretation of Article 1 of the Agreement is the starting-point for reviewing the consistency of the second paragraph of Article 2, the first paragraph of Article 3, the first paragraph of Article 10, and the second paragraph of Article 14 of the Agreement.**
- III. The second paragraph of Article 2 of the Agreement, according to which the Republic of Slovenia recognises the legal personality of territorial and personal Church institutions based in the Republic of Slovenia, which have such personality pursuant to the norms of canon law and which the Church authority must register with the competent state authority in accordance with the legal order of the Republic of Slovenia, is not inconsistent with the principle of the equality of religious communities enshrined in the second paragraph of Article 7 of**

the Constitution or with the principles of a state governed by the rule of law enshrined in Article 2 of the Constitution.

- IV. The first paragraph of Article 3 of the Agreement, according to which the legal order of the Republic of Slovenia guarantees the Catholic Church the free pursuit of activities, liturgy, and catechesis, is not inconsistent with the principle of sovereignty enshrined in Article 3 of the Constitution, the principle of the separation of the state and religious communities enshrined in the first paragraph of Article 7 of the Constitution, or the principles of a state governed by the rule of law enshrined in Article 2 of the Constitution.
- V. The first paragraph of Article 10 of the Agreement, according to which the Catholic Church has, in accordance with the legislation of the Republic of Slovenia and canon law, the right to establish and manage schools of all types and levels, dormitories for secondary school and university students, and other educational institutions, is not inconsistent with the principle of the separation of the state and religious communities enshrined in the first paragraph of Article 7 of the Constitution.
- VI. The second paragraph of Article 14 of the Agreement, according to which the Republic of Slovenia and the Holy See will endeavour to continue discussing outstanding issues that are not subject of this Agreement, with the intention of settling them by mutual agreement, is not inconsistent with the principle of sovereignty enshrined in Article 3 of the Constitution or the principle of the separation of the state and religious communities enshrined in the first paragraph of Article 7 of the Constitution.
- VII. When implementing the Agreement, the state authorities of the Republic of Slovenia will be required to respect the content of the provisions of the Agreement as determined by the interpretation of the Constitutional Court.

### *Reasoning*

#### **A**

##### *The Statements of the Government of the Republic of Slovenia*

1. The Government proposed that, on the basis of the second paragraph of Article 160 of the Constitution and Article 70 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the Constitutional Court issue an opinion on the consistency of the preamble and the entire Agreement (Articles 1 to 14) with the Constitution, especially with Articles 7 and 41 thereof. In the Government's opinion, by reviewing the constitutionality of the Agreement "any possible doubt about its constitutional consistency" would be resolved, although the applicant deems that the Agreement is not inconsistent with the Constitution. The Government also informed the Constitutional Court that it had proposed that the National Assembly postpone the ratification of the Agreement until the decision of the Constitutional Court.

2. Upon the Constitutional Court's request, the Government supplemented its proposal to issue an opinion with the statement that the Constitutional Court review two issues in terms of their consistency with Article 7 of the Constitution: first, whether the entire Agreement (or several of its provisions) entails that the legal order of the Republic of Slovenia and canon law are rendered equal and, second, whether the Agreement entails the unequal treatment of different religious communities. The Government believes that Articles 1, 2, 3, 8, 9, 10, and 12 of the Agreement undoubtedly reflect the "primacy of the legal order of the Republic of Slovenia and that the Agreement does not introduce anything new regarding the legal position of the Catholic Church in Slovenia and does not require existing legislation to be amended." As, in the opinion of the Government, there are no provisions in the Agreement that would give the Catholic Church a privileged position in comparison to other religious communities in the country, it does not violate the principle of the equality of religious communities enshrined in the second paragraph of Article 7 of the Constitution.
3. Upon the Constitutional Court's request, the Government supplemented its proposal and defined the specific provisions of the Agreement (the preamble, Articles 1, 2, 3, 10, and 14) that were alleged to be constitutionally disputable "according to some opinions and positions expressed in the media in connection with the coordination within the coalition during the preparation of the bases and upon the signing of the mentioned Agreement".
4. The preamble was alleged to be inconsistent with the Constitution as it does not expressly provide that the Agreement only confirms the already established legal position of the Catholic Church in the Republic of Slovenia. Such allegedly allows for "different interpretations of the Agreement". The Government, on the contrary, believes that in particular the reference to Articles 7 and 41 of the Constitution in the Preamble [of the Agreement] demonstrates that it was not the intention of the contracting parties to interfere with the constitutional order of the Republic of Slovenia through the Agreement. The Government requested an opinion on Article 1 of the Agreement due to concerns as to whether the Agreement's wording could be construed to mean that the Republic of Slovenia recognises that the Catholic Church is not bound by the legal order of the Republic of Slovenia, and as to whether it allows, or even affords, that equal importance be given to the legal order of the Republic of Slovenia and canon law. In this regard, the Government explains that the first paragraph of this Article refers to the relation between the Republic of Slovenia and the Holy See as two subjects of international law to which the principle of independence and autonomy applies; in this paragraph, the term Catholic Church means the Universal Church, which is represented by the Holy See in international relations. The second paragraph of Article 1 refers to the Catholic Church in the Republic of Slovenia, emphasising on the one hand the freedom to pursue activities in accordance with the second paragraph of Article 7 of the Constitution, and on the other hand that such activities must be in accordance with the legal order of the Republic of Slovenia. Therefore, according to the Government, the wording of Article 1 does not interfere with the territorial and personal sovereignty of the Republic of Slovenia;

on the contrary, it determines that the activities of the Catholic Church must be at all times consistent with the legal order of the Republic of Slovenia. Article 2 of the Agreement was alleged to be inconsistent with the second paragraph of Article 7 of the Constitution, as it does not explicitly provide that the Catholic Church and its institutions are legal entities [Translator's note: Regularly, *pravna oseba* is translated as legal entity; however, canon law uses the term juridic person. Therefore whenever there are references to canon law the term juridic person is used.] under private law as provided in the Agreement on the Legal Position of the Evangelical Church in the Republic of Slovenia (signed on 25 January 2000). In the Government's opinion, it follows from the entire context of the Agreement and the rules of interpretation that the instances in question concern legal personality under private law. The first paragraph of Article 3 of the Agreement was alleged to be inconsistent with the Constitution as it does not (explicitly) determine that all the activities of the Catholic Church in the Republic of Slovenia must be performed in accordance with its legal order. The Government believes that the first paragraph of Article 3 [of the Agreement] summarises the essence of Article 7 of the Constitution regarding the free pursuit of the activities of religious communities, which must be performed in accordance with the legal order of the Republic of Slovenia already on the basis of the second paragraph of Article 1 of the Agreement. It was argued that the Constitutional Court should review the consistency of Article 10 of the Agreement with the Constitution due to allegations that the content of this Article allows the Catholic Church to interfere with the legal regulation of public schools. In the Government's opinion, Article 10 does not interfere with the regulation of public schools as it only refers to schools that are established and managed by the Catholic Church in accordance with the legislation of the Republic of Slovenia. In connection with the second paragraph of Article 14 of the Agreement, the Government suggests that the Constitutional Court establish, whether, on the basis of that provision, the Republic of Slovenia is obliged to engage in bilateral resolution of all open issues, namely also including those that fall under the exclusive jurisdiction of the Republic of Slovenia and with regard to which the Holy See may neither cooperate nor co-decide. The Government states that, through that provision, the Republic of Slovenia did not undertake to resolve such open issues by agreement, but only to endeavour to discuss them. In the Government's opinion, the aforementioned provision of the Agreement has thus not exceeded the boundaries of courtesy that are common in treaties.

5. On 19 April 2002, the Constitutional Court received a supplemented proposal to issue an opinion, which was sent by the Minister of the Interior, the Minister of Work, Family and Social Affairs, and the Minister of Culture. In their supplement they state that, at its session held on 18 April 2002, the Government rejected their proposal to also send the documents titled "Opinion of the minority in the Government on the consistency of the Agreement with the Holy See with the Constitution" as an appendix to the supplemented Government proposal. The Constitutional Court could not consider the mentioned document as part of the applicant's submissions as it had been expressly rejected by the applicant.

## B – I

### *The Content of the Agreement and the Purpose of its Conclusion*

6. It is evident from the title of the Agreement, which was signed by the authorised representatives of the Holy See and the Republic of Slovenia, that it regulates specific legal issues referring to the position of the Catholic Church in the Republic of Slovenia. The preamble, which consists of four indents, reveals the circumstances that led to the conclusion of the Agreement. The first and fourth indents refer respectively to the political and historical circumstances that led to the conclusion of the Agreement, i.e. the establishment of diplomatic relations between the Republic of Slovenia and the Holy See, which followed the recognition by the Holy See of the sovereignty and independence of the Republic of Slovenia by Note No. 226/92RS, dated 23 January 1992 (Decree on the Ratification of the Agreement on the Establishment of Diplomatic Relations between the Republic of Slovenia and the Holy See, Official Gazette RS, No. 32/92, MP, No. 7/92), and to the centuries-old historical connection between the Slovene people and the Catholic Church. The second and third indents refer to the legal acts that were taken into account by the contracting parties when concluding the Agreement. For the Republic of Slovenia, this legal act is the Constitution, in particular Articles 7 and 41 thereof, and for the Holy See, these legal acts are canon law norms and the documents of the Second Vatican Council. The Constitutional Court considered canon law norms to be the norms contained in the Code of Canon Law (hereinafter referred to as the CCL).<sup>1</sup> At the same time, the mentioned indents emphasise the importance of human rights and the internationally recognised principles of freedom of thought, conscience, and faith.
7. The Catholic Church actively engages not only in the area of religious matters (*res spirituales*) but also in other areas of social life that fall under the jurisdiction of the state (known as mixed matters – *res mixtae*). It follows from the wording of the Agreement that, in addition to recognising the autonomy and independence of the activities of the Catholic Church in spiritual matters, its purpose is to regulate legal issues in those areas where the activities of the Catholic Church and the state overlap or intertwine. The Agreement therefore regulates the recognition of the legal personality of Church institutions (Article 2); the performance of public religious services (the second paragraph of Article 3); the establishment of religious associations (Article 8); the establishment and management of schools (Article 10); the maintenance of cultural monuments owned by the Church (Article 11); pastoral activities in hospitals, nursing homes, prisons, and other institutions, where the free movement of persons is restricted (Article 12); and the establishment of charity and social Church institutions and organisations (Article 13). The intention to regulate these issues by the Agreement is also evident from the documents of

1 On 25 January 1983, Pope John Paul II proclaimed the new (amended) Code of Canon Law. Its translation into Slovene, dated 27 November 1983, was published by the Archiepiscopal Ordinary's Office in Ljubljana, Ljubljana 1983.

the Mixed Umbrella Commission of the Roman Catholic Church and the Government of the Republic of Slovenia. The intention to reach an agreement between the state and the Catholic Church “in matters in which both are active” is explicitly emphasised in point 7 of the document entitled “The Constitutional Provision on the Separation of the state and Religious Communities as the Basis for the Work of the Mixed Umbrella Commission” (hereinafter referred to as the documents of the Mixed Umbrella Commission).<sup>2</sup>

*Jurisdiction and Scope of Review by the Constitutional Court*

8. On the basis of the second paragraph of Article 160 of the Constitution, the Constitutional Court is vested with the special competence of preliminary (*a priori*) constitutional review of treaties. This power only refers to reviewing the consistency with the Constitution, not with ratified treaties and the general principles of international law. The purpose of the preliminary constitutional review of treaties is to prevent that, upon the ratification of a treaty, the state assumed an obligation arising from international law that would be inconsistent with the Constitution, or that, following its ratification, it were forced to bring the treaty into line with the Constitution, which could lead to serious complications. In Opinion No. Rm1/97, dated 5 June 1997 (Official Gazette RS, No. 40/97, and OdlUS VI, 86), the Constitutional Court held that an obligation arising from international law would be contrary to the Constitution if, upon the entry into force of the treaty in the domestic law, it created directly applicable unconstitutional legal norms or obliged the state to adopt an internal legal act that would be contrary to the Constitution. As a treaty is the result of an agreement between the contracting parties, the Constitutional Court can neither abrogate or annul specific provisions of the treaty nor can it require the National Assembly to bring it into line with the Constitution. In deciding on the consistency of a treaty with the Constitution, the Constitutional Court cannot address the question of the appropriateness of specific solutions, and is even less able to address the question of whether the specific solutions are advantageous for the state. The provisions of a treaty in the wording in which it has been submitted for ratification are the subject of review in proceedings to issue an opinion on the consistency of a treaty with the Constitution. As is evident from the proposal and its appendices, by letter No. 08000/20013, dated 24 January 2002, the Government referred the Draft Law on the Ratification of the Agreement for discussion and adoption to the National Assembly, and simultaneously proposed that it postpone the ratification until the Constitutional Court has issued its opinion.

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2 Point 7 reads as follows: “Therefore the Mixed Umbrella Commission considers it useful that, given the full consideration of mutual independence and autonomy, the State and the Catholic Church cooperate and enter into agreements respecting the Constitution, international documents on human rights, and the laws of the Republic of Slovenia in matters where their activities meet. The Mixed Umbrella Commission will endeavour to regulate the legal position of the Roman Catholic Church in the form of an agreement between the Church and the State. The final aim of that endeavour is the overall guarantee and respect for the right to religious belief and a rich spiritual life of the citizens.”

9. The Agreement is being concluded between the Republic of Slovenia as an independent and autonomous state and the Holy See as a *sui generis* subject of international law.<sup>3</sup> The treaties that the Holy See, as the highest and sovereign authority of the universal Catholic Church, enters into refer to issues that are directly related to the Catholic Church in the contracting states in which particular churches are located (see Can. 368). Among the special functions of the pontifical legates, Can. 365 of the CCL also determines the conclusion “and implementation of concordats and other agreements of this type”. The Agreement that is the subject of this constitutional review belongs to “agreements of this type”. Notwithstanding the particularities of agreements between states and the Holy See (known as concordats, conventions, covenants, *modi vivendi*, protocols, or agreements), the prevailing theory of international law treats them as proper treaties that not only confirm the existing rights of contracting parties (e.g. the free pursuit of the activities of the Church), but can also create new rights and obligations for both sides.<sup>4</sup> The rules of the Vienna Convention on the Law of the Treaties (Official Gazette SFRY [Socialist Federal Republic of Yugoslavia], No. 30/72 – hereinafter referred to as the VCLT), which was also signed and ratified by the Holy See, apply to the interpretation of these agreements in the same way as to treaties concluded between states.<sup>5</sup>
10. The Constitutional Court reviewed the consistency of the challenged provisions of the Agreement with the provisions of the Constitution that the applicant explicitly stated or that logically follow from the proposal’s statement of reasons. The Agreement refers to the relationship between the Catholic Church as a religious community and the Republic of Slovenia as a state. This relationship is regulated by Article 7 of the Constitution, the first paragraph of which provides that the state and religious communities are separate (the so-called principle of the separation of the state and religious communities), and the second paragraph of which ensures religious communities equal rights and the free pursuit of their activities (the so-called principle of the equality of religious communities and the principle of the free pursuit of religious communities’ activities). The principles of the equality of religious communities and the free pursuit of their activities originate from the constitutional right to freedom of conscience determined in the first and second paragraphs of Article 41 of the Constitution, as this human the exercise of right can only be guaranteed on the basis of the equality of all religious communities and the free pursuit of their activities. Notwithstanding the institutional relationship between the state and religious communi-

3 The CCL determines that the “the term Apostolic See or Holy See refers not only to the Roman Pontiff but also to the Secretariat of State, the Council for the Public Affairs of the Church, and other institutes of the Roman Curia, unless it is otherwise apparent from the nature of the matter or the context of the words” (Can. 361). The Holy See with the Pontiff at the head is not only the highest authority of the Universal Catholic Church, but also of the State of the Vatican City.

4 Concordats, Encyclopedia of public international law, Volume one, 1992, p. 729.

5 On 30 September 1969, the Holy See signed the Vienna Convention and, on 25 February 1977, ratified multilateral treaties deposited with the Secretary-General, Status as at 31 December 2000, Volume II, United Nations, Chapter XXIII, p. 263.

ties, the constitutional right to freedom of religion, which encompasses its positive<sup>6</sup> and negative<sup>7</sup> aspects, entails the foundation of the entire regulation of the position of religious communities, as such concerns respect for this fundamental constitutional right, which is also protected by numerous international instruments.<sup>8</sup> Therefore, the finding that a specific provision of the Agreement is consistent with the principle of the equality of religious communities and the principle of free pursuit of their activities enshrined in the second paragraph of Article 7 of the Constitution also involves a finding of consistency with Article 41 of the Constitution, which was not specifically stated by the Constitutional Court in the operative provisions.

11. The Government proposed that the preamble be reviewed as it does not include confirmation or a statement that the existing legal position of the Catholic Church in the Republic of Slovenia is being confirmed by the Agreement. With regard to the content of a preamble, there are no rules in international practice that would require preambles to include anything more than the determination of the contracting parties and their representatives and a declaration of the agreement that follows from the wording of the treaty. Aust<sup>9</sup> states that, from a legal perspective, it is sufficient for the preamble to state that the parties agreed on the content arising from the wording of the treaty; however, where parties want to express more in the preamble of a treaty, the purpose of such preamble is to present the principal content of the treaty by also including the so-called background of the treaty, and to define its purpose. Andrassy<sup>10</sup> states that a treaty usually includes a preamble wherein the contracting parties, their representatives, and other circumstances relevant for the conclusion of the treaty are indicated. Its content and the answer to the question of whether the statements contained therein are binding on the contracting parties depend entirely on the parties' decision. They are not bound by any rule stipulating that all the essential aspects of a concluded treaty must be outlined in its preamble. It therefore follows from the legal nature of the preamble that it is not possible to challenge what has not been included therein, unless the elements that were omitted are obligatory constituent parts of the preamble of every treaty. The Agreement, however, does include such elements. The fact that the contracting parties did not include a specific statement or circumstance in the Agreement's preamble cannot entail an independent argument for the unconstitutionality of the preamble itself. For the mentioned reasons, it is not possible to conduct the proposed review of the preamble to the Agreement.

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6 Religious and other beliefs may be freely professed in private and public life (the first paragraph of Article 41 of the Constitution).

7 No one shall be obliged to declare their religious or other beliefs (the second paragraph of Article 41 of the Constitution).

8 Article 9 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), Article 18 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, MP, No. 7/71, and Official Gazette SFRY, MP, No. 9/92 – hereinafter referred to as the Covenant), Article 18 of the Universal Declaration of Human Rights.

9 Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2002, pp. 335–338.

10 Andrassy, *Međunarodno pravo* [International Law], Školska knjiga, Zagreb, 1976, p. 328.

12. The fact that the content of the preamble is an important part of the treaty is demonstrated when it is being interpreted. This follows from the first paragraph of Article 31 of the VCLT, which as a general interpretation rule determines that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object or purpose; the second paragraph of the same article clarifies that the context for the purpose of the interpretation of a treaty shall include its preamble as well as its text (and annexes). In accordance with the cited rule, when interpreting specific provisions of the Agreement the Constitutional Court has taken into account not only the Constitution but also the acts stated in the Agreement's preamble, i.e. canon law, the documents of the Second Vatican Council, particularly the Declaration on Religious Freedom (*Dignitas humanae*) and the Pastoral Constitution on the Church in the Modern World (*Gaudium in Spes* – hereinafter referred to as the Pastoral Constitution), both dated 7 December 1965,<sup>11</sup> and the internationally recognised principles with regard to ensuring freedom of religion, especially the principles of the ECHR and the Covenant [on Political and Civil Rights]. In this context, it has also taken into account the documents of the Mixed Umbrella Commission.

## B – II

### *Review of Article 1 of the Agreement*

13. Article 1 of the Agreement reads as follows:

“The Republic of Slovenia and the Holy See confirm the principle that the state and the Catholic Church are both independent and autonomous in their organisation, and undertake not only to fully comply with this principle in their mutual relations but also to cooperate in the advancement of the human person and the common good.

In the Republic of Slovenia, the Catholic Church performs its activities freely under canon law, in accordance with the legal order of the Republic of Slovenia.”

14. The Government proposed that the quoted provision be reviewed as it was concerned that the principle according to which the state and the Catholic Church are, each within its own organisation, independent and autonomous (hereinafter referred to as the “principle of independence and autonomy”) may be construed to mean that the Republic of Slovenia recognises the independence of the Catholic Church from the legal order of the Republic of Slovenia. Such is allegedly inconsistent with the Constitution, particularly with the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution) and with the principle of sovereignty (the second paragraph of Article 3 of the Constitution).
15. The question of how to interpret the wording of Article 1 of the Agreement is vital for the review. As the wording of this provision does not provide a clear answer thereto, the Constitutional Court had to determine its meaning through interpretation. In this respect it had to base its review on the sources that are cited in its preamble as the basis of the Agreement. In establishing the meaning and possible interpretation of the wording, the Court, in addition to the Constitution, therefore also had to take

11 *Koncilski odloki* [Council Decrees], Družina, Ljubljana 1995.

into account the law of the Catholic Church (canon law and the documents of the Second Vatican Council), which is the foundation of the “principle of independence and sovereignty”. In accordance with Article 31 of the VCLT, the Constitutional Court has taken into account the preamble’s provision from which it follows that, when concluding the Agreement, each contracting party took its own law into account.<sup>12</sup>

16. It follows from the documents of the Mixed Umbrella Commission that the Government adopted the following two premises when concluding the Agreement: (1) the previous negative comprehension of the separation of the state and religious communities has been surpassed by the new democratic system; and (2) it is necessary to opt for a positive comprehension of this principle within the meaning of the equality of all religious communities and the free pursuit of their activities. The documents emphasise that the meaning of the separation of the state and religious communities lies in “the state neither being affiliated with any religious community nor privileging or discriminating against any of them, and that religious communities are independent and autonomous in their respective areas.”
17. The legal position of religious communities, which includes the Catholic Church, in the Republic of Slovenia is primarily founded on three constitutional principles: the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution), the principle of the equality of religious communities and the principle of the free pursuit of their activities (the second paragraph of Article 7 of the Constitution).<sup>13</sup> The Constitution has determined the relation be-

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12 The second indent of the preamble reads as follows: “whereas the Republic of Slovenia takes into account its Constitution, particularly Articles 7 and 41 thereof, and the Holy See takes into account the documents of the Second Vatican Council and the norms of canon law.”

13 The legal position of religious communities in Slovenia is still regulated in more detail by the Legal Status of Religious Communities in the Socialist Republic of Slovenia Act, the principal text of which was adopted in the previous socialist order in 1976 (Official Gazette SRS, Nos. 15/76 and 42/86, and Official Gazette RS, No. 22/91 – hereinafter referred to as the LSRCA). The amendments to this Act that were adopted in 1991, just before the adoption of the independence legislation (the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, Official Gazette RS, No. 1/91-I, and the Constitutional Act for the Implementation of the Basic Constitutional Charter on Independence and Sovereignty of the Republic of Slovenia, Official Gazette RS, No. 1/91-I), were a crucial step forward in the understanding of the principle of the separation of the state and religious communities defined in the previous socialist order, in which the state had limited the activities of religious communities exclusively to the private sphere. See Kerševan, *Sporazumi s Svetim sedežem in družbeni položaj Rimskokatoliške cerkve (RKC) v Sloveniji* [Agreements with the Holy See and the Social Position of the Roman Catholic Church in Slovenia], Čarnijev zbornik (1931–1996), Ljubljana 1998, p. 83. The abovementioned amendments to the LSRCA eliminated the obstacles preventing religious communities from becoming more involved in society. Therefore, the provisions which had explicitly prohibited religious communities from playing an active role in the area of education and from performing any activity of “general or special social importance” ceased to have effect. The legal and actual position of religious communities in the Republic of Slovenia (e.g. the payment of the employer’s contributions for old-age, disability and health insurance to priests and monks of all religious communities, benefits in the form of tax and customs exemptions, the Faculty of Theology joining the state university, the partial financing of private schools, the recognition of the pupils’ end of year reports, access to hospitals,

tween the state and religious communities merely in principle, while the significance and content of the mentioned principles are still being established.<sup>14</sup>

18. The principle of the separation of the state and religious communities is generally established as a fundamental modern principle in most modern constitutions and legislation. The essential components of this principle are: (1) that the state is not bound by any religion; (2) that there is no state religion or state church; and (3) that religious communities have autonomy over their affairs. The position of the constitution framers regarding the establishment of this principle is demonstrated in the preparatory materials for the Constitution. The substantiation of the first written record on the principle of separation is provided in the explanatory memorandum for the Draft Constitution, dated 29 October 1990.<sup>15</sup> The principle was intended to emphasise “that the Church may not perform functions that are reserved for the state or state authorities (e.g. such as marriages, the keeping of registers, issuance of public documents). Such, however, does not limit Church activities in certain areas, such as charity activities, education, etc., which may be carried out by the Church under the same conditions as by citizens. Such also does not prevent Church institutions from becoming part of various public institutions, e.g. theological faculties joining existing universities, provided that the legislation in the relevant areas is respected.”<sup>16</sup> The explanatory memorandum for the Proposal of the Constitution, dated 12 December 1991, which contained the proposed wording of Article 7 that does not differ from its present wording, stated that this provision “introduces the principle of a secular state. Due to the point of view according to which church(es) and various other religious communities should be treated equally, the first paragraph is formulated in a more general sense, while in addition to equality of religious communities the second paragraph guarantees free pursuit of their activities.”<sup>17</sup>

19. The Constitutional Court already considered the content of this principle in Decision No. U-I-68/98, dated 22 November 2001 (Official Gazette RS, No. 101/01, and OdlUS X, 192). It held that, on the basis of the general principle of the separation of the state and religious communities, the state is obliged to be neutral, tolerant and to perform its activities in a non-missionary manner. In the cited decision, particular emphasis was devoted to state neutrality towards all religions, which it may not identify with, as an essential component of this principle. The Constitutional Court also adopted the posi-

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nursing homes, prisons, and the army) demonstrates that religious communities in the Republic of Slovenia are guaranteed internal autonomy and can freely pursue activities in various areas.

- 14 Šturm emphasised the importance of the Mixed Umbrella Commission documents for interpreting the constitutional provision on the separation of the state and religious communities in: Lovro Šturm (ed.), *Komentar Ustave Republike Slovenije* [The Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, 2002, p. 124.
- 15 The first paragraph of Article 5 read as follows: “The Church is separate from the state.”
- 16 *Nastajanje slovenske ustave, Izbor gradiv Komisije za ustavna vprašanja* [The Creation of the Slovene Constitution, Selected Documents of the Commission for Constitutional Issues], Vol. III, Cerar, Perenič (eds.), Državni zbor, Ljubljana 2001, p. 1242.
- 17 *Ibid.*, p. 2360.

tion that the state is under no obligation to support or further the activities of religious communities. However, the principle of the separation of the state and religious communities does not imply that all forms of support and assistance are excluded, provided, of course, that the equality of all religious communities is guaranteed. The Constitutional Court also explained the content of this principle in a similar manner in Decision No. U-I-92/01, dated 28 February 2002 (Official Gazette RS, No. 22/02, and OdlUS XI, 25).

20. The principle of the separation of the state and religious communities entails that the state is not bound by any religion, that it may not grant any religion the status of a state religion, and that it does not have its own world view. This therefore entails that, with regard to the regulation of affairs that fall under its jurisdiction, the state may not identify with any religion or be bound by the positions of any religion. The state may, however, develop common civil values, particularly those which enable people with different (religious) values to live together [in peace]. These values are laid down by international instruments as fundamental values and human rights. State neutrality in respect to all religions and other beliefs (including those held by atheists) also entails that the state neither encourages nor prohibits any ideologies, and that it guarantees individuals the right to freely pursue individual and group activities in this area.<sup>18</sup> It must therefore also base the statutory regulation of issues that fall under its jurisdiction on these foundations. One of the essential elements of the principle of the separation of the state and religious communities in countries where this is consistently applied (e.g. France, the United States of America, and Japan) is also that the state provides no financial or other support to religious activities.<sup>19</sup>
21. It follows from the above that the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution), as part of the democratic system (Article 1 of the Constitution) that protects human rights and fundamental freedoms (the first paragraph of Article 5 of the Constitution), guarantees religious communities the complete freedom to pursue their activities in their religious (spiritual) area. At the same time, it prevents the state from expanding its powers into areas that are exclusively religious by nature or concern the internal affairs of religious communities (the second paragraph of Article 7 of the Constitution). Regarding those areas in which the activities of religious communities interfere with state powers, the freedom of religious communities to pursue their activities, as a constituent part of the principle of the separation of the state and religious communities, is limited by state sovereignty.
22. The Republic of Slovenia became an independent and sovereign state upon the entry into force and implementation of the Basic Constitutional Charter. The constitution framers defined this as a value, to which they refer in the preamble of the Constitution. They also expressly stated in the first paragraph of Article 3 of the Constitution that Slovenia is a state of all its citizens and is founded on the permanent and inalienable right

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18 Kerševan, *Sporazumi s Svetim sedežem in družbeni položaj Rimskokatoliške cerkve (RKC) v Republiki Sloveniji*, op. cit., p. 86.

19 *Ibid.*, p. 85.

of the Slovene nation to self-determination. State sovereignty is a feature of state authority, on the basis of which it is the highest authority in the state territory (the so-called supremacy of state authority), which is externally independent from other authorities of the same kind and to which all other authorities are internally subordinated.<sup>20</sup> State sovereignty is divided into external sovereignty, which means the independence of state power or the state in respect to other subjects of the same kind, and internal sovereignty which reflects the fact that in its territory the state is the supreme, independent, original, uniform, and overall organisation to which everything on its territory is subordinated by the power of the state.<sup>21</sup> Neither the first nor the second aspect of state sovereignty are absolute: the external aspect due to the existence of public international law,<sup>22</sup> and the internal aspect due also to the fact that internal authority cannot be all-encompassing.<sup>23</sup> The limits of internal state sovereignty are determined by the constitutional regulation of the position of state authorities and their powers, which serves as a legitimate and legal basis for them to interfere with citizens and autonomous social subjects.<sup>24</sup>

23. The principle of state sovereignty therefore entails that “state authorities exercise their sovereign authority and perform all their authoritative functions throughout the entire state territory within the framework of a uniform constitutional, economic, fiscal, customs, and security defence system.”<sup>25</sup> Unless the Constitution is amended, the performance of specific authoritative functions may not be renounced by treaties.<sup>26</sup> The state’s legitimacy to exercise its authority derives from the principle of the sovereignty of the people, which is enshrined in the first sentence of the second paragraph of Article 3 of the Constitution: “In Slovenia, power is vested in the people.” This entails that “political power cannot not exist as such but needs legally valid, legitimate grounds for its existence and operation, and this legitimacy may not be founded on any other authority (e.g. God, an ideology, historical goals, class interests) than the people themselves; the people are the only holders of power, which they exercise directly or indirectly.”<sup>27</sup> The principle of the sovereignty of the people entails that the people are the only holder of state authority and that “in the state, there cannot be several sovereign state entities.”<sup>28</sup>
24. The principle of state sovereignty prevents the Republic of Slovenia from transferring its sovereign powers determined in the Constitution to another state, institution, or religious community. An exception regarding such transfer of the exercise

20 *Pravo, leksikon Cankarjeve založbe* [Law, a lexicon of Cankarjeva založba], second expanded and altered edition, Pavčnik (ed.), p. 74. See also Pitamic, *Država* [The State], Cankarjeva založba, Ljubljana 1996, pp. 27-44.

21 Kaučič in: Grad and others, *Državna ureditev Slovenije* [The Organisation of the State of Slovenia], second amended and supplemented edition, Ljubljana 1996, p. 19.

22 This was also emphasised by Pitamic, *ibid.*

23 *Pravo, leksikon, op. cit.*, p. 74.

24 Grad in: Grad and others., *Državna ureditev Slovenije, op. cit.*, p. 82.

25 Jerovšek in: *Komentar Ustave, op. cit.*, p. 110.

26 *Ibid.*, p. 111.

27 Jambreč in: *Komentar Ustave, op. cit.*, p. 46.

28 Šturm in: *Komentar Ustave, op. cit.*, p. 104.

of part of its sovereign rights is only permitted by Article 3a of the Constitution (Constitutional Act amending Chapter I and Articles 47 and 68 of the Constitution of the Republic of Slovenia, Official Gazette RS, No. 24/03), which refers to Slovenia's integration into international organisations and defence alliances.

25. In light of the above, it would be inconsistent with Article 3 of the Constitution if the Republic of Slovenia renounced part of its sovereignty and transferred its powers to another institution with regard to matters which, in accordance with the Constitution, fall under national jurisdiction. The principle of the separation of the state and religious communities does not prevent religious communities from performing activities in different areas of social life (e.g. education, charity, social, health, and economic activities). However, due to the principle of sovereignty (i.e. internal state sovereignty), only the state may set the limits within which and the conditions under which the carrying out of tasks pertaining to the competence of the state may be entrusted to the private sphere. The principle of sovereignty concurrently determines the limits of the independence of a religious community, which is guaranteed by the first paragraph of Article 7 of the Constitution. The role the religious communities play and the position they hold in areas in which their powers and state powers converge depend on the organisation of the state, which must ensure the basic equality of all citizens, regardless of whether they are believers or not (the first paragraph of Article 14 and the second paragraph of Article 41 of the Constitution). Therefore, a review of Article 1 of the Agreement in terms of its consistency with the principle of sovereignty enshrined in Article 3 of the Constitution is also crucial for a review of its consistency with the first paragraph of Article 7 of the Constitution.
26. The content of the "principle of independence and autonomy",<sup>29</sup> which the Catholic Church adopted at the Second Vatican Council in the Pastoral Constitution, is relevant for understanding the meaning of the first and second paragraphs of Article 1 of the Agreement. In the Pastoral Constitution, the Second Vatican Council defined "how it conceives of the presence and activity of the Church in the world of today".<sup>30</sup> Chapter IV, particularly Article 76 of the Pastoral Constitution, in which the relation between the political community and the Church is defined, is important for determining the meaning of this principle. The third paragraph of Article 76 begins with the following wording: "The Church and the political community in their own fields are autonomous and independent from each other. Yet both, under different titles, are devoted to the personal and social vocations of the same men. The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all."<sup>31</sup>

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29 The mentioned principle is included in the agreements reached between the Holy See and Italy, Poland, Croatia, Latvia, and Lithuania. This principle was also included in the agreement between the Holy See and the Czech Republic; however, the Czech parliament did not ratify the agreement. The agreement between the Holy See and Estonia does not include this principle.

30 *Koncilski odluki*, *op. cit.*, the first paragraph of Article 2, p. 570.

31 *Ibid.*, p. 650.

27. As a supranational religious organisation (as the Universal Church), the Catholic Church operates in states with different constitutional systems. On the basis of the provisions of the Pastoral Constitution, the Catholic Church considers the “principle of independence and autonomy” to be universal and the same in every government system irrespective of whether it operates in states where the Catholic Church has a special role or where the principle of the separation of the state and religious communities is not expressly determined (e.g. Germany, Austria, Italy, Spain, and Portugal), or in states where the principle of the separation of the Church and the state has been adopted, although not necessarily literally or in the same (milder or more consistent) form (e.g. France, the USA, Belgium, and the Netherlands). This universality is emphasised in the first paragraph of Article 76 of the Pastoral Constitution, which reads as follows: “It is very important, especially where a pluralistic society (*societas pluralistica*) prevails, that there be a correct notion of the relationship between the political community and the Church.” It is characteristic for the Pastoral Constitution that the powers of the Church as well as the powers of the political community are determined therein: “It is only right, however, that at all times and in all places, the Church should have true freedom to preach the faith, to teach her social doctrine, to exercise her role freely among men, and also to pass moral judgment in those matters which regard public order when the fundamental rights of a person or the salvation of souls require it. In this, she should make use of all the means – but only those – which accord with the Gospel and which correspond to the general good according to the diversity of times and circumstances” (the last sentence of the fifth paragraph of Article 76); and political authority must always be “exercised within the limits of the moral order and directed toward the common good” (the fourth paragraph of Article 74 of the Pastoral Constitution).
28. Church law draws a distinction between the Church as a legal institution and the Church as an institution of Divine Law. “This duality is also reflected in the Church’s legal dimension, as canon law is composed of human law established by the church authority (the Roman Pope, ecumenical councils, bishops, etc.) and of Divine Law, which we understand to be a set of guiding premises that are explicitly or implicitly determined by God himself and to which the specific solutions of canon law must strictly abide.”<sup>32</sup> In conformity with the Church teaching, divine natural law is eternal and unalterable. “Regarding the hierarchy of legal sources, Divine law is in every respect above human law insofar as it comes from God. It is therefore not possible for anyone to either partially or entirely annul the provisions of Divine law or polemicize against them.”<sup>33</sup> According to canon law, the “principle of independence and autonomy” could be construed to mean that the Catholic Church is independent and autonomous from state regulation in all matters which are considered to be of a religious (spiritual) nature and fall under Divine law, including so-called mixed matters.

32 Košir, *Uvod v kanonsko pravo* [An Introduction to Canon Law], Ljubljana 1997, p. 28.

33 *Ibid.*, p. 29.

29. Modern states that recognise and protect human rights do not regulate the religious life of their citizens.<sup>34</sup> The state must allow religious communities to freely pursue their activities (the second paragraph of Article 7 of the Constitution) when the exercise of the constitutional right to freedom of conscience is involved. The state must therefore guarantee individual and collective religious freedom to all citizens. Furthermore, Article 41 of the Constitution guarantees that religious freedom and other beliefs are fully respected in private and public life. On the other hand, the Catholic Church does not demand a dominant position with regard to the state. In secular matters, it respects national law and either observes it or attempts to reach a different agreement.<sup>35</sup> This is also shown in specific provisions of the Agreement in which it is explicitly stated and clearly defined that the Catholic Church will act in “accordance with the legal order of the Republic of Slovenia” regarding the registration of church institutions as legal entities (the second paragraph of Article 2), the notification of public liturgy (the second paragraph of Article 3), the establishment of associations (Article 8), property relations (Article 9), and the establishment of private schools (Article 10). A different understanding of the relation between the state and the Catholic Church could only arise in areas which are considered by the Church to be religious matters from a religious perspective, but which the state deems to be secular matters, i.e. so-called mixed matters, such as public schools and marriage. The key issue is whether the first paragraph of Article 1 of the Agreement recognises the complete freedom of the Church to pursue activities in these so-called mixed areas.
30. The answer to this question must be sought in connection with the second paragraph of Article 1 of the Agreement, which provides that “in the Republic of Slovenia, the Catholic Church performs its activities freely under canon law, in accordance with the legal order of the Republic of Slovenia.” The provisions of the first and second paragraphs of Article 1 of the Agreement are linked in terms of content and so they must be interpreted on the basis of the same premises.<sup>36</sup> However, the grammatical interpretation of the second paragraph of Article 1 also does not give a clear answer to the question of what the relation between canon law and the law of the Republic of Slovenia in these so-called mixed areas is. The comma in the second paragraph of Article 1 of the Agreement indicates that the wording does not mean “and in accordance with the legal order of the Republic of Slovenia.”<sup>37</sup> The wording

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34 Kerševan, *Cerkev, Politika, Slovenci po letu 1990* [The Church, Politics, Slovenians after 1990], pp. 19–21 and 136.

35 Can. 1290 provides that: “The general and particular provisions which the civil law in a territory has established for contracts and their disposition are to be observed with the same effects in canon law insofar as the matters are subject to the power of governance of the Church, unless the provisions are contrary to divine law or canon law provides otherwise.”

36 That the second paragraph of Article 1 of the Agreement must be interpreted in conjunction with the “principle of independence and autonomy” determined in the first paragraph of this article also follows from the fact that otherwise it would be meaningless as the second paragraph of Article 7 of the Constitution and the first paragraph of Article 3 of the Agreement guarantee the Catholic Church the right to freely pursue its activities in the Republic of Slovenia.

37 Such interpretation is also supported by the fact that the Holy See did not accept the wording contained in

of this provision could thus be construed to mean that the Church is obliged to act in conformity with the legal order of the Republic of Slovenia only in those areas which it considers to be secular matters.

31. Such an interpretation of the wording of the second paragraph of Article 1 of the Agreement would entail that the state recognises the right of the Catholic Church to unilaterally interfere in areas which otherwise fall under the jurisdiction of the state. As a result, the Republic of Slovenia would renounce part of its (state) sovereignty, without there being a basis for this in the Constitution, which would therefore be contrary to Article 3 of the Constitution. Such an understanding would also be inconsistent with the second paragraph of Article 7 of the Constitution, according to which the state must treat religious communities equally. If it renounces a part of its sovereignty to the benefit of one religious community, it would thereby grant that religious community a privileged position in comparison with other religious communities.
32. The wording of the second paragraph of Article 1 of the Agreement can also be interpreted as allowing the Catholic Church to perform activities in accordance with canon law in so-called mixed areas as long as such activities do not conflict with the legal order of the Republic of Slovenia. Such an interpretation is closer to the Italian original version of the Agreement, in which the wording “*e nel rispetto dell'ordine giuridico della Repubblica di Slovenia*”, if translated literally, reads “and in accordance with the legal order of the Republic of Slovenia”.<sup>38</sup> The Catholic Church also sees its independence and autonomy, and thus its relation to the state, as a dynamic process that takes into account the diversity of national systems, and it is prepared to adapt to the existing legal order of the state in which it operates. Note 1 of the Pastoral Constitution specifically emphasises that “the constitution must be interpreted according to the general norms of theological interpretation. Interpreters must bear in mind – especially in part two – the changeable circumstances which the subject matter, by its very nature, involves.”<sup>39</sup> The chapter that covers the life of a political community<sup>40</sup> and that, in Article 76, determines the “principle of independence and autonomy” also forms part of these matters, which are covered in part two of the Pastoral Constitution. Furthermore, the observance of the state legal order is also emphasised in the Declaration on Religious Freedom, with Article 4 thereof providing that all religious communities must have the right to liberty, “provided the just demands of public order are observed”. The protection of religious freedom also falls within the power of public authority, which must ensure such protection “through juridical norms which are in conformity with the objective moral order” (Article 7).

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one of the drafts, which read as follows: “The Catholic Church pursues its activities freely in the Republic of Slovenia, in accordance with the legal order of the Republic of Slovenia and canon law.”

38 Article 33 of the VCLT, interpretation of treaties authenticated in two or more languages.

39 *Koncilski odluki, op. cit.*, p. 570.

40 The second part also includes chapters covering the dignity of marriage and the family, the proper encouragement of cultural progress, economic and social life, and striving for peace and support for the association of nations.

33. If we interpret the provisions of both paragraphs of Article 1 on the basis of the premises outlined in the previous paragraph, this article can only be understood in the sense that, in performing its activities in so-called mixed areas, the Catholic Church will respect the legal order of the Republic of Slovenia. In doing so it has the right to strive, within this legal order and through constitutionally permitted means (also including endeavours to amend the provisions of the Constitution), to pursue its aims and to attempt to cooperate with the state in mixed areas.
34. If the “principle of independence and autonomy” is interpreted in such a manner, and if the wording of Article 1 of the Agreement is understood in conformity with this interpretation, then this provision of the Agreement is not inconsistent with Article 3 of the Constitution. The “principle of independence and autonomy”, when understood in such a manner, is also not inconsistent with Article 7 of the Constitution.
35. As the Constitutional Court found that the wording of Article 1 of the Agreement could be interpreted in two ways, one of which is inconsistent with the Constitution, it adopted a so-called interpretative opinion. The Constitutional Court had already proceeded in this manner in the preliminary review of a treaty in Opinion No. Rm-1/97.<sup>41</sup> As a result, it prevented that, in the event of the ratification of the Agreement, contents which were inconsistent with the Constitution would be adopted into the legal order upon the Agreement’s entry into force. There is no constitutional impediment, however, for a treaty provision to be adopted in the internal legal order insofar as it is interpreted in a constitutionally consistent manner, as it follows from this Opinion.
36. Furthermore, Article 1 of the Agreement is crucial for the understanding and meaning of the other provisions of the Agreement which were reviewed by the Constitutional Court (the second paragraph of Article 2, the first paragraph of Article 3, the first paragraph of Article 10, and, in particular, the second paragraph of Article 14). The Constitutional Court therefore based its review of these provisions on the premises defined in this part of the reasoning of the Opinion (Point II of the operative provisions of this Opinion).

### B – III

#### *Review of the second paragraph of Article 2 of the Agreement*

37. Article 2 reads as follows:

“The Republic of Slovenia recognises the legal personality of the Catholic Church. The Republic of Slovenia also recognises the legal personality of all territorial and personal Church institutions based in the Republic of Slovenia, which are granted such personality pursuant to the legal norms of canon law. According to the legal system of the Republic of Slovenia, the Church authority must report such institutions to the state authority for registration.”

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<sup>41</sup> The interpretative decision (*la décision de non-contrariété sous réserve*) was introduced in the constitutional review of treaties by the French *Conseil Constitutionnel*. Instead of finding that a treaty provision is inconsistent with the constitution, it interprets this provision in such a manner as to allow for the conclusion that this provision is not inconsistent with the constitution. Gaïa, *Le Conseil constitutionnel et l’insertion des engagements internationaux dans l’ordre juridique interne*, Economica, Paris 1991, pp. 123–127.

38. Article 2 of the Agreement allegedly also features among the constitutionally disputable articles; however, the Government expressed its doubts only in relation to its second paragraph. Therefore, the Constitutional Court proceeded to review only this provision. The provision of the second paragraph of Article 2 is allegedly constitutionally disputable as it does not determine that the Catholic Church and its organisations are recognised legal personalities under private law. By adopting the Agreement, the Republic of Slovenia allegedly violated the principle of the equality of religious communities enshrined in the second paragraph of Article 7 of the Constitution, as the Agreement does not explicitly provide that the territorial and personal institutions of the Catholic Church in the Republic of Slovenia are legal entities under private law, as is provided for the Evangelical Church in the Agreement on the Legal Position of the Evangelical Church in the Republic of Slovenia.<sup>42</sup> As canon law also recognises public and private legal entities, there is a concern that the Catholic Church may assert that those legal entities that have the status of public legal entities under canon law<sup>43</sup> also acquire the status of entities under public law in accordance with the legislation of the Republic of Slovenia. There is also a concern that the provision is not sufficiently clear and precise, thereby constituting a violation of the principles of a state governed by the rule of law (Article 2 of the Constitution).

39. As in the majority of legal orders, in the legal order of the Republic of Slovenia the so-called *numerus clausus* principle also applies to legal entities, limiting the choice of possible types of legal entity and prohibiting combinations of different types of legal entities.<sup>44</sup> The existing legislation of the Republic of Slovenia (the first paragraph of Article 7 of the LSRCA) determines that religious communities are legal entities under civil law. They are *sui generis* civil-law legal entities.

40. Pursuant to canon law, juridic persons are either aggregates of persons or aggregates of things (Can. 115, first paragraph). Can. 114 determines that “[j]uridic persons are constituted either by the prescript of law or by special grant of the competent authority given through a decree. They are aggregates of persons [...] or of things [...] ordered for a purpose which is in keeping with the mission of the Church and which transcends the purposes of individuals”. The “territorial and personal Church institutions” referred to in the Agreement can therefore be groups of persons or groups of things that enjoy the status of a legal entity pursuant to canon law. It is evident

42 The Agreement on the Legal Position of the Evangelical Church in the Republic of Slovenia, which was signed by the authorised representatives of the Government and the Evangelical Church on 25 January 2000.

43 The first paragraph of Can. 116 provides that: “Public juridic persons are aggregates of persons or things which are constituted by competent ecclesiastical authority so that, within the purposes set out for them, they fulfil in the name of the Church, according to the norm of the prescripts of the law, the proper function entrusted to them in view of the public good; other juridic persons are private”. Public juridic persons are accorded legal personality either by the law itself or by a special decree of the competent authority expressly granting such, while private juridic persons are given legal personality only through a special decree of the competent authority expressly granting such (Can. 116, second paragraph). Particular churches (dioceses, Can. 373) and parishes (Can. 515) are, for example, deemed to be public juridic persons by law.

44 Trstenjak, *Pravne osebe* [Legal Entities], *Gospodarski vestnik*, 2003, pp. 66–67.

from the second paragraph of Article 2 of the Agreement that the state recognises their existence and does not require them to meet the requirements determined for civil-law legal entities by the law of the Republic of Slovenia in order to recognise their legal personality. For the recognition of their status under civil law, it is sufficient for the Church authority to report them to the competent state authority for registration pursuant to the legal order of the Republic of Slovenia.<sup>45</sup> In its Decision No. U-I-25/92, dated 4 March 1993 (Official Gazette RS, No. 13/93, and OdlUS II, 23), the Constitutional Court emphasised that, in relation to legal personality, Church organisations and institutions must abide by state regulations. The Agreement therefore provides no basis for the recognition of public-law status to territorial or personal Church institutions.

41. For the reasons mentioned above, the second paragraph of Article 2 of the Agreement is not inconsistent with the principle of the equality of religious communities enshrined in the second paragraph of Article 7 or with the principles of a state governed by the rule of law enshrined in Article 2 of the Constitution.

#### **B – IV**

##### *Review of the First Paragraph of Article 3 of the Agreement*

42. Article 3 of the Agreement reads as follows:

“The legal order of the Republic of Slovenia guarantees the Catholic Church the freedom to perform its activities, liturgy, and catechesis.

All extraordinary public liturgy and other public religious gatherings (pilgrimages, processions, meetings) are to be notified by the competent authority of the Catholic Church to the competent state authority in accordance with the legal order of the Republic of Slovenia.”

43. Article 3 of the Agreement allegedly also features among the constitutionally disputable articles. However, the Government expressed its doubts only in relation to its first paragraph. Therefore, the Constitutional Court proceeded to review only this provision. The second paragraph of Article 7 of the Constitution provides that religious communities have the right to pursue their activities freely. The Constitution itself thus guarantees to the Catholic Church the freedom to pursue activities in all religious matters, including the liturgy and catechesis. The first paragraph of Article 3 of the Agreement

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<sup>45</sup> It is evident from the article of Dr Miha Juhart “Premoženskoppravna razmerja Cerkve v Sloveniji med svetovnjima vojnama” [The Property Relations of the Church in Slovenia between the World Wars] that there are no doubts about this; in the article, he explains that “in contemporary conditions it would probably not go amiss if a special register were introduced in relation to Church legal entities, which, by being made public, could improve the security of legal transactions. Even if such a special register is introduced, the determination of requirements for legal personality might be left entirely to the provisions of internal canon law, and the register would only make details of the internal Church organisation public. Together with the registration of a legal entity, the register could also provide other data which are important for legal transactions.” Published in: Država in Cerkve, izbrani zgodovinski in pravni vidiki, Mednarodni posvet 21. in 22. 6. 2001 [The State and the Church, Selected Historical and Legal Aspects, International Symposium held on 21 and 22 June 2001], Slovenska akademija znanosti in umetnosti, Ljubljana 2002, p. 129.

therefore only confirms the principle of the free pursuit of activities of religious communities determined in the second paragraph of Article 1 of the Agreement. By this provision the contracting parties sought to specifically emphasise the most important parts of the religious activities of the Catholic Church, i.e. the liturgy<sup>46</sup> and catechesis.<sup>47</sup>

44. The freedom to pursue activities in this area is a reflection of the “principle of independence and autonomy”, as it is apparent from the reasoning of this Opinion in relation to the review of Article 1 of the Agreement. The Constitutional Court reiterates that, in order to understand the first paragraph of Article 3 of the Agreement, it is necessary to take into account the constitutionally consistent interpretation of Article 1 thereof. Therefore, the first paragraph of Article 3 of the Agreement cannot be understood in the sense that it could constitute a basis for the liturgy and catechesis to be included in the public activities of the state, e.g. as an element of public education (Constitutional Court Decision No. U-I-68/98). This provision refers only to the regulation of the operation of the Catholic Church in the areas in which it is free to act in accordance with the principle of the separation of the state and religious communities. This is also confirmed by the wording of the second paragraph of Article 3, which is an exception to its first paragraph. The wording of the first paragraph of Article 3 of the Agreement would undoubtedly be clearer if it were explicitly emphasised that the freedom to pursue activities refers “especially” or “particularly” to liturgy and catechesis. However, despite the aforementioned, this article can only be interpreted as referring exclusively to the religious activities of the Catholic Church in the Republic of Slovenia. Therefore, the concerns that through this provision the Republic of Slovenia recognises the “entire” operation of the Catholic Church to be free and renounces its powers are unfounded.
45. Consequently, the first paragraph of Article 3 of the Agreement is not inconsistent with the principle of the separation of the state and religious communities enshrined in the first paragraph of Article 7, the principle of sovereignty enshrined in Article 3 and the principles of a state governed by the rule of law enshrined in Article 2 of the Constitution.

## B – V

### *Review of the First Paragraph of Article 10 of the Agreement*

46. Article 10 of the Agreement reads as follows:

“In accordance with the legislation of the Republic of Slovenia and canon law, the Catholic Church has the right to establish and manage schools of all types and levels, dormitories for secondary school and university students, and other educational institutions.

46 The Constitution on the Sacred Liturgy adopted at the Second Vatican Council provides that the liturgy is the summit toward which the activity of the Church is directed (Article 10) and that the “sacred liturgy does not exhaust the entire activity of the Church” (Article 9), *Koncilski odluki, op. cit.*, pp. 65 and 66.

47 It follows from the Decree on the Pastoral Office of Bishops in the Church adopted at the Second Vatican Council that catechesis – catechetical instruction – is one of the primary tasks of bishops (Articles 13 and 14). *Ibid.*, p. 265.

The state provides support to the institutions referred to in the previous paragraph under the same conditions as it provides support to other similar private institutions. The status of secondary school and university students and the pupils of these institutions is equal to the status of students and pupils in public institutions.”

47. The first paragraph is alleged to be constitutionally disputable, as it allows the Catholic Church to interfere with the legal regulation of public schools in the Republic of Slovenia.
48. The area of education is an area in which the Church’s mission and the jurisdiction of the state meet. The Church strives to ensure that Catholic teaching and education are performed in schools of every kind and level, i.e. also in public (state) schools.<sup>48</sup> The Constitutional Court already decided on this issue in Decision No. U-I-68/98. The Agreement does not cover this issue. Article 10 of the Agreement refers exclusively to the right to establish and manage schools, dormitories for secondary school and university students, and other educational organisations. In Article 10 of the Agreement, the Republic of Slovenia recognises the right of the Catholic Church to establish and manage, in accordance with canon law,<sup>49</sup> “schools of all types and levels, dormitories for secondary school and university students, and other educational institutions,” while the Catholic Church undertakes to respect the legislation of the Republic of Slovenia.<sup>50</sup> That the first paragraph of Article 10 of the Agreement relates to the establishment and management of private schools clearly follows from its second paragraph, which refers to the first paragraph and in which the Republic of Slovenia undertakes to provide support to private educational establishments founded by the Catholic Church, in the same manner as other similar private establishments and organisations.
49. Considering the above, the first paragraph of Article 10 is not inconsistent with the principle of the separation of the state and religious communities enshrined in the first paragraph of Article 7 of the Constitution.

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48 Book III of the CCL governs “The Teaching Function of the Church”. The Church has “the duty and innate right, independent of any human power whatsoever, to preach the gospel to all peoples” (Can. 747). Can 761 determines that “various means available are to be used to proclaim Christian doctrine: first of all preaching and catechetical instruction, which always hold the principal place, but also the presentation of doctrine in schools, academies, conferences, and meetings of every type.” First and foremost, it is the duty of parents to ensure their children receive a Catholic education, and they have the right to assistance from civil society in order to ensure this (Can. 793). All Catholic religious instruction and education imparted in any schools whatsoever are subject to the authority of the Church (Can. 804).

49 Canon law (Can. 800) grants the Catholic Church the right to establish and direct schools of every discipline, type and level. A Catholic school is a school that is directed by a competent ecclesiastical authority or a public ecclesiastical juridic person or which is recognised as such by an ecclesiastical authority by way of a written document (Can. 803). The local bishop has the right to issue prescripts which pertain to the general regulation of Catholic schools (Can. 805–806).

50 In accordance with Article 57 of the Constitution, the legislation of the Republic of Slovenia governing schooling facilitates and legally regulates the establishment and operation of private schools, which can be established as educational institutions by domestic and foreign natural persons and legal entities, unless otherwise provided for a particular activity or specific type of institution (Articles 1 and 2 of the Institutes Act, Official Gazette RS, No. 12/91, and the Organisation and Financing of Education Act, Official Gazette RS, No. 12/96, etc.).

## B – VI

### *Review of the Second Paragraph of Article 14 of the Agreement*

**50.** Article 14 reads as follows:

“The Republic of Slovenia and the Holy See shall resolve any disagreement that might arise due to the interpretation or application of the provisions of this Agreement amicably and through diplomatic channels.

The Republic of Slovenia and the Holy See shall endeavour to continue discussing outstanding issues that are not the subject of this Agreement, with the intention of resolving them by mutual agreement.”

**51.** The second paragraph is alleged to be constitutionally disputable, as it imposes on the Republic of Slovenia the obligation to bilaterally resolve all outstanding issues which are not covered by this Agreement, and the Republic of Slovenia allows the Holy See to participate in the decision-making process on issues that fall under its sovereign and exclusive jurisdiction.

**52.** By this provision the state undertakes to further attempt to settle any possible outstanding issue with the Holy See by mutual agreement. However, this provision can only be understood in the sense that the state is also restricted by the constitutional order when trying to reach further agreements. Thereby, it assumes the duty to negotiate so that, on the basis of the diplomatic negotiations conducted, it will endeavour to find amicable and mutually acceptable solutions for any outstanding issue that is not covered either sufficiently or at all by the Agreement. The second paragraph of Article 14, however, does not imply that, by assuming such obligation, the Republic of Slovenia also assumed the obligation in advance to reach an agreement in subsequent negotiations regarding a mutually acceptable solution, i.e. that it assumed the duty to reach an agreement. Therefore, such provision cannot in itself be inconsistent with the principle of the separation of the state and religious communities enshrined in the first paragraph of Article 7 of the Constitution. This principle does not exclude the conclusion of agreements with specific religious communities. If the outcome of such an agreement remains within the constitutional limits defined by the Constitutional Court in this Opinion with regard to Article 1 of the Agreement, it will not be inconsistent with the first paragraph of Article 7 of the Constitution.

## B – VII

**53.** In this review, the Constitutional Court issued the opinion that the challenged provisions of the Agreement are not inconsistent with the Constitution and adopted an interpretative decision regarding Article 1 of the Agreement, which is vital for the review of the other provisions of the Agreement. The decisions of the Constitutional Court are binding (the third paragraph of Article 1 of the CCA). An opinion issued in a case concerning the review of the constitutionality of a treaty that is in the process of ratification has the same legal effects. As the Constitutional Court has already emphasised in its Opinion No. Rm-1/97, such opinion has an internal legal effect – it is binding on the state authorities of the Republic of Slovenia; however, in the area of international law, such a decision has no effect. In the implementation

of the Agreement (either when concluding further agreements with the Holy See or adopting legislation), provided it is ratified and enters into force, the state authorities of the Republic of Slovenia will be required to take into account the content of the reviewed provisions of the Agreement as determined by the interpretation of the Constitutional Court. Such will also need to be taken into account by the National Assembly when ratifying the Agreement. As the Constitutional Court emphasised already in its Opinion No. Rm-1/00, dated 19 April 2001 (Official Gazette RS, No. 43/01, and OdlUS X, 78), any disagreement arising between the contracting parties during the implementation of the Agreement due to a different understanding of its content (particularly Article 1) by the other contracting party cannot be the subject of constitutional review, but is instead a matter for political debate in the National Assembly upon its ratification.

### C

54. The Constitutional Court issued this Opinion on the basis of Article 70 of the CCA and the second indent of the third paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette, 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, Dr Mirjam Šrk, and Jože Tratnik. The Opinion was adopted unanimously.

*Dr Dragica Wedam-Lukić*  
*President*

Decision No. **U-I-111/04**, dated 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.<sup>1</sup> 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]”.<sup>2</sup> As constitutional

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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.

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.<sup>3</sup> 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,<sup>4</sup> 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

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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."

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,<sup>5</sup> 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.<sup>6</sup> If only the legality of the content of a referendum ques-

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- 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

tion 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.<sup>7</sup> 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.<sup>8</sup> Spatial arrangements are determined and planned by spatial acts.<sup>9</sup> Until the entry into force of the spatial orders of municipalities, the spatial management conditions,<sup>10</sup> 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

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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.

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).<sup>11</sup> 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

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- 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. *masgid* 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 slimhigh 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 *masjid* (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.

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 asses “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.<sup>12</sup> 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.<sup>13</sup>

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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 pub-

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.<sup>14</sup> 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.<sup>15</sup> With regard to local referenda, the Constitu-

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lic 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 goal 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

tion 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.<sup>16</sup> 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

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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.

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.<sup>17</sup> 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.”<sup>18</sup> 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.<sup>19</sup>

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'

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.

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,<sup>20</sup> 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)<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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

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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](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 25<sup>th</sup> 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.

profession of an individual religion is not a constitutive part of the right to freedom of religion is erroneous.<sup>25</sup> 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.<sup>26</sup> 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

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.

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<sup>27</sup> 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).<sup>28</sup> If the interference with a human right is intended

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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

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.<sup>29</sup> The goal of the referendum is thus to prevent members of the Islamic

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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.

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

**DECISION**

At a session held on 15 April 2010 in proceedings to review constitutionality initiated upon the request of the National Council, the Constitutional Court

*decided as follows:*

1. The first paragraph of Article 13 and the first and fifth items of Article 14 of the Religious Freedom Act (Official Gazette of the Republic of Slovenia, No. 14/07, hereinafter referred to as the RFA) are abrogated.
2. The abrogation determined in Point 1 of the operative provisions will come into effect one year after the publication of this decision in the Official Gazette of the Republic of Slovenia.
3. Article 20 of the Legal Status of Religious Communities in the Socialist Republic of Slovenia Act (Official Gazette of the Socialist Republic of Slovenia, Nos. 15/76 and 42/86, and Official Gazette of the Republic of Slovenia, No. 22/91) and the third paragraph of Article 29 of the RFA are not inconsistent with the Constitution.
4. The third paragraph of Article 24 of the RFA, to the extent that it refers to the employment of priests, the fourth paragraph of Article 24 of the RFA, to the extent that it refers to an employed priest, the second paragraph of Article 25 of the RFA, and the last sentence of the first paragraph of Article 27 of the RFA, to the extent that it refers to Articles 24 and 25 of the RFA, are abrogated.
5. The abrogation determined in Point 4 of the operative provisions will come into effect one year after the publication of this decision in the Official Gazette of the Republic of Slovenia.
6. Articles 24 and 25 of the RFA are not inconsistent with the Constitution in the part not referred to in Point 4 of the operative provisions.
7. Articles 22 and 23 of the RFA and the third paragraph of Article 52 of the Defence Act (Official Gazette of the Republic of Slovenia, No. 103/04 – official consolidated text) are not inconsistent with the Constitution.
8. Article 26 of the RFA is not inconsistent with the Constitution
9. The fifth paragraph of Article 27 of the RFA is not inconsistent with the Constitution.
10. Articles 30 and 32 of the RFA are not inconsistent with the Constitution

## A

**Assertions of the National Council**

1. The National Council requested a review of the constitutionality of a number of provisions of the RFA, Article 20 of the Legal Status of Religious Communities in the Socialist Republic of Slovenia Act (hereinafter referred to as the LSRCA), and Article 52 of the Defence Act (hereinafter referred to as the DA). It alleges that the contested provisions are inconsistent with Articles 2, 3, 7, 14, 16, 38, 42, 63, 87, 120, 153, and 158 of the Constitution. They propose that the Constitutional Court annul the RFA in its entirety and find that the contested provisions of the LSRCA and the DA are inconsistent with the Constitution.
2. According to the assertions of the applicant, Article 20 of the LSRCA regulates the financial support of the state to churches in a manner which is inconsistent with Articles 2 and 120 of the Constitution. In its opinion, it allegedly does not provide a framework and criteria for allocating the financial support of the state. This allegedly allows for arbitrary application of the Act.
3. According to the assertions in the request, the third paragraph of Article 3 of the RFA, which sets out the conditions under which differential treatment of the employment of religious and other employees of churches and religious communities [Translator's note: in both the RFA and this Decision, the terms "churches and religious communities" and only "religious communities" are used synonymously.] does not constitute discrimination, is inconsistent with the principle of freedom of activity of religious communities (the second paragraph of Article 7 of the Constitution). By regulating this issue the state allegedly interferes with the manner of practicing religious rites. This provision of the RFA is allegedly also inconsistent with the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution), as the grounds for justifying the differential treatment of the employment of religious and other employees of the churches and religious communities refer to the ethics of churches and other religious communities and not to the Slovene legal order.
4. Article 4 of the RFA is allegedly inconsistent with the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution). This provision only provides, in the opinion of the applicant, what kind of conduct of the state is prohibited – because with such the latter allegedly interferes in the sphere of activities of churches and religious communities – but does not regulate what religious communities are prohibited from doing in order for them not to interfere with the sovereignty of the state. This provision is allegedly unconstitutional also because it does not prohibit religious communities from being politically active.
5. The first paragraph of Article 5 of the RFA, which specifies the conditions under which churches or religious communities are considered charitable organisations, is allegedly inconsistent with the principle of clear and precise regulations (Article 2 of the Constitution) and the principle of the separation of the state and religious

communities (the first paragraph of Article 7 of the Constitution). It is allegedly inconsistent with Article 2 of the Constitution because it is allegedly not clear what the terms “spirituality in public life” and “finding purpose in life”, which religious communities are to strive for, entail. Since the two criteria are – in the opinion of the applicant – entirely religious in nature, the state should not apply them when assessing whether a certain church or religious community is a charitable organisation. With such assessment, the state, in its opinion, interferes in the sphere of religion and thus violates the first paragraph of Article 7 of the Constitution.

6. The second paragraph of Article 5 of the RFA, which allegedly governs the relationship of the state to churches and religious communities in a general manner, is allegedly also incompatible with the principle of the separation of the state and religious communities. Namely, it allegedly determines that the state establish a lasting dialogue with churches and religious communities and develop forms of enduring cooperation. If this can be understood as the obligation to achieve a specific result on the part of the state, the applicant deems that this is inconsistent with the first paragraph of Article 7 of the Constitution. Since the commitment of the state to respect the identity [of churches and other religious communities] and to open and lasting dialogue and cooperation is allegedly not also determined in relation to unregistered religious communities, this is allegedly inconsistent with the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution).
7. According to the applicant, the second paragraph of Article 6 of the RFA, which provides, *inter alia*, that the activities of churches and religious communities must be “known to the public”, is also inconsistent with the Constitution. Since the requirement of the public nature of activities is not listed as one of the grounds for the prohibition of activities in Article 12 of the RFA, it is not clear what the purpose of this provision is. Allegedly, it also entails a disproportionate interference with the freedom of association referred to in the second paragraph of Article 42 of the Constitution; it would be more reasonable if the legislature were to prescribe only that information be available on demand. In its opinion, this provision is inconsistent with the principle of the clarity and precision of regulations (Article 2 of the Constitution) insofar as it determines that the activities of a church or religious community should not be contrary to moral principles. Since this prohibition is not included in Article 12 of the RFA as one of the grounds for the prohibition of the activities of religious communities, the applicant cautions that such regulation allows for the arbitrariness of the state authority and therefore violates Article 2 of the Constitution.
8. Item 2 of Article 7 of the RFA is, according to the applicant, inconsistent with the principle of state sovereignty (Article 3 of the Constitution), as it provides that the employees of religious communities must comply with the regulations, rules, and powers of the supreme authority of their church or religious community rather than also the legal order of the Republic of Slovenia in areas where they overlap. It is allegedly also constitutionally questionable that this provision does not differentiate between the employees of religious communities engaged in a purely religious function and those engaged in charitable work.

9. According to the applicant, items 1 and 2 of the first paragraph of Article 12 of the RFA determine that the activities of a religious community are prohibited on the basis of a court decision if, *inter alia*, it “seriously” breaches the Constitution, encourages discrimination, violence, or war, if it incites hatred, intolerance, or persecution, or if it “seriously” undermines human dignity. Such a regulation is allegedly inconsistent with Article 63 of the Constitution, under which “any” such conduct is unconstitutional and not just that which is “serious”, and with the second paragraph of Article 16 of the Constitution, which allegedly does not allow for any suspension or restriction of the right to human dignity. The same provisions are, in its opinion, also inconsistent with Article 2 of the Constitution. The legal situation is allegedly unclear and unpredictable, as the RFA supposedly does not allow for a clear identification when the need for the prohibition of the activities of a religious community occurs. This uncertainty is allegedly inconsistent also with the fourth paragraph of Article 153 of the Constitution, on the basis of which the individual acts and actions of authorities must be based on a law or a regulation adopted pursuant to law. Article 12 of the RFA is, according to the applicant, inconsistent with the Constitution also because it does not state that activities in conflict with public morality are grounds for the prohibition of the activities of religious communities.
10. The conditions for the registration of religious communities set out in Article 13 of the RFA (i.e. at least 100 members – citizens or aliens with permanent residence – and at least 10 years of activity in the territory of the Republic of Slovenia) are allegedly inconsistent with the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution). According to the applicant, due to the equality of religious communities, the differentiation concerning registration, which entails the acquisition of a legal personality, is allegedly not allowed, but such differentiation would only be admissible if the religious community were to seek to become involved in the public sphere. The conditions for registration are allegedly also incompatible with the freedom of conscience (the first paragraph of Article 41 of the Constitution), which the state should not recognise in name only. The prescribed period of 10 years is, according to the applicant, inconsistent with the freedom of association (the second paragraph of Article 42 of the Constitution). The applicant also claims that there is an internal incompatibility in the RFA itself since Article 8 of the RFA mentions the right to establish a church or a religious community, whereas the conditions determined in Article 13 curtail this right for at least 10 years.
11. Item 7 of Article 14 of the RFA allegedly determines the content of the bylaws which a church or religious community must file upon registration. This item is allegedly inconsistent with the principle of freedom of activity of religious communities (the second paragraph of Article 7 of the Constitution), as it allegedly interferes with the freedom of activity of religious communities too strongly by defining the content of the bylaws in the fourth, sixth, and seventh indents.
12. Articles 22, 23, 24, 25, and 27 of the RFA and the third paragraph of Article 52 of the DA are allegedly inconsistent with the Constitution because they do not define the framework and criteria for spiritual care. Neither the RFA nor the draft of this Act

allegedly indicate why the legislature, in regulating spiritual care, chose only some establishments and closed institutions (the Army, the Police, prisons, hospitals, and social welfare institutions providing institutional care), but not also others that are similar to these. Even in these selected institutions only *nudum ius* is allegedly guaranteed and allegedly no criteria for defining the beneficiaries of religious spiritual care are determined. Such regulation is allegedly inconsistent with Articles 87 and 120 of the Constitution, and Article 24 of the RFA is allegedly also inconsistent with Article 2 of the Constitution. Article 23 of the RFA [is allegedly inconsistent] as it leaves the regulation of the detailed organisation and manner of the implementation of spiritual care in the Police to the Minister, and Article 24 of the RFA [is allegedly inconsistent] as it neither provides the criteria for the provision of spiritual care in prisons nor provides for the issuance of regulations that would regulate this area. The third paragraph of Article 24 and the second paragraph of Article 25 of the RFA are allegedly inconsistent with Articles 87 and 120 of the Constitution as they do not sufficiently explicitly specify what the terms “a sufficiently large number of detainees of the same religion”, “a sufficiently large number of occupants of the same religion”, and “the necessary number of priests” entail. Similarly, the applicant considers that the third paragraph of Article 52 of the DA is inconsistent with Article 120 of the Constitution, as, in its opinion, it does not provide the Minister with the criteria and standards for determining how the exercise of the right to religious spiritual care in the Army is to be implemented.

13. The religious spiritual care provided by the state should be, according to the applicant, related to the physical inability of an individual to obtain spiritual care. Article 22 of the RFA is therefore allegedly inconsistent with the freedom of conscience (the first paragraph of Article 41 of the Constitution). Members of the Army are allegedly constantly ensured religious spiritual care and not only when exercise of their freedom of religion would have been effectively impossible. This provision is also, according to the applicant, inconsistent with the principle of equality (the second paragraph of Article 14 of the Constitution). It allegedly provides for the continuous religious spiritual care of members of the Army, while Article 23 provides such to police officers only in circumstances where the exercise of their religious freedom is rendered difficult.
14. Articles 24 and 25 in conjunction with Articles 22 and 23 of the RFA are allegedly inconsistent with the principle of equality determined in Article 14 of the Constitution. The latter two allegedly – in contrast to Articles 24 and 25 of the RFA – do not expressly provide for the right to collective religious spiritual care. The challenged regulation, according to which persons in prisons, hospitals, and social welfare institutions allegedly have the right to collective religious spiritual care, while members of the Army and Police Force do not, is allegedly inconsistent with freedom of conscience (the first paragraph of Article 41 of the Constitution).
15. The applicant states that Articles 24 and 25 of the RFA, which enable the employment of priests in prisons and hospitals, is inconsistent with the principle of the separation of the state and religious communities (the first paragraph of Article 7

of the Constitution). The state is allegedly not entitled to employ priests as public officials. As these provisions are allegedly inconsistent with each other, they are also allegedly inconsistent with the principle of a state governed by the rule of law (Article 2 of the Constitution). Namely, Article 24 allegedly allows for a choice between the employment of a priest and the provision of “different remuneration for the work done” [in the words of the applicant], while Article 25 allegedly provides for the mandatory employment of priests. In the opinion of the applicant, there is no reasonable reason for such differentiation.

16. The fourth paragraph of Article 24 and second paragraph of Article 25 of the RFA, which provide that appointed and employed priests can perform their function undisturbed and visit people in detention or in residential care, are allegedly inconsistent with the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution) and freedom of conscience (the first paragraph of Article 41 of the Constitution). According to the applicant, all religious officials and not just employed priests should have the right to undisturbed access to detainees or people in residential care that desire such care, irrespective of whether they fall within the framework of a “sufficiently large number of persons of the same religion”. The right to be visited by their religious representatives is allegedly granted only to adherents of registered churches and religious communities; adherents of unregistered religious communities allegedly have no such right. Given that such visits are allegedly restricted to priests as only one category of religious officials, such regulation is allegedly also inconsistent with the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution). Such applies also, according to the applicant, to Articles 24 and 25 of the RFA in the parts in which they refer to “priest”. The state, in its opinion, should leave it to individual religious communities themselves to determine the religious officials who are to provide spiritual care in closed and other types of institutions.
17. The provisions of Article 26 of the RFA are allegedly inconsistent with Article 2, the first paragraph of Article 7, the second paragraph of Article 14, Article 87, and Article 158 of the Constitution. The first paragraph of Article 26, which gives religious communities the right to build and to undisturbed use of their own religious spaces and buildings, is, according to the applicant, inconsistent with the principle of the clarity and certainty of regulations. Namely, it allegedly does not follow clearly from this paragraph whether the rights in this provision refer only to the registered religious communities or also to unregistered religious communities. The applicant states that the second paragraph of Article 26 is undetermined and unclear, as in its opinion it does not specify the criteria for exercising the right to build buildings and facilities, as it does not determine what “the large number of adherents” entails, it does not determine which spatial acts are concerned, which authorities are competent, and as it does not state whether religious communities are to be participants in the proceedings for adopting spatial planning acts.
18. Article 26 of the RFA is allegedly inconsistent with the principle of the separation of the state and religious communities, as it is allegedly the state authority and

not the religious community which decides on a religious community's need for a religious building. The state authority should, according to the applicant, decide only on the appropriateness of the facility regarding the spatial and building requirements. The alleged nonconformity can be found, in the opinion of the applicant, also in the second paragraph of Article 26, which determines that the state authorities and religious communities must agree on the needs and interests of religious communities. In its opinion, this entails the state's obligation to achieve a specific result. The third paragraph of Article 26 of the RFA, which allegedly obliges the competent authorities to properly amend the existing spatial planning acts in force, allegedly also suggests such an obligation. Such regulation allegedly disproportionately interferes with the right of the state and local communities to free spatial planning. The regulation is, in its opinion, also inconsistent with Article 87 of the Constitution, as these rights can be regulated only by Acts. As the third paragraph of Article 26 of the RFA allegedly envisages amendments to the spatial plans already in force, it allegedly interferes with their finality and thereby violates Article 158 of the Constitution. As religious communities are allegedly in a privileged position concerning the construction of buildings and facilities in comparison with other voluntary and charitable associations and organisations active in spiritual areas, Article 26 of the RFA is allegedly also inconsistent with the general principle of equality before the law (the second paragraph of Article 14 of the Constitution).

19. The regulation of religious spiritual care in institutions, according to the applicant, violates the principle of equality (the second paragraph of Article 14 of the Constitution), as the priests employed in the institutions receive higher remuneration for the same services than those priests for whom the religious community receives only the payment of social security contributions.
20. The first and fourth paragraphs of Article 27 of the RFA are allegedly inconsistent with the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution), freedom of conscience (the first paragraph of Article 41 of the Constitution), and the principle of equality (the second paragraph of Article 14 of the Constitution). The applicant states that the right of religious communities to receive financial support to pay for the social security contributions of their employees depends on the Slovene citizenship of the adherents of religious communities and their employees, and emphasises that freedom of religion is a human right, irrespective of nationality. It is allegedly inconsistent with the principle of equality that the adherents of religious communities who are aliens with permanent residence status are allegedly not eligible for state financial support. The applicant refers to the Judgment of the European Court of Human Rights (hereinafter referred to as ECtHR) in the case of *The Moscow Branch of the Salvation Army v. Russia*, dated 5 October 2006, in which this court allegedly held that there was no reasonable and objective justification for distinguishing between Russian citizens and aliens regarding the possibility to exercise their right to freedom of religion through participation in organized religious communities.

21. The fourth paragraph of Article 27 of the RFA, which allegedly determines that the condition for guaranteeing the right to the payment of the social security contributions of religious officials is that there be a reasonable proportionality between the number of religious officials and the number of adherents of a religious community, is allegedly inconsistent with the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution). It allegedly entails unjustified discrimination against smaller religious communities. Equality is allegedly violated as the condition for this right is the number of adherents and not the religious care that was actually provided.
22. The fourth paragraph of Article 27 of the RFA is allegedly also inconsistent with Article 38, the first paragraph of Article 41, and the second paragraph of Article 120 of the Constitution. According to the statements of the applicant, it determines that religious communities must demonstrate the fulfilment of the condition of reasonable proportionality between the number of religious officials and the number of adherents of the religious community in question with credible data sources; *inter alia*, they may also propose that the latest census data are used. Thus, it would allow for the use of data obtained from the census in a way that opposes the grounds for their collection and is inconsistent with the principle of the protection of personal data (Article 38 of the Constitution). The principle of legality (Article 120 of the Constitution) is thereby violated, according to the applicant, as the RFA does not determine other “reliable data sources” and as the census data are not reliable since proclamation of one’s religious affiliation was not obligatory in the census. The applicant deems that there is an unjustified differentiation in the fact that certified signatures of hundreds of adherents must be submitted for the registration of a religious community, whereas such is not necessary to ascertain whether the condition of reasonable proportionality for entitlement to the payment of the social security contributions of religious officials is fulfilled.
23. The fifth paragraph of Article 27 of the RFA allegedly determines that the condition of reasonable proportionality between the number of religious officials and the number of members of churches or religious communities is met also if the religious community was active in the Republic of Slovenia at least eighty years before the RFA came into force. This allegedly constitutes a violation of the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution). The applicant states that the provision is intended only for the Jewish religious community, and therefore it entails unjustified positive discrimination at the expense of other, newer religious communities.
24. Articles 5, 27, and 28 of the RFA are allegedly inconsistent with the Constitution, as they do not take into account the property of a particular religious community when considering the payment of the social security contributions of religious officials.
25. According to the applicant, the third paragraph of Article 29 of the RFA, which provides that the state may provide financial support to registered religious communities, inadmissibly discriminates against unregistered communities. The conditions required for registration (100 members and 10 years of activity), have no

direct relationship to the general benefits of churches and religious communities for society, which is the reason the state supports them financially in accordance with this provision. The principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution) is allegedly violated, as Article 5 of the RFA allegedly does not allow unregistered religious communities to obtain the status of a charitable organisation, regardless of compliance with all the conditions determined in Article 5 of the RFA. The regulation of the funding of religious communities is allegedly inconsistent with the principle of equality before the law (the second paragraph of Article 14 of the Constitution), as it allegedly unduly differentiates between religious communities and other charitable (non-governmental and non-religious) associations that are active in fields beneficial to society. In particular, the inequality in funding allegedly concerns associations active in spiritual areas. According to the applicant, even though such could perform similar activities as religious communities, they cannot compete for the same financial support of the state due to this provision of the Act. The applicant emphasises that the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution) requires that the state grant financial support under the same conditions to all organisations pursuing generally beneficial purposes. In its opinion, charitable activities should be funded if they are actually performed, but not exclusively religious activities. The applicant addresses, *mutatis mutandis*, the same and some other complaints also with regard to Articles 13 to 18 of the RFA, which it argues are inconsistent with Articles 2, 7, 25, 120, and 158 of the Constitution. Freely active (unregistered) religious communities are allegedly not allowed to obtain the status of a charitable organisation, while allegedly this status can be obtained only by registered religious communities without any special procedure establishing and proving that the conditions determined in Article 5 of the RFA have been met. In its opinion, a legal remedy should be provided against such decision of the competent authority. The applicant holds that this is incompatible with the right to legal remedies (Article 25 of the Constitution).

26. The third paragraph of Article 29 of the RFA is allegedly, similar to Article 20 of the LSRCA, inconsistent with Articles 2, 7, and 120 of the Constitution, as it does not determine the criteria and the procedure for obtaining the status of a charitable organisation in a sufficiently clear and precise manner. According to the applicant, the conclusion that all the fields of activity of religious communities are in the public interest is false. The general benefits to society are allegedly related only to specific areas of social life, but the RFA does not identify them with sufficient clarity and precision. It deems that such approach should be used also when funding religious communities.
27. The RFA is allegedly inconsistent with Article 2 of the Constitution, as it uses different terms in referring to religious officials (religious official, employee of the church, priest, nun, monk, insured person) in different provisions (in the second item of Article 7, in Articles 24, 25, 27, and 28). The applicant states that the situation is even more ambiguous as the Standard Classification of Professions does not

use the term religious official, but only the occupation of religious professional. Such differing approaches concerning the terminology allegedly disrupt legal certainty, as it is allegedly not always possible to determine with certainty to whom a certain status or right pertain.

28. Article 30 of the RFA, which concerns the tasks of the competent authority, is allegedly inconsistent with Article 2 of the Constitution. The applicant claims that this provision does not determine clearly which authority is competent to perform these tasks. As the competent authority imposes sanctions for violations (Article 32 of the RFA), the applicant claims that religious communities do not know which body is the minor offence authority. It is allegedly not clear from the RFA that the Office of the Republic of Slovenia for Religious Communities (hereinafter referred to as the Office) is the body that currently performs these tasks, and it is allegedly referred to only in the transitional provisions of the RFA. In this respect, the applicant additionally claims that the Office is an executive government agency, which are not established to perform administrative tasks, and that the regulation is inconsistent with Article 120 of the Constitution, as the organisation of [the state] administration must be regulated by an Act.
29. Article 33 of the RFA allegedly violates the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution), as the religious communities that were already registered with the Office at the time the RFA came into effect will retain the status of legal persons and will be entered into the register *ex officio*. The applicant emphasises that they will never have to fulfil the conditions otherwise prescribed for registration. Similarly, the financial support granted to them for the payment of the social security contributions of religious officials will allegedly also be preserved to the extent to which they received such before the RFA came into force. The inequality is allegedly also reflected in relation to other organisations (associations) active in spiritual areas, as such will allegedly not have their period of activity in a different organisational form recognised if they transform into a registered religious community.

### **Reply of the National Assembly**

30. In its reply to the request, the National Assembly states that the contested provisions cannot be deemed to be unconstitutional. It states its interpretation of the content of Articles 7 and 41 of the Constitution and thereby refers to certain decisions of the Constitutional Court, and underlines the relevant binding international instruments on human rights.
31. Article 4 of the RFA is allegedly not unconstitutional, as in conformity with Article 7 of the Constitution it determines that the state should not interfere with the organisation and functioning of religious communities, except in the cases provided by an Act. Religious communities are allegedly not above the law or outside it and, according to the National Assembly, have the obligation to act in accordance with the legal order of the Republic of Slovenia, which is explicitly stated also in the second paragraph of Article 6 of the RFA. It emphasises that the principle of state

sovereignty determines the limits of the independent functioning of religious communities. Only the state is competent to decide what activities, and under what conditions, can be left to entities of private law.

32. The statement that the first paragraph of Article 5 of the RFA is unconstitutional is allegedly unfounded and no reasons corroborating such allegation were put forward. The determination of the conditions under which a certain religious community is a charitable organisation allegedly does not prejudice either the freedom of religion or other beliefs, nor the activities of religious communities in the religious sphere. This provision, according to the National Assembly, only determines general criteria which cannot be more specific. The second paragraph of Article 5 of the RFA does not prescribe an obligation to achieve a specific result. Likewise, the principle of dialogue and cooperation allegedly does not apply only to registered religious communities but to all religious communities.
33. The applicant allegedly did not submit arguments as to why item 7 of Article 14 of the RFA is unconstitutional. The RFA, in the opinion of the National Assembly, does not interfere with the freedom of activity of religious communities, as it does not determine the manner in which the organisation of religious communities must be regulated, but only that they must be regulated. The applicant allegedly did not explain why the requirement regarding the public nature of activities and the requirement that each religious community publish its rules are inconsistent with the Constitution.
34. The constitutional review request allegedly does not contain arguments concerning the second paragraph of Article 6 and the third paragraph of Article 3 of the RFA; the applicant allegedly misread these provisions. The third paragraph of Article 3 of the RFA allegedly determines an exception to the prohibition of discrimination based on religious or other beliefs when employing religious officials and lay personnel of a religious community. Such a regulation is allegedly reasonable and objectively justified given the nature of religious communities.
35. The National Assembly also rejects the complaint of the applicant concerning the [alleged] ambiguousness due to different terms being used to refer to religious officials. They consider that such usage is sufficiently clear, as it is always evident to which persons the terms refer and which rights are enjoyed by each religious official. They deem that the different terminology is necessary precisely due to different rights belonging to different persons.
36. They also deem to be unfounded the allegations that Articles 22 to 25 and Article 27 of the RFA and Article 52 of the DA do not provide criteria for determining the beneficiaries and the scope of spiritual care. The same allegedly also holds for the allegations regarding the ambiguity of these provisions due to the lack of a precise definition of certain terms in the Acts. They emphasise that the RFA determined the institutions in which the state guarantees religious spiritual care. In this manner the right is guaranteed by the Act, and it is left to the regulations to determine the manner of exercising this right. This is, in its opinion, necessary considering the different circumstances in which certain jobs are performed and the various types of closed institutions. It states

that the term “a sufficiently large number” of adherents of the same religion is a legal standard and can be determined. The exact definition should be determined in the regulation, as this number is allegedly different in different institutions, since the conditions and circumstances in these institutions are allegedly also different from each other. The RFA allegedly allows different forms of employment of priests; even though this is allegedly explicitly mentioned only in Article 24, there is no reason, according to the National Assembly, that this is not valid also in other cases.

37. The National Assembly emphasises that the starting point of the RFA is that the declaration of rights does not suffice for their exercise. Therefore, it claims that the state is obliged to enable and guarantee the conditions for the effective exercise of human rights. Therefore, the RFA obligates certain institutions to provide the financial conditions for the exercise of religious freedom. It maintains that the state must, if there is a sufficient number of adherents of a particular religious community in such institutions, also provide a priest who administers spiritual care. Such a regulation allegedly cannot be inconsistent with the Constitution, as it allegedly provides the conditions for the actual exercise of the right to freedom of religion.
38. The National Assembly deems that the allegation of the applicant that the state should provide religious spiritual care only to those persons who are physically unable to obtain such by themselves outside of state institutions is unfounded. It allegedly follows from the RFA and the DA that religious spiritual care in the Army and Police is related to the particular work performance conditions, especially regarding the difficult access to and even non-availability of spiritual care. In such cases, the state is allegedly obliged to provide for conditions for the provision of religious [spiritual] care, as this is allegedly the only way to ensure the right to profess one's religion. According to the National Assembly, Article 7 of the Constitution does not prohibit this. However, it is allegedly evident that the state must remain neutral in respect to all religions. In any situation, in the Army, Police, prisons, hospitals, and social welfare institutions, individual and collective spiritual care are allegedly ensured. In addition, there is allegedly no differentiation between registered and unregistered religious communities. The National Assembly states that religious spiritual care does not depend on “a sufficiently large number” of adherents. Any member of any religious community allegedly has the right to religious spiritual care. According to the National Assembly, only the manner of the provision of religious spiritual care may vary. Thus, provision by an employed priest depends on there being “a sufficiently large number” of adherents of a religious community.
39. The allegation that the funding of religious spiritual care is inconsistent with the principle of the separation of the state and religious communities is allegedly unfounded. This constitutional principle allegedly does not entail that the state may not financially support religious communities. In their view, the state may act in this manner while respecting the principle of equality; in addition, the manner and extent of funding is a matter to be assessed by the legislature.
40. The fourth paragraph of Article 27 of the RFA, which enables the use of data from the last census, is allegedly not inconsistent with the Constitution as it allegedly does not

concern the use of personal data. The National Assembly emphasises that the data obtained from the census were given voluntarily and only illustrate the statistically determined and treated data on the number of citizens who declared themselves voluntarily. They refute the allegation that the legislature did not provide other data sources on the grounds that such is a matter of their discretion.

41. The National Assembly responded to the complaints that religious communities and other non-religious organisations are treated differently by stating that the Constitution guarantees equal freedom for all beliefs and professions, religious and otherwise philosophical. However, the RFA regulates only the situation of churches and religious communities; therefore, the National Assembly considers the argument that it places non-religious associations in an unequal position in comparison to religious ones to be unfounded.
42. It is allegedly crucial for the exercise of the right to freely profess one's religion that religious communities are permitted to build their own buildings which are appropriate for their manner of religious worship and religious rites and customs. The Constitutional Court has allegedly already ruled on this matter. The National Assembly emphasises that this is the reason why the second paragraph of Article 26 of the RFA, which requires that the body drafting the spatial planning act assess the need for religious buildings in the draft and which requires that the needs, recommendations, and interests of religious communities be obtained and coordinated in accordance with the latter, is not inconsistent with the Constitution, but, on the contrary, it follows the standpoints adopted by the Constitutional Court.
43. Regarding Article 30 of the RFA, the National Assembly states that this provision determines the powers of the competent authority but does not really identify the latter. However, in the National Assembly's view, it is undisputed that this refers to the office established on the basis of the Government of the Republic of Slovenia Act (Official Gazette RS, No. 24/05 – official consolidated text, and 109/08 – hereinafter referred to as the GRSA). Thereby the first paragraph of Article 120 of the Constitution is allegedly respected.
44. The claim of the applicant that the RFA does not guarantee all religious communities the freedom to profess one's religion due to the conditions for registration is allegedly unfounded. The National Assembly emphasises that registration is not compulsory and that such obligation would be contrary to the freedom of association. In their view, neither the right to the freedom to profess religion nor the majority of other rights provided by the RFA are subject to registration. A religious community allegedly only acquires a legal personality with registration; however, this status is allegedly not a prerequisite for it to be active. It claims that the state may enter into agreements with registered religious communities, but such are also not a prerequisite for the activity of religious communities. The only right that allegedly pertains only to registered religious communities on the basis of the RFA is the right to financial aid for the purpose of the payment of the social security contributions of religious and other officials. It allegedly also follows clearly from the case law of the European Court of Human Rights that the state may make "additional rights" that

are not related to the fundamental human right to freedom of religion conditional upon the registration of the religious community in question. However, on no account can the freedom to perform religious rites or the right to religious buildings be conditional upon registration. Consequently, the National Assembly sees no reasons why the conditions for registration are inconsistent with the Constitution.

### **Opinion of the Government of the Republic of Slovenia**

45. The Government filed an opinion on the request for a review of constitutionality in which it opposes the assertions of the applicant concerning the nonconformity of the contested provisions with the Constitution.
46. It considers that Article 20 of the LSRCA is not inconsistent with the Constitution, given that the funding of religious communities is not inconsistent with the Constitution. The principle of the separation of the state and religious communities allegedly does not entail that all support and aid are excluded, provided, of course, that all religious communities are equal. The Constitutional Court has allegedly already adopted such a position.
47. The Government replies to the complaint concerning the use of different terminology for religious officials in the RFA by stating that there is no violation of the principle of a state governed by the rule of law. It is allegedly sufficiently clear from the RFA to which persons it refers and which rights belong to an individual religious official. The different terminology is allegedly necessary due to the different rights pertaining to such officials. The Government additionally adds that the Decree on the Introduction of the Standard Classification of Occupations (Official Gazette RS, Nos. 28/97 and 16/2000) regulates in detail the occupations of religious professionals. The Pension and Disability Insurance Act (Official Gazette RS, No. 109/06 – official consolidated text) allegedly uses the terms priest and monk or nun. The term insured person is allegedly used in the RFA only in the phrase [social security] “contributions of the insured person”, which is allegedly determined in the Social Security Contributions Act (Official Gazette RS, No. 5/96 *et seq.*).
48. Concerning the applicant’s complaints as to the [alleged] unconstitutionality of Articles 5, 27, and 28 of the RFA, the Government responds that such funding is an expression of the principle of a social state determined in Article 2 of the Constitution. Priests and other ordained persons in religious communities allegedly perform an important function in meeting the human need for spirituality and the need to profess one’s religion. In addition, they allegedly perform a series of other activities – charitable, educational, didactic, philanthropic, cultural, and similar. Such funding is allegedly also in accordance with the principle of equality, as the state has allegedly undertaken to fund 100% of the social security contributions [including contributions for health insurance] of all self-employed persons in culture by the Act Regulating the Realisation of the Public Interest in the Field of Culture (Official Gazette RS, No. 77/07 – official consolidated text *et seq.*, hereinafter referred to as the ARRPIFC). The exclusion of religious officials would, in the opinion of the Government, constitute discrimination on the basis of religion.

49. The Government claims that the RFA contains detailed criteria for such funding in Articles 27 and 28 and in the transitional provisions, and Article 29 of the RFA provides that financial support may also be regulated in other Acts.
50. In the opinion of the Government, the allegation that Article 5 of the RFA does not determine the criteria and procedure for obtaining the status of a charitable organisation is also unfounded. These criteria are allegedly clearly determined. In any case, the concept of charitable organisations in the legal order is allegedly known – e.g. in the Foundations Act (Official Gazette RS, No. 70/05 – official consolidated text and 91/05 – corr. – FA) and the Associations Act (Official Gazette RS, No. 61/06 and 58/09 – hereinafter referred to as the AA-1). Allegedly, even the Constitutional Court has adopted the standpoint that religious communities perform an important social function.
51. The Government considers the requirement determined in Article 6 of the RFA, i.e. that the activities of religious communities should not contradict moral principles and public order, to be a general provision in accordance with the principle that the conduct of legal entities must be in accordance with public order. Moral principles are, in its view, an undetermined legal notion which is also determined in other acts. The second paragraph of Article 6 of the RFA allegedly follows the provisions of the International Covenant on Civil and Political Rights (Official Gazette of the Socialist Federal Republic of Yugoslavia No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as ICCPR).
52. The Government contends that the fifth paragraph of Article 27 of the RFA, which was, according to the applicant, adopted only for the benefit of the Jewish religious community, does not refer to any religious community by name, but provides a general condition that the Jewish community fulfils. The provision allegedly pursues the legitimate goal of facilitating the activities of religious communities that already have a historical tradition in Slovenia. Specifically, such a provision can, in its opinion, help to maintain the Jewish culture in Slovenia by maintaining the Holocaust in our conscience.
53. Concerning Articles 13 to 18 of the RFA, the Government states that the RFA confers the status of charitable organisation on those religious communities that carry out functions that entail a social state and thereby enrich the national identity. The primary activity of religious communities allegedly cannot be compared to the activities of non-governmental organisations, even though such also have great importance in many areas of social life. It adds that the Constitutional Court has repeatedly expressed the standpoint that religious communities are institutions of general benefit performing an important social function.
54. The Government rejects the complaint concerning the [alleged] discriminatory conditions for registration determined in Article 13 of the RFA by stating that the activities of churches and religious communities are free regardless whether they are registered or active without registration. The RFA allegedly does not prescribe the conditions for the establishment of a religious community, but only the conditions for its registration. It emphasises that registration is not obligatory and that it

entails the recognition of certain rights which by their very nature cannot be provided to unregistered communities. The position of the applicant that a religious community becomes equal only by registering is allegedly also erroneous. According to the Government, a religious community exists already before registration; it can also be formed as a legal person under civil law. In its opinion, registration under the RFA enables it to obtain a specific type of legal personality which is merely a prerequisite for obtaining rights under this Act. In this framework, the RFA allegedly treats all religious communities equally. Registration allegedly does not restrict the religious community's freedom of activity and the conditions for registration are allegedly not too demanding, but comparable with the regulation of such in other states of the European Union.

55. Concerning the alleged unconstitutionality of item 2 of Article 7 of the RFA, the Government believes that the division of religious workers between those performing purely religious functions and those performing generally beneficial work is not possible as the same persons perform both. Moreover, the fact that religious officials must comply with the internal regulations of religious communities is allegedly not inconsistent with the Constitution, as everyone has a duty to comply with the legal order of the Republic of Slovenia.
56. In the opinion of the Government, the complaint regarding the unconstitutionality of items 1 and 2 of Article 12 of the RFA is also unfounded, as pursuant to these provisions the activities of religious communities can be prohibited only if they seriously violate the Constitution or seriously undermine human dignity. It asserts that the content and standards of these undetermined legal notions will be developed in more detail by the case law.
57. The Government states that item 7 of Article 14 of the RFA does not determine the content of the bylaws but only its obligatory elements, and the content is left to the autonomy of the church or religious community. The RFA thus allegedly does not determine how these issues should be regulated, but only that they must be regulated. The determination of the essential elements of the bylaws allegedly does not interfere with the autonomy of religious communities; it aims only to ensure the transparency of its activities. It emphasises that certain rights are subject to having the legal status of religious community, therefore the state is entitled to determine the obligatory elements of the bylaws of religious communities on the basis of the principles of a state governed by the rule of law and of equality before the law.
58. Article 33 of the RFA, which, according to the applicant, violates the principle of the equality of religious communities and the principle of equality between religious communities and other charitable organisations, allegedly derives from the principle of the continuity of the functioning of religious communities and preserves the acquired rights. If the RFA did not allow registered religious communities to continue to perform their mission, this could, in the view of the Government, constitute an inadmissible interference with legitimate expectations. Any requirement that the already registered communities must re-register would allegedly entail discrimination between the existing religious communities and those that intend to register anew.

59. The third paragraph of Article 3 of the RFA, which allegedly interferes with the manner of performing religious rites, is, in the view of the Government, not inconsistent with the Constitution. This provision allegedly determines only the instances in which differential treatment on the grounds of religious belief does not constitute discrimination. Because of the principle of the separation of the state and religious communities, the state allegedly may not interfere in the autonomous rules and ethics of religious communities. This regulation is allegedly also in accordance with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2 December 2000, p. 16).
60. Article 4 of the RFA, which, in the opinion of the applicant, should define what a religious community must not do in order not to interfere with the sovereignty of the state, is allegedly not unconstitutional. The sovereignty of the state is allegedly already limited by the Constitution and the Acts, as the state authorities are only allowed to act in accordance with the Constitution and the Acts. The RFA allegedly regulates the field of religious freedom, which entails also the freedom and autonomy of the activities of religious communities. It allegedly protects religious communities against the interventions of the state in their autonomy. The Government also rejects the allegation of the unconstitutionality of Article 12 of the RFA as it does not state that activities in conflict with public morality are grounds for the prohibition of the activities of religious communities.
61. Regarding the criteria determined in Article 5 of the RFA that refer to “spirituality in public life” and “finding purpose in life”, the Government states that these are undetermined legal terms whose content and standards will be determined in more detail by the case law. It points to the principle of the clarity and precision of regulations, derived from the principle of a state governed by the rule of law, which, in its opinion, entails that the statutory solutions must be general and abstract.
62. The Government rejects the alleged unconstitutionality of Articles 22 to 25 and Article 27 of the RFA and Article 52 of the DA by stating that the right to spiritual care in the Army, Police, prisons, and other institutions are regulated in accordance with the Constitution and international instruments and are furthermore comparable internationally. The provisions allegedly regulate the manner of the exercise of religious freedom in instances where an individual’s freedom of movement is considerably limited for various reasons or when he or she is unable to attend religious services due to illness or difficulties related to old age. Effective exercise of religious freedom allegedly requires the adoption of certain, particularly organisational and financial, measures. The RFA allegedly clearly determines the beneficiaries and the situations in which individuals are entitled to religious spiritual care, and more detailed organisation is to be regulated by regulations.
63. Regarding Articles 22 and 23 of the RFA, which compared to Articles 24 and 25 of the RFA allegedly do not recognise the right to collective spiritual care to members of the Army and Police Force, the Government claims that the contested provisions allow the members of the Army and the Police Force both individual as well as col-

lective religious spiritual care. Members of the Slovene Army are allegedly provided such care in accordance with statutory and regulatory provisions concerning military service and national defence, and members of the Police Force are allegedly provided such care in accordance with the RFA and the relevant regulations in instances where the Police act as a traditional military structure.

64. Concerning the standard of “a sufficiently large number of persons of the same religion”, the Government states that Articles 24 and 25 of the RFA only bind the ministries responsible for justice and health to employ the required number of religious officials. However, such commitment of the state allegedly occurs only when a certain number of adherents of the same religion exists. In the absence of a sufficient number of persons of the same religion, an individual allegedly still has the right to individual and collective spiritual care, but the state is allegedly not obliged to employ a religious official.
65. The Government rejects the allegation that Articles 24 and 25 of the RFA are unconstitutional, as it allegedly only enables the employment of priests, but not other religious officials, on the grounds that the employment of other religious officials is also possible if the religious community does not have the position of priest. It also deems that the applicant’s complaint that the employment of priests is necessary for the occupants of hospitals and social welfare institutions, but not in prisons, is unfounded, as in its view both provisions require the employment of a certain number of religious officials. It emphasises that the principle of a social state binds the state to proceed actively in order for individuals to be ensured the exercise of individual and collective religious freedom in circumstances that render this impossible for them.
66. Regarding the fourth paragraph of Article 27 of the RFA concerning the population census, the Government states that the data collected in the census can be used for statistical purposes. The RFA allegedly only provides the possibility for religious communities to propose that the statistical data from the last census be used.
67. The Government responds to the complaint that Articles 5, 21, 27, and 29 of the RFA inadmissibly differentiate between religious communities and other organisations performing activities for the general benefit by stating that the RFA regulates religious freedom and that the legislature did not overlook the equal treatment of non-religious organisations, particularly concerning funding. The position of associations is allegedly regulated by AA-1, the position of institutes is allegedly regulated by the Institutes Act (Official Gazette RS, Nos. 12/91 and 8/96), and the position of humanitarian organisations by the Humanitarian Organisations Act (Official Gazette RS, No. 98/03).
68. The freedom to build and use facilities and buildings for religious purposes determined in Article 26 of the RFA stems, according to the Government, from Article 41 of the Constitution. It states that this right is guaranteed under the Constitution already to all religious communities, regardless of registration, although Article 26 of the RFA refers only to registered religious communities. It explains that the Office only keeps records of registered religious communities; therefore the RFA can

require bodies drafting spatial planning acts to discuss and coordinate such planning only regarding the need for places of worship of such religious community. Article 26 of the RFA allegedly does not interfere with Article 7 of the Constitution, as the principle of the separation of the state and religious communities allegedly entails the neutrality of the state, and religious communities allegedly have to act in accordance with the legal order.

69. The Government agrees that Article 30 of the RFA actually does not expressly provide that the Office is the competent authority. However, it adds that such is provided for in a regulation, namely the Decision Amending the Decision on the Establishment of the Office of the Government of the Republic of Slovenia for Religious Communities (Official Gazette RS, No. 22/07). It states that even governmental agencies can be regarded as public administration bodies that can perform administrative tasks. It is allegedly determined in the second paragraph of Article 121 of the Constitution that duties of the state administration may be vested in other bodies and organisations, from which it allegedly follows that administrative duties may also be vested in governmental agencies.

## **B – I**

### **The Extent of the Constitutional Court Review**

70. In addition to Article of the LSRCA and Article 52 of the DA, the applicant challenges a large number of provisions of the RFA, the majority due to the alleged non-conformity with a number of provisions of the Constitution. The applicant motions that the entire RFA be abrogated.
71. The content of the application is broad. The applicant namely makes a number of allegations, although many of them are not elaborated. The shortcomings of its reasoning are either that the alleged unconstitutionality of the individual statutory provisions are not substantiated (e.g. the allegation that the RFA does not distinguish between religious officials who only perform religious functions and those performing generally beneficial work, and the allegation that Articles 27 and 28 of the RFA regarding the payment of the social security contributions of religious officials do not take into account the property of the particular religious community), or that it fails to establish a link between the contested statutory provision and the provision of the Constitution with which such is allegedly inconsistent (e.g. the complaint concerning the nonconformity of the fourth paragraph of Article 27 of the RFA with Article 41 of the Constitution, or concerning the unconstitutionality of Article 12 of the RFA, as it does not state that a religious community acting contrary to public morality is grounds for the prohibition of its activities). In addition to the allegations that are not substantiated, the request also contains a number of clearly unfounded allegations (e.g. that the RFA is inconsistent with the principle of legal certainty due to the use of different terminology for religious officials; the nonconformity with the principle of the separation of the state and religious communities as the state allegedly did not leave it up to religious communities to determine which religious officials will provide spiritual care in institutions and

establishments; the alleged violation of the principle of equality due to the fact that priests employed in institutions receive higher remuneration for the same services than those priests for whom the religious community receives only the payment of social security contributions).

72. The applicant is a state body envisaged by the Constitution which the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) vested with privileged access to the Constitutional Court. It is therefore reasonable to expect that its requests will be well and professionally reasoned. In accordance with this, the Constitutional Court considered only those complaints of the applicant that are understandable, sufficiently defined, and not manifestly unfounded. By proceeding in such a manner, the Constitutional Court did not deem it crucial that some of the complaints were not listed under the appropriate substantive subsets of the request. This entails that even those arguments concerning the nonconformity of the statutory provisions that were clear and of lawyerly quality that the applicant listed in the part of the request motioning for the temporary suspension of the implementation of the RFA were considered.
73. On the basis of this starting point, the Constitutional Court reviewed the consistency of the following provisions with the Constitution:
- the first paragraph of Article 13 of the RFA regarding the registration conditions (although the applicant states that it challenges the entire Article 13, it is evident from the content of the complaint that it challenges only the first paragraph of this provision) and items 1 and 5 of Article 14 of the RFA, which are directly related to this provision;
  - Article 20 of the LSRCA and the third paragraph of Article 29 of the RFA regarding the state providing financial support to religious communities (although the applicant addresses scattered complaints in this regard also concerning the first paragraph of Article 5 of the RFA and Articles 13 to 18 of the RFA, the Constitutional Court, in view of the substance of the allegations, assessed that the applicant challenges only these two provisions);
  - Articles 22, 23, 24, and 25, of the RFA and the third paragraph of Article 52 of the DA-OCT1 (although in the introduction and the proposal of the requests the applicant states that it is challenging Article 52 of the DA-OCT1 in its entirety, it follows from the reasoning of the complaint that it is challenging only the third paragraph of this Article) regarding the religious spiritual care in the Army, the Police, prisons, and in hospitals and social welfare institutions providing institutional care, and the directly related provisions of the last sentence of Article 27 of the RFA, to the extent that they relate to Articles 24 and 25 of the RFA;
  - Article 26 of the RFA regarding the right of religious communities to the freedom to build;
  - the fifth paragraph of Article 27 of the RFA regarding the conditions for funding one religious official;
  - Articles 30 and 32 of the RFA regarding the appointment of the competent authority.

**B – II**  
**Starting Points of the Constitutional Review**  
**Freedom of Conscience (Article 41 of the Constitution)**

*a) Freedom of Conscience in General*

74. Article 41 of the Constitution protects and guarantees freedom of religious and other beliefs. This is a human right related to some other human rights such as the right to personal dignity and safety (Article 34 of the Constitution), the protection of the right to privacy and personality rights (Article 35 of the Constitution), the protection of personal data (Article 38 Constitution), freedom of expression (the first paragraph of Article 39 of the Constitution), the right of assembly and association (Article 42 of the Constitution), and the rights and duties of parents (Article 54 of the Constitution). The first paragraph of Article 41 of the Constitution guarantees the free profession of one's religion in private and public life. The second paragraph states that no one is obliged to declare his religious or other beliefs, the third paragraph of the Article 41 of the Constitution gives parents the right to provide – in accordance with their beliefs – their children with a religious and moral upbringing, whereas the religious and moral guidance given to children must be appropriate to their age and maturity and consistent with their freedom of conscience, and religious and other beliefs or convictions.
75. In Article 41 the Constitution uses the terms “declaration” (the first paragraph of Article 41) and “belief” (the second paragraph of Article 41). Therefore, the question arises what the subject of protection of this constitutional provision is and whether there is a difference between the two terms used that is relevant for a constitutional review. The interpretation must also take into account the title of the Article, i.e. that the freedom of conscience is concerned. Slovar slovenskega knjižnega jezika [The Dictionary of Slovene Literary Language] (hereinafter referred to as the SSKJ)<sup>1</sup> defines the term “*opredeliti se*” [to declare oneself] as “to express, show one's position, one's allegiance” or “to express, to demonstrate one's position on something”. The declaration is therefore an expression of a position or affiliation. The term “*prepričanje*” [belief] is defined in the SSKJ more narrowly: as a set of interconnected thoughts, judgments regarding fundamental, general questions of the world, society, humans or regarding a part of reality.<sup>2</sup> A declaration is a more general term and also includes beliefs: any belief is also a declaration, but not every declaration is also a belief.<sup>3</sup> In accordance with this, it seems at first glance that the first paragraph of Article 41 of the Constitution guarantees freedom of (all) declarations, which also includes (all) beliefs, and the second paragraph only guarantees the right to not declare oneself

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1 A. Bajec et al. (ed.), *Slovar slovenskega knjižnega jezika* [The Dictionary of Slovene Literary Language], DZS, Ljubljana 1998, p. 781.

2 *Ibidem*, p. 1013.

3 In this sense, see M. Orehar Ivanc 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, pp. 445–446.

concerning beliefs, which could entail that not all declarations are included, but only those that are “a set of interconnected thoughts, judgments regarding basic, general questions of the world, society, humans or regarding a part of reality”. However, this fine linguistic distinction becomes less important, even trivial, if the concepts are interpreted in conjunction with the title of Article 41 of the Constitution, i.e. freedom of conscience. Conscience is a feeling, an awareness of the moral value of one’s own behaviour, reflection that creates a sense of moral responsibility.<sup>4</sup> The concept of conscience thus falls within the scope of ethics. It is conscience that indicates to a human being what “right” is. The subjects of protection in the framework of Article 41 of the Constitution are therefore only declarations and beliefs in the field of ethics and morality, in particular all theistic, atheistic, and non-theistic beliefs. In this sense, such beliefs can be defined also as declarations of one’s world-view, that is, as philosophical or ideological theories or systems of thought that explain the human being, his essence, and the world in which he resides; it may also, although not necessarily, come from a higher, metaphysical level.<sup>5</sup> This entails that various political, scientific, aesthetic, historical, and other declarations or beliefs do not fall under the scope of protection of Article 41 of the Constitution, but are protected by other constitutional provisions (e.g. the freedom of expression determined in the first paragraph of Article 39 of the Constitution or the freedom of science and the arts determined in Article 59 of the Constitution).<sup>6</sup> However, also regarding the beliefs that can enjoy protection under Article 41 of the Constitution, it cannot be stated that each of them already automatically receives protection under this provision. Only if the internal and external characteristics of such belief demonstrate its consistency, cogency, seriousness, cohesion, and importance, is it justifiably concluded that it is a religious or other beliefs in the sense of Article 41 of the Constitution.<sup>7</sup> The state, of course, cannot assess regarding this whether such a religion or belief in a theological or philosophical sense is (un)true or (il)legitimate.

76. The first and second paragraphs of Article 41 of the Constitution in particular expose as the subject of protection religious freedom (freedom of religion, freedom to profess one’s religion). However, they do not determine precisely what it entails

4 A. Bajec et al. (ed.), *ibidem*, p. 1507.

5 The RFA mentions spirituality in several places. The concept of spirituality is distinctively pluralistic, having multiple meanings. The SSKJ defines it as an orientation towards non-material values. It is an integral part of any individual’s personal definition – religious or non-religious – regarding the issues of being, the world, and the universal connections in it. It is not identical to religious belief, nor does religion have a monopoly thereon. Religious spirituality, which is an integral part of religious experience or belief, is just one of the dimensions of the varied spectrum of spirituality.

6 Cf. M. Orehar Ivanc, *ibidem*, p. 446.

7 Such is also the position of the ECtHR, which stated, for example, in the Judgment Campbell and Cosans v. United Kingdom, dated 25 February 1982, and in the Judgment Leela Förderkreis E. V. and Others v. Germany, dated 6 November 2008, that Article 9 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) includes views which “attain a certain level of cogency, seriousness, cohesion, and importance”.

or what its components and scope are. By taking into account Article 8,<sup>8</sup> the second paragraph of Article 153,<sup>9</sup> and the fifth paragraph of Article 15<sup>10</sup> of the Constitution, when interpreting the right to religious freedom a number of international instruments have to be considered which define the content and the scope of this human right in more detail in comparison to the first paragraph of Article 41 of the Constitution. Already the Charter of Fundamental Rights of the European Union (Človekove pravice [Human Rights], Zbirka mednarodnih dokumentov [Collection of International Documents], Part I, Univerzalni dokumenti, Društvo za ZN za Republiko Slovenijo, Ljubljana 1995, p. 1, hereinafter referred to as the UN Universal Declaration) guarantees everyone the right to freedom of thought, conscience, and religion. This right includes the freedom to change one's religion or beliefs, and the freedom, either alone or in community with others and in public or private, to manifest one's religion or beliefs in teaching, practice, worship, and observance (Article 18). The content of freedom of religion is defined similarly also in Article 18 of the ICCPR, which determines that everyone has the right to freedom of thought, conscience, and religion. This right includes the freedom to have or to adopt a religion or beliefs 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 beliefs in worship, observance, practice, and teaching. The ICCPR also determines that no person shall be subject to coercion which would impair their freedom to have or to adopt a religion or beliefs of their choice. A similar definition is contained in the first paragraph of Article 9 the ECHR, which provides that "everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice, and observance."

77. Similarly, the Charter of Fundamental Rights of the European Union (OJ C 83, 30 March 2010, p. 389),<sup>11</sup> which became legally binding by the entry into force of the Lisbon Treaty,<sup>12</sup> determines in the first paragraph of Article 10 (freedom of thought, conscience, and religion) that everyone has "[...] the right to freedom of thought, conscience, and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice, and observance."

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8 "Laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly."

9 "No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent."

10 "Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties."

11 The Charter of Fundamental Rights of the European Union was first solemnly declared on 7 December 2000 in Nice (OJ 364, dated 18 December 2000, p. 1).

12 See Article 6 of the Treaty on European Union (Consolidated Version of the Treaty on European Union, OJ C 83, dated 30 March 2010, p. 13).

78. It follows from the wording of the first and second paragraphs of Article 41 of the Constitution, considering the cited provisions of the ICCPR, the ECHR, and the Charter of Fundamental Rights of the European Union, that freedom of religion is a complex or composite human right. Its substantive framework operates on three levels of human existence and covers a range of derived rights of a constitutional level. All these rights obviously establish appropriate duties of the state, in statutory regulations as well as regarding such exercise in practice. The Constitutional Court has already adopted a number of standpoints on this matter, which are strengthened and in part expanded with the new ones in this Decision. The following decisions of the Constitutional Court are of particular importance: Decision No. U-I-68/98, dated 22 November 2001 (Official Gazette RS, No. 101/01, and OdlUS X, 192), Decision No. U-I-92/01, dated 28 February 2002 (Official Gazette RS, No. 22/02, and OdlUS XI, 25), Opinion No. Rm-1/02, dated 19 November 2003 (Official Gazette RS, No. 118/03, and OdlUS XII, 89), Decision No. U-I-111/04, dated 8 July 2004 (Official Gazette RS, No. 77/04, and OdlUS XIII, 54), and Decision No. U-I-354/06, dated 9 October 2008 (Official Gazette RS, No. 104/08, and OdlUS XVII, 52).
79. Hereinafter this Decision will refer mainly to religious freedom, however, the findings regarding the content of Article 41 of the Constitution also apply to other, non-religious ideological declarations or beliefs.

*b) Three Levels of Religious Freedom*

80. At the deepest spiritual level, freedom of religion entails the right to have a religion or the right to freely choose one's religion, the right to not have a religion or to not be a member of any religion, and the right to freely change one's religion. It is a freedom of belief (the freedom to believe), the so-called *forum internum*, an aspect of religious freedom which the Constitution does not mention explicitly, but undoubtedly the constitutional protection of Article 41 of the Constitution applies also to it. These are namely the internal considerations and the internal decisions of an individual, which by their very nature can be neither regulated nor restricted. Regarding the internal personal decisions of individuals concerning religious issues, Article 41 is a special provision of the Constitution in relation to the first paragraph of Article 39 of the Constitution, which otherwise ensures freedom of thought. Freedom of religion as a specific form of freedom of thought can be exercised only by natural persons, by the very nature of things, legal persons cannot enjoy this aspect of freedom of conscience.
81. The other two levels of religious freedom already entail the external manifestation of one's inner personal decisions (the so-called *forum externum*). The first of them entails the right to profess one's religion freely. In this sense, freedom of religion is a special form of the general right to freedom of expression (the first paragraph of Article 39 of the Constitution). Profession [of religion] entails external verbal or written expressions of religion, including for the purpose of spreading the religion. The first paragraph of Article 41 of the Constitution expressly refers only to the freedom to profess one's religion, however it is not possible to interpret this concept differently

but that the exercise of religion is protected as well. At the third level, freedom of religion is protected as a form of the general freedom of activity (Article 35 of the Constitution). The concept of professing one's religion thus also includes practices that are an integral part of a religion. In addition to religious teachings, it is worship or religious rituals, other rules of conduct stemming from its teachings, as well as integration in the community which are in fact essential to a religion. If such conduct was not constitutionally protected, freedom of religion would be almost completely hollowed out. Such activities are explicitly protected by the Charter of Fundamental Rights of the European Union, the ECHR, and the ICCPR. The freedom to profess and exercise one's religion is ensured to individuals and religious communities or associations, regardless of whether they have a legal personality or not.

82. Freedom of religion may be exercised individually or collectively; concerning both forms, it is possible to distinguish between positive and negative aspects. At the level of personal, individual decisions regarding religious affiliation (*forum internum*), freedom of religion entails the right of an individual to have a religious belief (the positive aspect) without the interference of a public authority, and at the same time the right of an individual to not have a religious belief if he or she does not want to, and that it is not admissible to coerce him or her into one (the negative aspect). Freedom of religion as *forum internum* enjoys absolute protection against interferences by the state – the state may not in any event or in any manner prescribe or force the people to adopt (a certain) religion or other beliefs nor prescribe or force the people to not have or adopt a religion or other beliefs.

*c) The Positive Aspect of Religious Freedom*

83. At the level of the profession and manifestation of religion, the positive aspect of religious freedom entails that an individual may freely profess his or her religious beliefs and other religious declaration in the outside world. External manifestations of religious beliefs are not limited only to privacy, but the first paragraph of Article 41 of the Constitution expressly protects the freedom to profess one's religion also in public life. Religious and other declarations are an integral part of public life and society. No one's freedom of religion or philosophical beliefs can be affected just because the activities of a free democratic society also encompass [other] religious aspects through citizens who are committed to their own religion as adherents.
84. The positive aspect of religious freedom is defined in the cited provisions of the Charter of Fundamental Rights of the European Union, the ECHR, and the ICCPR in more detail than in the Constitution. The Constitutional Court has already adopted the standpoint in Decision No. U-I-68/98 that the positive aspect of freedom of religion determined in the first paragraph of Article 41 of the Constitution ensures that an individual may freely profess his or her religion either alone or in community with others and in public or in private, by teaching, performing religious duties, in worship, and in observance. The positive aspect of religious freedom thus ensures any (oral or written, private or public) expression of religion or religious affiliation, including prayers and spreading religious dogma, and also actions which constitute

observance of religious rules (worship, rites, rituals, processions, the use of religious garments, symbols, etc.) are protected. In general, it can be stated that the constitutionally guaranteed freedom of religion includes externally perceived actions that are significantly related to the individual's religious beliefs. However, this does not entail that all actions that are only encouraged by religious beliefs or those that are influenced by it to whatever degree of intensity are protected. The constitutional protection encompasses only those actions which are reasonably related to the essence of the religious beliefs and without which the religious freedom of the individual would be significantly curtailed. Therefore, generally binding and religiously neutral statutory obligations and prohibitions intended for the protection of other generally beneficial values entail a limitation of this human right only when they refer to those religious manifestations that meet this mentioned quality. Obligations and prohibitions of actions that do not meet this standard cannot constitute an interference with freedom of religion.<sup>13</sup>

*d) The Negative Aspect of Freedom of Religion*

85. The negative aspect of freedom of religion entails that an individual is not obliged to have a religion and that he or she is not obliged to declare his or her religious or other beliefs, and that due to such he or she cannot be punished, discriminated against, or disadvantaged. Even if an individual is considered to be a member of a particular religion, it is not acceptable to coerce him or her to profess such religion and he or she also has the right to refuse to participate in actions manifesting such religion. Although the negative aspect of freedom of religion derives already from the first paragraph of Article 41 of the Constitution, it is specifically provided for in the second paragraph of this Article that no one shall be obliged to declare his religious or other beliefs. In Decision No. U-I-92/01 the Constitutional Court stated that the use of coercion in order to force someone to change or disclose their religious beliefs constitutes an interference with freedom of conscience. If a law required that an individual was obliged to declare his or her religious beliefs, it would constitute a violation of freedom of conscience and would be unconstitutional (i.e. inconsistent with the second paragraph of Article 41 of the Constitution). The right to not declare one's religious or other beliefs logically also includes the right to not profess or to not exercise a religion, as the requirement to profess or manifest a religion also entails that the individual declare his or her beliefs with regards to that religion.
86. In Decision No. U-I-68/98 the Constitutional Court, *inter alia*, accepted the standpoint that the negative aspect of religious freedom requires the state to prevent

13 The restriction of religious expression protected by Article 9 of the ECHR to only those external manifestations that entail the exercise of religion or beliefs in a generally accepted form is well established also in the case law of the European Commission of Human Rights and the ECtHR. Namely, for example, the ECtHR did not consider the refusal of a pharmacist to sell contraceptive pills to be the exercise of religion or belief (the decision in the case *Pichon and Sajous v. France*, dated 2 October 2001). See B. Vermeulen, in: P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (ed.), *Theory and Practice of the European Convention on Human Rights*, 4<sup>th</sup> edition, Intersentia, Antwerp – Oxford 2006, p. 762.

any forced (unwanted) exposure to any religious belief. However, in the conflict between the positive and the negative aspects of freedom of religion, i.e. in instances where the positive aspect of freedom of religion interferes with the negative aspect of freedom of religion, the negative aspect of such freedom does not have an *a priori* advantage over the positive aspect of such freedom.<sup>14</sup> Weighing must be carried out in each individual case and it has to be considered which aspect of such freedom must be given priority in accordance with the principle of proportionality. In the cited Decision, the Constitutional Court, for example, found that the ban on religious activities in public kindergartens and schools entails a proportionate and therefore admissible interference with the positive aspect of freedom of religion (the first paragraph of Article 41 of the Constitution) and with the right of parents determined in the third paragraph of Article 41 of the Constitution in order to protect the negative aspect of the freedom of religion of other children and their parents (the second paragraph of Article 41 of the Constitution).<sup>15</sup> Regarding the upbringing and education of children, in addition to the freedom of religion of children, also the third paragraph 41 of the Constitution, which guarantees parents a specific aspect of their freedom of religion, i.e. the right of parents to provide their children with a religious and moral upbringing in accordance with their beliefs, has to be taken into account.

*e) The Collective Aspect of Religious Freedom*

87. Freedom of religion is not only an individual right of individuals, but it also contains a collective dimension, which includes the interactions of adherents. It is common that individuals practice their religion together with others who share the same religious beliefs (especially in the form of rites), and join together in religious associations (churches or other religious communities). The Constitutional Court has already emphasised in Decision No. U-I-111/04 that the Constitution does not protect only the individual but also the collective aspect of the profession of one's religion. The wording of Article 9 of the ECHR, i.e. that one component of freedom of religion is also the right to profess one's religion or beliefs "in community with others", reveals this in particular.
88. The collective exercise of religious freedom has two aspects. The first entails the right of individuals to join together and establish a religious community in the context of their religious freedom. In this context, the positive and negative aspects of freedom of religion as determined in the first and second paragraphs of Article 41 of the Constitution are special with respect to the general freedom of association determined

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14 M. Orehar Ivanc, *ibidem*, p. 448.

15 On the other hand, for example, in Decision No. U-I-111/04 the Constitutional Court did not adopt the standpoint that the construction of a religious building may constitute an interference with the negative freedom of religion of others, who would have to deal with this facility permanently and involuntarily. It held that the mere fact that such a building, which also has external religious characteristics, is located on land that is intended for the construction of a religious building, cannot by itself interfere with the so-called negative aspect of freedom of religion.

in the second paragraph of Article 42 of the Constitution. The direct constitutional basis for the establishment of religious communities is therefore the first paragraph of Article 41 of the Constitution, although the content of these rights should also be understood in light of the second paragraph of Article 42, in particular with due regard to the views of the Constitutional Court in Decision No. U-I-155/07, dated 9 April 2009 (Official Gazette of RS, No. 32/09). The second collective aspect of religious freedom is a result of and an elaboration of the first one: it ensures freedom of conscience also to religious communities themselves.

89. The freedom of religious association ensures that everyone is free to join religious communities with other adherents. An essential element of that right is the element of will: every person has the right to freely decide whether to join a religious community or not.<sup>16</sup> In addition to the right to associate with others (the so-called positive aspect of freedom of association), everyone has the right to not associate with others (the so-called negative aspect of freedom of association). The collective exercise of religious freedom in connection with individual religious freedom implies the positive entitlement of an individual to profess his or her religion in association with others and to establish religious communities with them, to become a member thereof, and to participate in religious rites, as well as the negative entitlement that he or she does not need to become a member of a religious association, to decline his or her participation in an association, and to not attend religious rites or other expressions of religious belief. Although the negative aspect of freedom of religious association is not expressly determined in the Constitution, it results from the very substance of this right and is an integral part thereof.
90. Religious association is characterised by the internal organisation of a religious community. Such internal organisation entails that the religious community is more than just a collection of individuals. The right to freedom of association presupposes an organised association of individuals who operate internally by their own rules. The freedom to establish religious communities, thus, implies also the right of religious communities to independently and autonomously regulate their internal affairs concerning their activities and the internal position of their members. This freedom of activity must have a larger margin if the organisational rules according to which the religious community functions have the status of religious rules (e.g. the religious rituals have meaning for adherents only if they are carried out by priests, appointed in accordance with the rules of the religion). In the framework of freedom of religion determined in the first paragraph of Article 41 of the Constitution, the free activity of religious communities specifically guaranteed in the second paragraph of Article 7 of the Constitution is therefore also protected. In terms of the freedom to establish religious communities, it is not necessary that a religious community be officially recognised or registered. Constitutional protection is also ensured to completely informal religious communities.

16 An exception is the constitutional right of parents to raise their children in accordance with their own religious beliefs.

91. The second collective aspect of religious freedom ensures freedom of conscience also to religious communities themselves. Not as a *forum internum*, which by its very nature can be possessed only by a natural person, but as the right to freely and in accordance with their own rules profess religious beliefs and carry out religious practices.<sup>17</sup>

*f) The Obligations of the State when Ensuring Religious Freedom*

92. Freedom of religion is primarily a defensive right<sup>18</sup> (the so-called negative status right). The state – the same applies to local communities and bearers of public authority – must not inadmissibly interfere in the relationships protected in the first and second paragraphs of Article 41 of the Constitution. This aspect prohibits the state first of all from adopting decisions on issues concerning the teachings of religion or the internal autonomy of religious communities, prohibits the state from requiring (some manner of) declaration concerning religious issues or issues of conscience, and from rewarding or punishing activities constituting the profession of a (certain) religion or other belief. In connection with Article 14 of the Constitution (the first paragraph of Article 14 prohibits discrimination regarding human rights and fundamental freedoms and the second paragraph establishes the general constitutional principle of equality), Article 41 of the Constitution also prohibits unfair discrimination (privileging or neglecting) against individuals due to their religion or other beliefs.
93. The duty to ensure and protect freedom of religion does not entail that any measure adopted by the state that touches upon religious issues already constitutes an inadmissible interference with freedom of religion. In accordance with the third paragraph of Article 15 of the Constitution, human rights and fundamental freedoms are limited by the rights of others and in such cases as provided by the Constitution. Regarding collective religious freedom, also the third paragraph of Article 42 should be considered, which provides that legislative restrictions on the right to freedom of association are permissible if so required for reasons of national security or public safety and for protection against the spread of infectious diseases. Any restrictions of human rights or fundamental freedoms must also be consistent with the principle of proportionality, which is one of the principles of a state governed by the rule of law (Article 2 of the Constitution).
94. The duty of the state to enable unhindered exercise of religious freedom also requires certain positive measures. In particular, it must ensure and build tolerance among adherents of different religions or beliefs,<sup>19</sup> and prevent unjustified differentiation on

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17 It is also an established position of the ECtHR that religious groups are also the addressees of the right determined in Article 9 of the ECHR. The ECtHR has emphasised in several decisions, *inter alia*, that religious communities traditionally exist in the form of organised structures and that their autonomous existence is an indispensable element of pluralism in a democratic society and thus an issue at the very heart of the protection which Article 9 affords. See, for example, the Judgments in the case *Cha'are Shalom Ve Tsedek v. France*, dated 27 June 2000, and in the case *Hasan and Chaush v. Bulgaria*, dated 26 October 2000.

18 The same in M. Orehar Ivanc, *ibidem*, p. 448.

19 Cf. M. Orehar Ivanc, *ibidem*, pp. 448–449.

the grounds of religion also among individuals (e.g. concerning employment, where such is not necessary due to the nature of the matter). Persons who have limited access to religious care must be enabled access to religious care in certain situations (e.g. soldiers, prisoners, etc.). The state must provide a framework for the acquisition of a legal personality by religious communities that wish to do so. The full effectiveness of the free functioning of religious communities in a modern democratic state would be undermined if they did not have an opportunity to exercise their rights and (thus) the rights of their adherents, which are essential elements of the exercise of its constitutionally protected entitlements, on the basis of their own activities in legal transactions.<sup>20</sup> It is only the status of legal person which fully makes it possible for a religious community, for example, to rent or to own religious facilities and, finally, also for the judicial protection of rights.<sup>21</sup> One of the key issues that the Constitutional Court addressed in this case is how broadly the duty of the state to create conditions for the free realisation of religious needs extends.

### **The Principle of the Separation of the State and Religious Communities (the first paragraph of Article 7 of the Constitution)**

95. Article 7 of the Constitution determines three principles that define the legal status of religious communities in the Republic of Slovenia: the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution) [hereinafter: the principle of separation], the principle of the freedom of activity of religious communities and the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution). The Constitution defines the relationship between the state and religious communities only in principle, while the meaning and the content of these principles and also their relationship with Article 41 of the Constitution are only beginning to be formed.<sup>22</sup>
96. The standpoint of the constitution framers concerning the enactment of the principle of the separation of the state and religious communities is reflected in the preparatory materials for the Constitution. The reasons behind the first recorded mention of the principle of separation follow from the reasoning of the Draft Constitution, dated 29 October 1990.<sup>23</sup> With this principle, it should be emphasised “[...] that the church cannot perform functions that are reserved for the state or state authorities (such as, conducting marriages, maintaining registers of personal status, issuing public docu-

20 Among the scholars who emphasise that legal personality is of vital importance for the life and all activities of religious communities, there is, for example, W. C. Durham Jr., *Facilitating Freedom of Religion or Belief through Religious Association Laws*, in: T. Lindholm, W. C. Durham and B. G. Tahzib-Lie (ed.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers, Leiden 2004, pp. 322 *et seq.*

21 The ECtHR has also repeatedly emphasised that the failure to recognise the legal personality of a religious community constitutes an interference with the freedom of religion determined in Article 9 of the ECHR (e.g. the Judgment in *Religionsgemeinschaft der Zeugen Jehovas et al. v. Austria*, dated 31 July 2008, and the Judgment in *Metropolitan Church of Bessarabia et al. v. Moldova*, dated 13 December 2001).

22 The Constitutional Court has already stated this in Opinion No. Rm-1/02.

23 The first paragraph of Article 5 stated: “The church is separate from the state.”

ments, etc.). This does not limit the activities of the church in some areas, e.g. in the sphere of charitable activities, education, etc., where the church may perform such activities under the same conditions as citizens. This also does not prevent the inclusion of certain institutions of the church in various public institutions, for example, the integration of theological faculties in universities while respecting the legislation in the relevant areas.”<sup>24</sup> In the statement of reasons of the Draft of the Constitution, dated 12 December 1991, in which the wording of Article 7 proposed is equivalent to the text in force, it was stated that this provision “[...] enacts the principle of the laical nature of the state. Due to the standpoint that the equal treatment of church(es) and various other religious communities should be enabled, the first paragraph is formulated in more general wording, whereas the second paragraph in addition to equality also provides for the freedom of activity of religious communities.”<sup>25</sup>

97. The Constitutional Court considered the content of the principle of separation already in Decision No. U-I-68/98. At that time it adopted the standpoint that, in accordance with the general principle of the separation of the state and religious communities, the state is bound to neutrality, tolerance, and a non-missionary manner of operating. Similarly but slightly more broadly, the content of this principle was explained also in Decision No. U-I-92/01, wherein the Court stated that this principle concerns above all the autonomy of religious communities (in their own sphere), the secularisation of public life, and the neutrality of the state with respect to religious communities.
98. The Constitutional Court adopted an even more detailed standpoint concerning the principle of separation in Opinion No. Rm-1/02. It emphasised the neutrality of the state towards all religious and other beliefs as its particularly essential component. This neutrality prohibits the state from identifying with any religious or other belief and the establishment of a state religion, as well as the promotion or prohibition of ideological beliefs. The Constitutional Court assessed that the principle of separation, which is included in the democratic order (Article 1 of the Constitution) that protects human rights and fundamental freedoms (the first paragraph of Article 5 of the Constitution), provides that religious communities may completely freely pursue activities in their religious (spiritual) sphere. It prevents any expansion of the powers of the state to matters which are of an exclusively religious nature or which fall under the internal affairs of religious communities (similar also in Decision No. U-I-354/06). In the areas in which the activities of religious communities interfere with the competences of the state, the freedom of activity of religious communities as an integral part of the principle of the separation of the state and religious communities is limited by the sovereignty of the state. It does not prevent religious communities from pursuing activities in various

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24 M. Cerar and A. Perenič (ed.), *Nastajanje slovenske ustave: izbor gradiv Komisije za ustavna vprašanja 1990–1991* [The Creation of the Slovene Constitution: a Selection of Materials of the Commission for Constitutional Questions], III. zvezek, Državni zbor Republike Slovenije [National Assembly of the Republic of Slovenia], Ljubljana 2001, p. 1242.

25 *Ibidem*, p. 1260.

areas of social life (e.g. educational, charitable, social, health, economic activities). Due to the principle of sovereignty (internal state sovereignty), only the state may determine the limits in accordance with which the performance of tasks in the competence of the state can be left to the private sphere and under what conditions. The Constitutional Court also adopted the standpoint that the state is not bound to support and encourage the activities of religious communities, and added that the principle of the separation of the state and religious communities does not entail the exclusion of all support and assistance, provided, of course, that the equality of all religious communities is ensured.

99. From those standpoints it can be presumed that the principle of the separation of the state and religious communities determined in the first paragraph of Article 7 of the Constitution in the broad sense has three elements: (1) the religious or ideological neutrality of the state, (2) the autonomy of religious communities in their own sphere, and (3) the equal relation of the state towards all religious communities. The autonomy and equality of religious communities are the mirror image of the requirement of the neutrality of the state: the state is not neutral if it does not treat religious communities equally and if it interferes in autonomous religious areas. They are determined as special constitutional principles in the second paragraph of Article 7 of the Constitution. Although they are an integral part of the broader principle of the separation of the state and religious communities, they can be considered separately.
100. Although in Article 7 the Constitution expressly determines only the separation of the state and religious communities, the neutrality of the state towards religious beliefs also requires the neutrality of the state towards other worldviews. The requirement of the equal treatment of religious and other beliefs stems from the first paragraph of Article 41 of the Constitution in conjunction with Article 14 of the Constitution. As the first paragraph of Article 7 of the Constitution requires the neutrality of the state towards religions and religious communities, the same requirement also extends to other ideological beliefs
101. The religious or worldview neutrality of the state obliges it to not include in its operations religious and philosophical elements, to remain impartial, to neither accept nor reject religion and other worldviews and to – in ideological terms – neither support nor hinder any of them. The requirement of the neutrality (secularity) of the state, of course, does not require the exclusion of religion from public life: already the first paragraph of Article 41 of the Constitution explicitly guarantees freedom to profess of one's faith in private and public life.<sup>26</sup>

26 Foreign, especially German, legal theory distinguishes between the concepts of laity and secularity, and perceives the difference between them to be in the extent of the neutrality of the state. The first notion is interpreted as an originally French one (in French: *laïcité*) developed in the late 19<sup>th</sup> century as a worldview and which has roots in the Enlightenment, and which was eventually transformed into the principle of state laity. The concept of laity according to this classification includes not only the secularisation of the state authority in the narrow sense, but also the withdrawal of religion from public life and into the privacy of individuals. See, for example, V. Wick, *Die Trennung von Staat und Kirche*, Mohr Siebeck, Tübingen 2007, pp. 11 and 39.

**102.** The Preamble to the Constitution emphasises that human rights and fundamental freedoms are the fundamental premise that were relied on by the constitution framers in adopting the Constitution. This must be taken into account when interpreting the normative part of the Constitution. Slovenia is a democratic state (Article 1 of the Constitution). Therefore, its first and most important duty is to protect and ensure human rights and fundamental freedoms (the first paragraph of Article 5 of the Constitution). Accordingly, the Constitutional Court has highlighted in several decisions the instrumental nature of constitutional principles as tools intended to protect the rights of individuals. Thus, it has, for example, repeatedly emphasised that the essence of the principle of the separation of powers is in its basic function of protecting individuals against the state (see, for example, Decision No. U-I-158/94, dated 9 March 1995, Official Gazette RS, No. 18/95, and OdlUS IV, 20; Decision No. U-I-224/96, dated 22 May 1997, Official Gazette RS, No. 36/97, and OdlUS VI, 65, and Decision No. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006, Official Gazette RS, No. 27/06, and 1/07, and OdlUS XV, 84) and that the principle of the separation of powers is the principle intended to prevent the abuse of authority which always occurs at the expense of the people or at the expense of the rights of an individual (Decision No. U-I-60/06, U-I-214/06, U-I-228/06). The dimensions of the principle of the separation of the state and religious communities as well cannot be filled with meaning without understanding the purpose of the existence of this principle. The aim of this principle is to ensure true freedom of conscience (and, in a broader sense, pluralism as an essential component of a democratic society), and the equality of individuals and religious communities. In other words, it is not the purpose of the principle of the separation [of the state and religious communities] to protect the state itself from religious and other beliefs and associations (the state itself, of course if it is democratic, is not to be protected from anything), but to ensure complete freedom of conscience and the equality of all people, adherents and non-adherents, with its neutral stance.<sup>27</sup> Without this principle, encompassed in freedom of conscience, this human right would be incomplete. It would be incomplete because there would be no effective tool for establishing freedom and equality for all. And, more importantly, without this principle the door would be open in the other direction – to the influence of the state on religious communities. The principle of separation is therefore not statist, but humanistic. A neutral state respects the right of individuals to freely, individually, or collectively profess their religion or other beliefs. Regarding this, it takes into account that citizens have different religious and non-religious beliefs or that they do not have them at all and that it is responsible for ensuring the freedom of everyone.

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<sup>27</sup> Legal theory distinguishes two concepts of the model of the separation of the state and religious communities which are demonstrated by the historical development regarding this: the French model, in legal theory referred to as the anti-clerical or statist model, which sought to free the state from the church, while the American liberal model of separation is a consequence of the idea of the liberation of the church from the state with the intent to provide space for religious freedom. See C. Walter, *Religionsverfassungsrecht*, Mohr Siebeck, Tübingen 2006, p. 69.

- 103.** The religious and ideological neutrality of the state perceived in such a manner is not an obstacle to the cooperation of the state with religious communities. A modern democratic and social state is actively involved in many areas of society, which it promotes in various ways, directly or indirectly. As on the basis of their convictions religious communities carry out tasks in such areas as well, the state must not ignore or even eliminate them in encouraging and promoting various activities in society.<sup>28</sup> The religious neutrality of the state does not entail that religion is pushed to the margins of society, as this could lead to precisely the opposite effect: discrimination based on religion and the denial of neutrality. The principle of separation does not prevent the state from establishing positive relationships, forms of cooperation, and joint efforts with those religious communities that also perform charitable activities, such as the state has in this respect with other organisations of civil society.<sup>29</sup> In doing so, it also cannot be disputed if the legislature assesses in general that religious communities with their fundamental mission – care for religious freedom as a human right – perform an important and useful role in terms of strengthening human dignity in a modern democratic society that goes beyond the pursuit of individual goals. Regarding this, the attitude of the state in relationship to various religious communities must not be inconsistent with the principle of equality, and it especially must not result in the eventual assessment of the state of the legitimacy of the content of such beliefs.
- 104.** This neutrality also does not require the state to be indifferent towards the religious needs of the people. Religion is certainly not a state matter. However, as follows from Article 41 of the Constitution, the state is obliged to take into account to a certain extent the religious problems of individuals and religious communities, which it must approach in a neutral and fair manner. Therefore, although the state does not occupy itself with religious issues, it must nevertheless recognise the importance of religion for individuals and actively create conditions for the exercise of this human right. The interpretation of the first paragraph of Article 41 of the Constitution is crucial for determining the duty of the state in relation to it enabling the religious life of people. Nobody has the right to request public assistance in the profession of religion, unless, of course, such a duty results from the first paragraph of Article 41 of the Constitution. This entails that everything that falls within the scope of the exercise of the right to freedom of religion determined in Article 41 of the Constitution cannot be considered inconsistent with the principle of separation determined in the first paragraph of Article 7 of the Constitution. The cooperation of the state with religious communities is not in itself illegal from the perspective of constitutional law, even if it exceeds the limit required by Article 41 of the Constitution, namely as long as the state is religiously neutral in acting in this manner and does not identify itself with religion or religious communities.

<sup>28</sup> L. Šturm in: L. Šturm (ed.), *ibidem*, p. 130.

<sup>29</sup> *Ibidem*.

**The Principle of the Freedom of Activity of Religious Communities**  
**(the second paragraph of Article 7 of the Constitution)**

105. The principle of the freedom of activity of religious communities is one of the three components of the broadly perceived principle of the separation of the state and religious communities. It entails the protection of religious communities against the interventions of the state, i.e. it is a guarantee of the autonomy of religious communities in their internal affairs. This principle is further emphasised in the Constitution in the second paragraph of Article 7, which explicitly refers to the free activity of religious communities. At the same time, as already mentioned, the autonomy of religious communities is also a component of the provisions concerning human rights and fundamental freedoms: in general, it is an expression of the general freedom determined in Article 35 of the Constitution, and its direct constitutional basis is also determined in the first paragraph of Article 41 of the Constitution (the Constitutional Court adopted a similar position also in Opinion No. Rm-1/02). This finding entails that interference with the autonomy of religious communities is regarded as an interference with a human right, which is admissible only if it fulfils the conditions of review under the so-called strict proportionality test.
106. In substance, this right ensures religious communities in particular the freedom of establishment, organisation, implementation, the performance of religious rites, and the enactment of other religious matters. This entails that they may organise themselves freely and decide independently on their internal structure, composition, internal competence, the functioning of their bodies, the appointment and duties of their priests and other representatives, the rights and obligations of their adherents related to the exercise of religion, and on connecting with other organisations or religious communities. Freedom of activity is ensured to them not only as regards their private activities and in private spaces, but also in public life. The right of religious communities to organise their internal rules on their own and to independently and autonomously carry out their mission does not relieve them of the obligation to act in accordance with the state legal order.
107. As a fundamental human right, the right to the freedom of activity of religious communities is in essence a defensive right against interferences by the state. The state must not adopt measures that unduly interfere with the sphere of autonomy of religious communities. Interferences with this right are permissible only if the general conditions determined in the third paragraph of Article 15 of the Constitution are fulfilled and the principle of proportionality is taken into consideration. In Paragraph 94 of the reasoning [of this Decision] the Constitutional Court already stated that the constitutionally protected freedom of activity of religious communities binds the state to establish a mechanism that allows religious communities to also obtain the status of a legal person.

**The Principle of the Equality of Religious Communities**  
**(the second paragraph of Article 7 of the Constitution)**

108. As well as the principle of freedom of activity, the principle of the equality of religious communities is, on the one hand, an integral part of the principle of the separation of the state and religious communities, since the religious neutrality of the state requires the equal treatment of religious communities. On the other hand,

its origins are found in the human right to freedom of conscience. In the same manner as regards the principle of freedom of activity, in Opinion No. Rm-1/02, the Constitutional Court adopted the standpoint that also the principle of equality derives from the human right to freedom of conscience determined in the first and the second paragraphs of Article 41 of the Constitution, “[...] as only on the basis of the equal and free activities of all religious communities can the exercise of this constitutional right be guaranteed”.

- 109.** Unlike the principle of autonomy, however, the principle of the equality of religious communities is not an independent component of the right to freedom of conscience determined in Article 41 of the Constitution, despite the fact that its intent is to ensure this right, but rather is a specific expression of the general principle of equality determined in Article 14 of the Constitution in the area of the relationship of the state to religious communities. The principle of the equality of religious communities is an instrument for ensuring religious freedom and should be understood in conjunction with the first paragraph of Article 14 of the Constitution, which prohibits discrimination on the basis of personal circumstances when exercising any human rights and fundamental freedoms, and in conjunction with the second paragraph of that same article, which determines the equality of all before the law. The different treatment of religious communities regarding the exercise of a human right or fundamental freedom based on faith should therefore be reviewed according to the strict proportionality test as required by the first paragraph of Article 14 of the Constitution (see Decision No. U-I-425/06, dated 2 July 2009, Official Gazette RS, No. 55/09). Other forms of differentiation between religious communities, namely those for which the reason for differentiation is either not religion (or any other personal circumstance) or those forms that do not relate to the exercise of human rights, are constitutionally permissible if they do not violate the general principle of equality before the law determined in the second paragraph of Article 14 of the Constitution. In accordance with the established constitutional review case law, the latter principle prohibits the legislature, *inter alia*, from arbitrarily differently regulating situations that are in their essence the same. In such a case, the differentiation of the legislature between religious communities regarding a specific issue is admissible if there exists a reasonable, objective reason that is justified by the nature of the matter.
- 110.** As the first and the second paragraphs of Article 41 of the Constitution provide for the same constitutional protection of religious and other philosophical beliefs, the first and the second paragraphs of Article 14 the Constitution also require appropriate equal treatment of religious communities and other ideological associations.

### Methodological Approach

- 111.** The close interlacing and substantive interdependence of Articles 41 and 7 of the Constitution and their connection to Article 14 of the Constitution require a response to the question of how to take into account in a methodological sense the mentioned relationships when reviewing the constitutionality of the contested provisions. The standpoint of the Constitutional Court is that in cases where a statutory

provision is contested on the basis of aspects that relate at the same time to the substance of one of the constitutional principles of Article 7 of the Constitution and of the human right determined in Article 41 (in particular, the circumstances stemming from the framework of the right to the freedom of activity of religious communities), a review of compliance with Article 41 of the Constitution is to be performed first of all. Firstly, it must therefore be established which rights stem from freedom of conscience, what the appropriate state duties are and whether the statutory measure interferes with them. The human right to freedom of conscience is namely the cornerstone of the entire regulation of the status of religious communities and in this sense takes precedence over the constitutional principles defining the status of religious communities in relation to the state. If the statutory measure passes the review of constitutionality in light of Article 41 of the Constitution, a review must then be performed, in the framework determined by the applicant's claims, concerning conformity with the first and second paragraphs of Article 7 of the Constitution, i.e. with those of its aspects – even if their origin and purpose is the protection of the human right determined in Article 41 of the Constitution – that do not comprise the core substance of this human right. This refers primarily to the requirements of the neutrality of the state and with regard to the equality of religious communities.

### **B – III**

#### **Review of the Conditions for the Registration of Religious Communities (the first paragraph of Article 13 of the RFA)**

- 112.** The contested first paragraph of Article 13 of the RFA determines that a church or other religious community may be registered if it has at least a hundred adult members who are citizens of the Republic of Slovenia or aliens with permanent residence on its territory and if it has been active in Slovenia at least in the last ten years. Article 14 of the RFA determines the documents that the religious community must enclose with the application for registration. In the first item it thus imposes the obligation to submit a list containing the data of the persons referred to in the first paragraph of Article 13 of the RFA (this includes their name, nationality, and residence) and their certified signatures. In the fifth item it requires the religious community to submit proof of its presence in Slovenia in the last ten years, which the religious community is not required to submit if it has been recognised in the world for over 100 years. The condition of ten years of activity in Slovenia is, therefore, pursuant to the fifth item of Article 14 of the RFA, not applicable to the registration of religious communities which have been recognised in the world for over 100 years. The third paragraph of Article 6 of the RFA determines that registered churches and other religious communities are legal persons under private law. The purpose of the registration is therefore to establish a special legal status that sets religious communities apart from other legal persons.
- 113.** The applicant considers the mentioned statutory conditions for the registration to be inconsistent with the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution), freedom of conscience (the first

paragraph of Article 41 of the Constitution), the freedom of activity of religious communities (the second paragraph of Article 7 of the Constitution) and right to freedom of association (the second paragraph of Article 42 of the Constitution). It states that a religious community needs a form of legal status if it wishes to be active in reality and to appear in public life. In its view, the RFA should allow for the registration of all religious communities and the state can determine the conditions [for this intervention in the public sphere] only when the religious community begins to intervene in the public sphere.

114. This registration or another form of acquiring a legal personality is not a precondition for the establishment and activity of religious communities. Religious communities can be active in a completely informal manner and such forms of associations already enjoy constitutional protection. However, the Constitutional Court has already stated (Paragraph 94 of the reasoning) that the constitutionally protected freedom of activity of religious community obliges the state to establish a mechanism for religious communities that wish to do so to acquire a legal personality. This is required by the collective aspect of the human right to freedom of conscience determined in the first paragraph of Article 41 of the Constitution, understood in the light of the second paragraph of Article 42 of the Constitution, which guarantees the right to freedom of association. In this regard, the second paragraph of Article 42 of the Constitution substantively codetermines the first paragraph of Article 41 of the Constitution.
115. In Decision No. U-I-155/07 the Constitutional Court determined in detail the substance of freedom of association pursuant to the second paragraph of Article 42 of the Constitution. It adopted the standpoint that this freedom guarantees individuals, *inter alia*, the possibility to establish a legal person for collective action in the area of common interest, as without a legal personality freedom of association often does not make any sense. It emphasised that the obligation of the state to ensure specific types of associations in general does not stem by itself from the second paragraph of Article 42 of the Constitution. The obligation of the state is in general therefore only to provide one or more forms that will allow individuals to effectively exercise their interests through an association. The legislature thus has discretion concerning which status forms or legal regimes it will provide, while taking into account the specificities of each area in which associations are active. The obligation to provide a certain or specific legal form (legal regime) of association derives from the Constitution only exceptionally: in particular where such special treatment is necessitated by other grounds of constitutional law or if such is strictly necessary for the exercise of other human rights or fundamental freedoms.
116. The Constitutional Court deems that religious association is not just exercise of the general constitutionally guaranteed right to freedom of association (the second paragraph of Article 42 of the Constitution), but is also an exercise of the right to freedom of religion determined in the first paragraph of Article 41 of the Constitution. The freedom of activity of religious communities derives already from the human right to freedom of conscience, and in particular their autonomy is determined as a fundamental constitutional principle also in the second paragraph of Article 7 of the Con-

stitution. This entails that the requirement to provide such legal forms of religious communities that allow for the greatest possible autonomy of religious communities in the exercise of religious freedom follows from the first paragraph of Article 41 in conjunction with the second paragraph of Article 42 of the Constitution and from the second paragraph of Article 7 of the Constitution. This essentially entails the requirement that the legal order must in principle respect the autonomous internal structure of a religious community and recognise legal personality to it as such.

- 117.** In view of this, the question arises whether from the perspective of the freedom of the establishment and activity of religious communities determined in such a manner it is sufficient that the state provides only a general, fundamental legal form of association, i.e. the form of an association. Namely, if the general legal regime of associations fulfils the requirements of the human right of religious communities to obtain such a legal personality that respects their autonomy to the greatest possible extent, then the conditions determined in the first paragraph of Article 13 of the RFA, which otherwise provides for a particular legal form specifically for religious communities, do not constitute an interference with this human right. The registration of religious communities in accordance with the RFA would in such a case constitute only one of the ways in which this human right can be exercised that the legislature made available in the framework of its discretion. Religious communities that do not meet the conditions determined in the first paragraph of Article 13 of the RFA, i.e. those regarding which the number of members is less than 100 and which are less than ten years old (or not recognised in the world for over 100 years) and whose registrants are not citizens or permanent residents of Slovenia, could obtain a legal personality as required by this human right in the general legal form of association. However, if it is ascertained that the legal regulation of associations is not sufficient from the point of view of the human right to obtain an adequate legal personality (which is derived from the first paragraph of Article 41 in conjunction with the second paragraph of Article 42 of the Constitution), then it must be reviewed whether the contested conditions determined in the first paragraph of Article 13 of the RFA are so restrictive that they constitute an interference with that right.<sup>30</sup> In order for the Constitutional Court to assess whether the specific conditions of the first paragraph of Article 13 of the RFA amount to an infringement of the human right of religious communities to obtain adequate legal personality, it had to first review the preliminary question whether the solutions in the Act

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30 This approach was adopted by the Constitutional Court already in Case No. U-I-155/07. In the statutory regulation of the forms of status of those associations that are required by the Constitution and which must be regulated by the legislature, it must be assessed on a case-by-case basis whether a certain statutory provision entails the determination of the manner of the exercise of freedom of association (or some other human right) or whether it already entails a limitation and thus an interference with this human right. On the other hand, the acts governing the types of associations that the Constitution does not require entail, in general, the manner of exercising the second paragraph of Article 42 of the Constitution. A statutory regulation that entails only the determination of the exercise of human rights is reviewed by the Constitutional Court with restraint, i.e. only in terms of reasonableness.

governing an association as the most general form of association (AA-1) are such that they provide religious communities with the greatest possible autonomy with regard to their establishment and activities.

- 118.** There are a number of provisions among the provisions of Part II of the AA-1, which governs the establishment and management of an association, that would in the view of the Constitutional Court – if they were applied to religious communities – interfere with the right of adherents to freedom of religious association and the autonomy of religious communities regarding their activities. Thus, for example, the second paragraph of Article 10 of the AA-1 provides, *inter alia*, that the name of the association must include the word association, alliance, or club, and the association must only use its registered name in legal transactions (the sixth paragraph of Article 10 of the AA-1). In accordance with the first paragraph of Article 12 of the AA-1, the members of an association participate directly or indirectly through representatives, elected bodies, or the representative of the association in managing the association in the manner determined in its bylaws. The first paragraph of Article 13 of the AA-1 determines that the bylaws of the association, its amendments, and other major decisions in the association must be adopted by the assembly of the members, composed of all members of the association. According to the first paragraph of Article 14 of the AA-1, each member of the association holds the right to challenge in court within one year from the date the final decision on such was adopted, the decisions of the bodies of the association [allegedly] adopted in violation of an act or the bylaws or other general acts of the association.
- 119.** The described regulation determined in the AA-1 would entail, if applied to religious communities, an interference with the right to the freedom of establishment and activity of religious communities, as ensured by the first paragraph of Article 41 of the Constitution in conjunction with the second paragraph of Article 42 of the Constitution. This holds in particular for the provisions that oblige associations to ensure a certain degree of “internal democracy” (the required election of bodies and the decision-making of the assembly of the members, although the internal structure and organisation of religious communities are often, if not usually, associated with religious elements, which are considered by the adherents of the community to be “sacred” – in particular the rules regarding who the leader is, who the priests are, etc.).<sup>31</sup> The same applies to those rules which require that all their internal decisions are subject to judicial control (that the possibility of a judicial challenge of the decisions of the bodies of religious communities generally interferes with the autonomy of religious communities is clear already from Order of the Constitutional Court No. Up-2229/08, dated 28 May 2009, Official Gazette RS No. 43/09). The constitutionally

<sup>31</sup> In this case, the Constitutional Court adopted the standpoint that the appointment and dismissal of the leaders of religious communities is typically an internal affair of the religious community that does not surpass its sphere of autonomy ensured by the Constitution, and the state (due to the principle of the separation of the state and religious communities determined in the first paragraph of Article 7 of the Constitution) must not interfere in this sphere, therefore regarding this matter it cannot create entitlements which would require legal protection.

guaranteed autonomy of religious communities namely prohibits the state authorities from acting as the arbitrator in disputes of a religious nature.

- 120.** In accordance with the third paragraph of Article 15 of the Constitution, human rights are limited by the rights of others and in such cases as are provided by the Constitution. In accordance with this, a prerequisite for the admissibility of an interference with human rights or fundamental freedoms is that the interference pursues a constitutionally admissible aim. Regarding the finding that the aim of the interference is constitutionally admissible, it must still be reviewed on the basis of the so-called strict test of proportionality also whether the interference is in accordance with the principles of a state governed by the rule of law determined in Article 2 of the Constitution (see Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS XII, 86; Paragraph 25 of the reasoning). The Constitutional Court found no constitutionally admissible aim on the basis of which the human right to the freedom of the establishment and activity of religious communities determined in the first paragraph of Article 41 of the Constitution in conjunction with the second paragraph of Article 42 of the Constitution should be interfered with in the manner presented. This entails that the application of the AA-1 to religious communities is inconsistent with the Constitution.
- 121.** The general legal form of association therefore does not correspond to the constitutional requirements arising from the purpose and content of the freedom of religious association. On the one hand, the form of an association would certainly ensure religious communities the right to be subjects of law, as is, *inter alia*, required by the first paragraph of Article 41 in conjunction with the second paragraph of Article 42 of the Constitution. However, at the same time it would constitutionally inadmissibly restrain their internal autonomy protected by the same provision of Article 41 of the Constitution and which is determined as the principle of freedom of activity also by the second paragraph of Article 7 of the Constitution. Due to their constitutionally guaranteed autonomy, it is therefore not constitutionally admissible to treat religious communities in the same manner as other forms of association. The legislature must provide a specific form of status that is appropriate to the content of the constitutionally protected right to religious association.<sup>32</sup>
- 122.** By the RFA the legislature regulated the special form of status which allegedly especially matches the nature and purpose of religious association. Due to the nature of things, the statutory regulation is necessary for the exercise of the human right of religious communities to acquire a legal personality (which is an integral part of the freedom of activity of religious communities, understood in the light of freedom of association). Without the latter this human right could not exist. For this reason, the legislature must establish a procedure and criteria for registration that allows the

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32 Cf. in academic theory, for example W. C. Durham Jr., *ibidem*, pp. 368-369, who argues that religious communities have all the rights deriving from freedom of association, and in some respects enjoy even higher protection. He emphasises that the nature of religious activity ensures religious communities, just as such also applies to political parties, a higher form of protection in comparison to the protection enjoyed by the activities pursued by different organisations (e.g. corporations).

acquisition of a legal personality. It depends on the effect of an individual prescribed condition for registration or the effect of all of them together on the exercise of this human right whether these still constitute a manner of regulating its exercise or if they have thus already expanded into an interference with this right. In the challenged first paragraph of Article 13, the RFA makes the possibility of registering a religious community contingent on it having at least 100 members with citizenship or permanent residence in Slovenia and ten years of activity in Slovenia (or more than one hundred years of recognition in the world). This entails that religious communities that do not fulfil these conditions have no possibility to acquire a legal personality under which their autonomy could be respected as much as possible. Given the above, when interacting, these conditions limit the human right to the freedom of activity of religious communities (understood in conjunction with freedom of association) to such a degree that they constitute an interference with it. A statutory regulation which interferes with a human right is constitutionally admissible only if it is based on a constitutionally admissible and objectively justified aim. Moreover, in accordance with the settled constitutional case law, it has to be reviewed whether the interference, even if it pursues a legitimate aim, is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with the principle which prohibits excessive state interference (the general principle of proportionality). A review of whether the interference might be disproportionate is carried out by the Constitutional Court on the basis of the so-called strict test of proportionality. This test comprises a review of three aspects of the interference: (1) whether the interference is actually necessary (needed), (2) whether the reviewed interference is appropriate for achieving the aim pursued, (3) whether the weight of the consequences of the reviewed interference for the affected human right is proportional to the value of the aim pursued or to the benefits which would arise due to the interference (the principle of proportionality in the narrow sense or the [similarly named] principle of proportionality). Only if the interference passes all three aspects of the test is it constitutionally admissible (Constitutional Court Decision No. U-I-18/02).

- 123.** It follows from the legislative preparatory materials<sup>33</sup> that the reason for determining such demanding conditions for registration was the assessment of the legislature that it is possible to recognise certain specific rights guaranteed by the Constitution, international treaties, and laws only to registered religious communities. It follows from the system of the RFA that these rights are the rights contained in the provisions of Chapter IV of the RFA that refer to the possibility of concluding agreements with the state, the provision of religious spiritual care in certain specific circumstances, the freedom of building and state funding. Without the need for the Constitutional Court to review at this stage what the nature of these rights is, it is obvious that such a reason (aim) is only partially constitutionally admissible. The legislature's aim, i.e. ensuring the so-called specific rights only to the registered religious communities that meet the demanding conditions, is namely inadmissible insofar as these specific

<sup>33</sup> Draft of the Religious Freedom Act (Gazette of the National Assembly, No. 26/06, pp. 36-37).

rights are rights constituting the exercise of human rights and fundamental freedoms. In this case, the aim of the interference with the human right of religious communities to obtain adequate legal personality is in fact a further restriction on other human rights. If the purpose (aim) of the limitation of a certain human right is a further restriction of the exercise of human rights, such purpose is not constitutionally admissible. The aim of the legislature to confer certain specific rights only to registered religious communities that fulfil the demanding conditions is admissible insofar as it relates to the recognition of such rights that are not required by freedom of religion and that are not prohibited by the principle of the separation of the state and religious communities. The legislature is not required to provide everyone with such additional rights (benefits or privileges) which the Constitution itself neither requires nor prohibits, but may (due to a scarcity of resources, security in legal transactions, etc.) lay down specific conditions for the recipients of such additional benefits. When regulating this, the legislature is bound by the obligation that the criteria for distinguishing between those religious communities which can obtain additional benefits and those that are unable to qualify for such are not unreasonable or arbitrary (in accordance with the principle of the equality of religious communities determined in the second paragraph of Article 7 of the Constitution as a particular expression of the general principle of equality before the law determined in the second paragraph of Article 14 of the Constitution).

124. If the Constitutional Court establishes that there exists a constitutionally admissible reason for the interference, it must then, in the framework of the strict test of proportionality, first review whether the interference is necessary to achieve the aim. This entails a review of whether the same aim can be achieved either without any interference or by a milder measure that interferes less severely with the affected human right. The challenged regulation regarding registration does not fulfil this requirement. It is perfectly possible to envisage such a legislative solution which, on the one hand, ensures that only some of the religious communities (i.e. registered, older, and larger ones that have at least 100 adherents with Slovene citizenship or permanent residence in Slovenia) enjoy special rights that the first paragraph of Article 41 of the Constitution does not require and which are not inconsistent with the first paragraph of Article 7 of the Constitution, and on the other hand, allows at the same time all religious communities to acquire an appropriate legal personality irrespective of the number, nationality, or residence of their members and irrespective of the duration of their activity or their recognition in the world. Thus, the legislature could, for example, determine additional conditions (e.g. the number of adherents, etc.) for acquisition of each of the specific rights. Another possibility is, for example, a two-level registration: the basic level would allow for the acquisition of legal personality, while the higher level requiring compliance with certain additional criteria would also provide additional rights. In this respect, it must be emphasised at this point that the legislature must specifically respect the principle of neutrality and the principle of the equality of religious communities also when determining what the reasonable and objectively justified criteria are for distin-

guishing between religious communities that are eligible to obtain special rights or a higher level concerning registration and those which are not. However, if the legislature prescribes registration as a precondition for the exercise of the rights stemming from the first paragraph of Article 41 of the Constitution, such registration is an interference with this human right that is constitutionally admissible only under the conditions referred to in the third paragraph of Article 15 of the Constitution (the so-called strict test of proportionality).

125. Since the challenged regulation of such registration is not a necessary interference with the human right of religious communities to acquire legal personality as an integral part of the right to freedom of the establishment and activity of religious communities determined in the first paragraph of Article 41 in conjunction with the second paragraph of Article 42 of the Constitution, there was no need to review whether it is appropriate and proportional in the narrower sense. The first paragraph of Article 13 of the RFA is inconsistent with the first paragraph of Article 41 in conjunction with the second paragraph of Article 42 of the Constitution already due to a lack of the necessity of the interference.
126. On the basis of this reason, the Constitutional Court abrogated the challenged first paragraph of Article 13 of the RFA and did not need to review the alleged nonconformity with other provisions of the Constitution. As it thus abrogated the provision which determines the conditions for registration, it also had to abrogate the first and the fifth item of Article 14 of the same Act, which requires religious communities to demonstrate the fulfilment of these conditions (Point 1 of the operative provisions). The abrogation entails that for the registration of religious communities there is no longer a prescribed minimum number of registrants, a prescribed nationality or permanent residence of their members, nor prior activity in Slovenia or more than 100 years of recognition in the world. The Constitutional Court suspended the effect of the abrogation for one year (Point 2 of the operative provisions). This gives the legislature the possibility to adopt a regulation on the criteria for registration consistent with the Constitution. The finding of nonconformity with the Constitution does not entail that the legislature should not determine the conditions for registration at all, or that any condition in itself constitutes an inadmissible interference with the human right to freedom of religious association. It must be emphasised that by the very nature of things it is necessary to regulate the procedure and criteria for registration in order to exercise the human right of religious communities to acquire a legal personality (which is an integral part of the freedom of activity of religious communities, understood in the light of freedom of association). Since the creation of a legal personality places a religious community among entities with legal relationships, the legislature may in the regulation of this institution also incorporate mechanisms aimed at protecting its members as well as third parties involved in legal transactions. It depends on the effect of each of the prescribed conditions for registration or the effect of all of them together on the exercise of this human right whether they still constitute a manner of regulating its exercise or if they have already expanded into an interference with this right. The

more narrowing the effect of the statutory regulation on the exercise of the human right is and the more the substance of a specific prescribed condition is removed from the nature [of the human right], that much closer it is to changing from a manner of exercise into an interference, and *vice versa*. Since the essence of the phenomenon of association is a mutual connection of individuals and therefore by its very concept it already presupposes more than one person (association with oneself is conceptually not possible), the legislature may – also for the purpose of legal certainty – prescribe a minimum number of members. The determination of the minimum number is thus in general a regulation of the manner of exercise of this human right (which is constitutionally admissible if it is not unreasonable), however, the legislature must take into account that a very high threshold would entail an interference therewith (which is constitutionally admissible only if it passes the so-called strict test of proportionality). On the other hand, it must also assess whether there are reasonable reasons on the basis of which freedom of religious association could be subject to conditions regarding the number of members which could be significantly higher than the conditions for other, more general forms of association. Any other conditions which are not a natural component of religious association (citizenship or permanent residency and the period of previous activity or the global recognition of the religious community) are also not necessarily inconsistent with the Constitution. Where there is a constitutionally admissible goal, the conditions which constitute an interference with a human right would be admissible if they pass the strict test of proportionality.

## B – IV

### Review of the Funding of Religious Communities

#### (Article 20 of the LSRCA and the third paragraph of Article 29 of the RFA)

127. The challenged Article 20 of the LSRCA<sup>34</sup> states: “The social community<sup>35</sup> may fund religious communities. The act by which the funding is given may determine the purpose for which the funding may be used. Religious communities are free to use the allocated funds. If the funding was given for a specific purpose, the authority that granted it may require that a report on its use be drawn up.” The contested third paragraph of Article 29 of the RFA provides: “The state may fund registered churches and other religious communities due to their generally beneficial purpose, as defined in Article 5 of this Act.”

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34 The legislature expressly maintained the application of this provision also after the RFA came into force on the basis of the first paragraph of Article 35 of the RFA.

35 Regarding the substance of the request, there was no need for the Constitutional Court to deal with the issue of the interpretation of the concept of social community. Notwithstanding this, the Constitutional Court emphasises that the principle of the separation of the state and religious communities determined in the first paragraph of Article 7 of the Constitution draws limitations in the relationship between all bearers of public authority (i.e. also the local communities), on one side, and religious communities, on the other. All that is valid for the relationship between the state and religious communities is valid also for the relationship between other bearers of public authority and religious communities.

128. Article 5 of the RFA, which defines the general beneficial purpose of religious communities, is connected to the third paragraph of Article 29 of the RFA: “Churches and other religious communities that strive for spirituality and human dignity in private and public life, endeavour to find the purpose of living in the sphere of religious life, and also engage in activities that play an important role in public life by developing their cultural, educational, didactic, philanthropic, charitable, and other activities in the scope of the social state, thus enriching the national identity and performing an important social role, are generally beneficial organisations”.
129. By using the established methods of interpretation, certain relevant legal rules can be derived from these legal provisions. Although the text of Article 20 of the LSRCA provides for fiscal funding for all religious communities and does not determine the reason and the purpose of funding, the RFA, as the subsequent regulation (*lex posterior derogat legi priori*), limited the possibility of funding only to registered religious communities and specifically determined that the characteristic due to the nature of which the funding of religious communities is admissible is “[...] their generally beneficial purpose, as defined in Article 5 of this Act.” This interpretation is also consistent with striving for transparency in the use of public funds. The RFA therefore outlines the purpose for which religious communities may be provided funding. Article 20 of the LSRCA and the third paragraph of Article 29 of the RFA must therefore be understood as an integral unit and interpreted as entailing that funding of any registered religious community that corresponds to the description of a generally beneficial organisation is admissible. The legislature defined the generally beneficial purpose of a religious community in Article 5 of the RFA as a combination of two elements of religious communities. The first element is the pursuit of spirituality and human dignity in private and public life and endeavours to create meaning in life in the sphere of religious life. In this part, the fundamental or original mission of religious communities is considered. The second element, which must exist at the same time as the first, is the direct broader contribution of these communities to the society, when their activities go beyond merely internal religious life so as to perform cultural, educational, didactic, philanthropic, charitable, and other activities in the scope of the social state.
130. In order to determine whether such regulation is consistent with the Constitution, the starting point must be a number of premises of constitutional law that are put forward in general terms already in Section B – II of this decision. The most important point is that funding of religious communities is not an obligation of the state that is a consequence of Article 41 of the Constitution. This constitutional provision in general does not entitle even individuals to demand that the state fund the exercise of their religious freedom. An exception may be specific situations where the funding of an aspect of religious activity in exceptional circumstances could be necessary in order to enable an individual to exercise freedom of religion (e.g. a military mission abroad). However, the fact that the obligation to provide funding does not result from the human right to religious freedom does not entail that such funding, if nevertheless provided by the state, is in itself constitutionally inad-

missible. While respecting the equality of religious communities, the state namely may provide support to religious communities – including financial – if this is not contrary to the principle of the separation of the state and religious communities, in particular with the requirement of the state’s religious and ideological neutrality stemming from this principle.

- 131.** It is precisely due to the requirement of the neutrality of the state (its mirror image is the principle of the equality of religious communities) that the criteria determined in the first paragraph of Article 5 of the RFA, which determine when religious communities are generally beneficial, must be interpreted with a great deal of reflection. An interpretation that entails that the state may, in reviewing the first, “internal”, element of a general beneficial purpose, i.e. the pursuit of spirituality and human dignity in private and public life and endeavours to create meaning in life in the sphere of religious life, assess the legitimacy or value acceptability of the substance of beliefs, is constitutionally inadmissible. Therefore, these criteria must be understood as an implied characteristic attributed by the legislature in the first paragraph of Article 5 of the RFA in general to all religious communities, that is, as the legislature’s assessment that it is characteristic of religious communities to endeavour to create meaning in life in the sphere of religious life and to pursue spirituality and human dignity. A different interpretation would namely allow for the possibility that the state places among the generally beneficial – and thus those that receive funding – only those religious communities whose substantive beliefs are close to those of the state, but not also those which it assesses, for example, that they do not strive (enough or in the right manner) to create meaning in life in the sphere of religious life. Such would namely go beyond the boundaries of the neutrality of the state guaranteed by the principle of the separation of the state and religious communities determined in the first paragraph of Article 7 of the Constitution.<sup>36</sup>
- 132.** By assuming that all religious communities are generally beneficial, the challenged statutory provisions in fact entail that the state can provide financial support only to those registered religious communities which are generally beneficial also for the wider society on the basis of their activities in those fields which otherwise fall within the scope of the social state.
- 133.** The applicant complains that the regulation of the financial support of religious communities discriminates in an inadmissible manner against unregistered communities, as such allegedly cannot obtain the status of a charitable organisation, whereas the conditions for registration (one hundred members – Slovene citizens or permanent residents of Slovenia – and ten years of activity or more than one hundred years of world recognition) allegedly bear no relation to having a charitable character. The

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36 The ECtHR maintained a similar position in its Judgment in the case *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, dated 31 July 2008 (paragraph 92), in which it emphasised that Article 9 of the ECHR binds states to remain neutral and that if a state sets up a framework for conferring a special (privileged) legal personality on religious groups to which a specific status is linked, the state must remain neutral and impartial: all religious groups which wish so must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner.

applicant's objection is unfounded. The generally beneficial character of religious communities is not statutorily defined as a special status. It entails only the definition of the circumstances due to which a religious community is generally beneficial, where activities in the scope of the social state are particularly crucial. Thus, it is not the issue of "the status of having a generally beneficial character" that is at issue, but whether it is admissible to distinguish between registered and unregistered religious communities regarding financial support.

134. The Constitutional Court abrogated the existing conditions for registration due to their nonconformity with the Constitution (Point 1 of the operative provisions). The conclusion regarding nonconformity is based on the finding that the interference with the right of religious communities to a legal personality is not necessary, as the statutory solution does not restrict 'general' registration, but rather makes possible the exercise of additional rights subject to certain particular conditions or to a higher level of registration. The approach chosen by the legislature is within its sphere of discretion. Regardless of the future regulation of this field, the fact which follows from the title of Chapter IV of the RFA and which is also expressly mentioned in the third paragraph of Article 29 of the RFA, i.e. that only registered religious communities can obtain public financial support, cannot be ignored.
135. Since public funding of religious communities is not a human right (and therefore there is no discrimination which could otherwise be reviewed in accordance with the first paragraph of Article 14 of the Constitution), the distinction between registered and unregistered religious communities regarding the financial support provided to them must be assessed in the light of that aspect of the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution) which is a special expression of the general principle of equality before the law within the scope of the relation of the state to religious communities (the second paragraph of Article 14 of the Constitution). This constitutional principle requires, *inter alia*, that the legislature regulate those situations which are essentially the same in the same manner. If it regulates them in a different manner, there must be reasonable grounds arising from the nature of things for the distinction. The principle of equality thus does not prevent the legislature from determining – within the limits of its competence – the criteria according to which it distinguishes between similar factual situations and attaches different legal consequences to them. Such distinction by which the legislature pursues admissible aims is an essential element of its legislative competences (see Constitution Court Decision No. U-I-36/06, dated 5 February 2009, Official Gazette of the Republic of Slovenia No. 14/09). The pertinent issue therefore is whether it is admissible from the point of view of the equality of religious communities for the state to provide financial support only for the "generally beneficial activities" of registered religious communities, while unregistered religious communities cannot apply for public funds for their "generally beneficial activities".
136. In the view of the Constitutional Court, the requirement that a religious community must be registered in order for it to obtain financial support from the state in accordance with the RFA is not an arbitrary one but reasonable and objectively justified.

Such a requirement is a natural condition for the participation of the religious community with the state in the funding [and realisation] of generally beneficial activities in the sphere of social state. Registration namely establishes the legal personality of a religious community, which allows it to be the bearer of rights and obligations – even those rights that are established in the relationship with the state at issue. By means of (co-financing, the state promotes the activities of the social state in a broader social area, by which it also indirectly affects third parties. Therefore, requiring the registration of religious communities, which ensures the transparency of their activities and internal structure, also has the function of providing for the legal security of third parties concerned with these areas.

137. The applicant's complaint that Article 20 of the LSRCA, the third paragraph of Article 29 of the RFA, and the first paragraph of Article 5 of the RFA do not clearly define the criteria and procedures for financially supporting religious communities and that therefore Article 20 of the LSRCA and the third paragraph of Article 29 of the RFA are inconsistent with Article 2 of the Constitution, is also unfounded. When interpreting the substance of these Articles also the regulations governing the use of public funds must be taken into account. The fundamental provision for the allocation of state subsidies, aid, and other forms of funding is the second paragraph of Article 53 of the Public Finance Act (Official Gazette of the Republic of Slovenia, No. 79/99 *et seq.* – hereinafter referred to as the PFA). This provision determines that the funds for subsidies, loans, and other forms of state aid are granted on the basis of a prior public tender published in the Official Gazette of the Republic of Slovenia, under the conditions and procedure prescribed by the Minister of Finance if a special act<sup>37</sup> does not determine otherwise. In addition to the PFA, the Rules on the Procedures for Implementation of the Budget of the Republic of Slovenia (Official Gazette of the Republic of Slovenia No. 50/07 and 61/08, hereinafter referred to as the Rules), which are subsidiarily applicable, should also be taken into account. It thus follows from the contested provisions of the LSRCA and the RFA that the state may provide financial support for the activities of registered religious communities which fall within the scope of the social state. The specific procedures for the allocation of funds are then conducted in accordance with other regulations governing the corresponding field. It follows from these regulations that public funds are allocated exclusively through public tenders by an individual act. As judicial protection against such an act (if there is no appeal against such in administrative proceedings) is provided in proceedings for the judicial review of administrative acts, the applicant's complaint regarding non-conformity with the right to legal remedies determined in Article 25 of the Constitution is also unfounded (see Decision No. U-I-219/03, dated 1 December 2005, Official Gazette of the Republic of Slovenia No. 118/05, and OdlUS XIV, 88).

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<sup>37</sup> In the field of cultural activities, such is, for instance, determined in the ARRPIFC and in the Rules on the Implementation of a Public Call and Public Tender (Official Gazette of the Republic of Slovenia No. 93/05), adopted on the basis of this Act.

138. Finally, the complaint that the contested statutory regulation of the funding puts other ideological associations (which fall within the scope of protection under Article 41 of the Constitution) in an unequal position in relation to religious communities and that it unjustifiably distinguishes between religious communities and other charitable associations which provide charitable work is also unfounded. In support of its allegations, the applicant indicates that the second paragraph of Article 5 of the RFA includes the open and on-going dialogue of the state with churches and religious communities, while the Act neglects equal respect for non-religious organisations, particularly concerning obtaining funding. The applicant alleges that these organisations are subject to more stringent conditions for obtaining funding on the basis of the AA-1 in comparison to religious communities under the RFA. The status of religious community, which brings financial entitlements, allegedly also puts all societies active in the spiritual field in an unequal position. The applicant states that all charitable organisations (e.g. associations in the public interest or humanitarian organisations) should be able to participate in tenders for public funds under the same conditions.
139. The RFA governs religious freedom and in this framework also the funding of religious communities. The position and funding of other associations are governed by the acts governing associations, institutes, humanitarian organisations, public interest in culture, etc. The applicant did not demonstrate why regulation by different acts constitutes an unjustified distinction between these entities. At the same time, the applicant's complaint is based on the wrong premise, i.e. that the state may provide financial support to religious communities without public tenders, differently than for associations in the public interest and humanitarian organisations. It follows from the regulations governing public finances that religious communities may be financially supported with public funds only through public tenders. The Constitutional Court does agree with the applicant that when funding generally beneficial activities, the state must treat all forms of associations equally – religious, ideological, and others. However, the irregularities in the funding of individual projects can only be the subject of specific judicial proceedings and cannot influence the review of the constitutionality of the RFA.
140. Considering the above-mentioned, Article 20 of the LSRCA and the third paragraph of Article 29 of the RFA are not inconsistent with the Constitution (Point 3 of the operative provisions).

## B – V

### **Review of the Employment of Priests in Prisons and Hospitals (the third and fourth paragraphs of Article 24 and the second paragraph of Article 25 of the RFA) in the Light of the Principle of the Separation of the State and Religious Communities**

141. The applicant states that Articles 24 and 25 of the RFA are inconsistent with the principle of the separation of the state and religious communities (the first paragraph of Article 7 of the Constitution), as they enable priests to be employed as public offi-

cials. The substance of the complaint refers to a part of the third paragraph of Article 24 of the RFA and to the second paragraph of Article 25 of the same Act, therefore, the Constitutional Court reviewed the complaint in this framework. Article 24 of the RFA, which regulates religious spiritual care in prisons, determines in the third paragraph that the ministry in charge of judicial affairs employ the appropriate number of priests of a particular religion on a full-time or part-time basis or that it ensure different remuneration for the work done if there is a sufficiently large number of detainees of the same religion in the whole country. In the fourth paragraph, this Article determines that a priest who is appointed and employed in accordance with the third paragraph can perform his function undisturbed and visit people in detention at the appropriate time without supervision. Article 25, which regulates religious spiritual care in hospitals and social welfare institutions providing institutional care, determines in the second paragraph that the ministry in charge of health ensure the employment of the necessary number of priests if there is a sufficiently large number of occupants of the same religion in the hospitals in the whole country. A priest appointed and employed in this manner can perform his function undisturbed and visit the occupants of the said religion at the appropriate time. The state may therefore employ priests in order to provide religious care in prisons and hospitals. The important difference between the two statutory provisions is that for religious spiritual care conducted by priests in prisons, remuneration for the work done can be ensured in a different manner and not necessarily by means of employment by the Ministry of Justice. Regarding religious spiritual care in hospitals, the RFA only provides for the employment of priests. The last sentence of the first paragraph of Article 27 of the RFA determines that religious employees employed on the basis of Articles 22 to 25 of the RFA cannot acquire the right to state financial aid intended for the payment of the social security contributions of insured person employed by churches and other religious communities.

142. In order to determine whether employing priests to provide religious spiritual care in the public sector is in accordance with the Constitution, it must first be determined what obligations relating to the exercise of religious freedom in prisons or in hospitals are imposed on the state by the first paragraph of Article 41 of the Constitution. The Constitutional Court has already substantiated that, given the substantive interconnection of the constitutional regulation of religious freedom and of the position of religious communities, everything that is required by Article 41 of the Constitution cannot be considered inconsistent with the principle of the separation of the state and religious communities determined in the first paragraph of Article 7 of the Constitution (Paragraph 104 of the reasoning).
143. Individuals may find themselves in circumstances in which their exercise of an important segment of religious freedom is significantly hindered or even rendered impossible for them, and the nature of such circumstances is such that, based on general empirical rules, they can provoke particularly intense experience of the issues and dilemmas encompassed by the concept of religious belief. In addition to closed environments such as the Army and prisons, such circumstances occur also in other-

wise open environments, such as hospitals and some social welfare institutions (e.g. residences for the elderly) in which individuals' exercise of religious freedom outside the institution is significantly hindered or prevented due to their (mainly) physical characteristics. When the state is connected to such circumstances, either directly (e.g. the Army and prisons) or more indirectly (public hospitals), it must also consider the constitutionally guaranteed freedom of religion. The latter above all requires that the state be restrained. It must not preclude, prevent, obstruct, or hinder the freedom to manifest and to exercise religion. If it is necessary for the exercise of this human right, the state must "neutralise" the restrained freedom of individuals also by active conduct intended to reduce the resulting disadvantages. It must enable individuals in such circumstances to perform individual acts of a religious nature (e.g. individual use of religious symbols – including garments, the provision of appropriate food, etc.), enable them to have access to books with religious content, visits by a priest, and also allow the performance of religious rites in the institution. Since a religious rite as a medium between the adherent and the transcendent is an essential element of the exercise of faith, which is usually collectively exercised in special consecrated premises, the positive obligation of the state in prisons and public hospitals is to enable the use of suitable premises for the collective exercise of religion. These rights are, of course, not absolute; the state may interfere with them if it has a constitutionally admissible aim in doing so (e.g. reasons of safety, health, etc.) and if the interference is consistent with the principle of proportionality.

144. The first paragraph of Article 41 of the Constitution, however, does not give to either individual adherents or to religious communities the right to public funding for the exercise of freedom of religion in prisons and in public hospitals. Using the argument *a minori ad major*, this entails that the state is also not obliged to employ priests in order to ensure the right to collective manifestation of religion in such institutions. The fact that the employment of priests is not an obligation of the state resulting from the first paragraph of Article 41 of the Constitution does not necessarily entail that such is inadmissible from the perspective of the Constitution. The issue is namely whether the state employing priests to perform religious activities is contrary to the principle of the separation of the state and religious communities determined in the first paragraph of Article 7 of the Constitution.
145. Religious or value neutrality as the central element of the principle of the separation of the state and religious communities obliges the state to not introduce religious or philosophical elements into its activities, to remain impartial, to neither accept nor reject religion or other philosophical worldviews; it must – in terms of values, neither support nor hinder any of them. The constitutional requirement of the separation of the state and religious communities does not hinder all cooperation of the state with religious communities, namely, provided that the state is religiously neutral and does not identify itself with religion or religious communities. Although state funding of religious spiritual care in hospitals and prisons therefore does not fall within the scope of a human right, the state may provide the necessary financial resources for this purpose in a manner not inconsistent with the first para-

graph of Article 7 of the Constitution, particularly in line with the requirement of the religious neutrality of the state. The more or less close cooperation of the state with religious communities in the provision of religious spiritual care in prisons (less intense and slightly less frequently also concerning hospitals) is likewise an accepted practice in the majority of foreign legal systems, including the United States of America,<sup>38</sup> Germany,<sup>39</sup> France,<sup>40</sup> Romania,<sup>41</sup> Ireland,<sup>42</sup> Lithuania,<sup>43</sup> Belgium,<sup>44</sup> the Czech Republic,<sup>45</sup> Sweden,<sup>46</sup> Estonia,<sup>47</sup> and the Netherlands.<sup>48</sup>

146. The preference of the legislature regarding (financial) support for the exercise of the religious life of individuals may therefore reach only the border delineated by the principle of the separation of the state and religious communities, in particular by the guarantee of state neutrality. It may not reach the point where the provision of support would entail (even symbolic) identification of the state with religion or religious communities.<sup>49</sup> It is precisely the manner (the modality or the form) of the provision of such support that may lead to a qualitative leap: financial support which is acceptable from the perspective of the principle of the separation of the state and religious communities may result due to the state providing such in a manner entailing a constitutionally unacceptable con-

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38 L. Boothby, *Protecting Freedom of Religion or Belief in Restricted or Institutional Settings*, in: T. Lindholm, W. C. Durham, and B. G. Tahzib-Lie (eds.), *ibidem*, pp. 407 *et seq.*

39 Article 141 of the so-called Weimar Constitution, which is a part of the Basic Law on the basis of Article 140 of this Law.

40 J. Gueydan, X. Delsol, P. Desjonqueres, *Cultes et religions, impôts et charges sociales*, L.G.D.J., Paris 1991, p. 270, quoted according to B. Basdevant-Gaudemet, *État et Églises en France*, p. 188, available at: [http://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Staat\\_und\\_Kirche\\_in\\_der\\_EU/08-France.pdf](http://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Staat_und_Kirche_in_der_EU/08-France.pdf) (accessed on 7 October 2009).

41 V. Bărbăţeanu and D. Suliman, *Constitutional Jurisprudence in the Area of Freedom of Religion or Beliefs*, in: D. Čepar and B. Ivanc (eds.), *Legal Aspects of Religious Freedom: International Conference, 15 and 18 September 2008, Office for Religious Communities of the Republic of Slovenia, Ljubljana 2008*, p. 234.

42 F. Brennan, *Constitutional Jurisprudence in the Area of Freedom of Religion or Beliefs, Response of Ireland*, in: D. Čepar and B. Ivanc (eds.), *ibidem*, pp. 133 *et seq.*

43 Adapted from R. Ruškýtė, *Legal Aspects of Religious Freedom*, in: D. Čepar and B. Ivanc (eds.), *ibidem*, pp. 168 *et seq.*

44 M. Tysebaert, *Administrative and Financial Matters – The Situation in Belgium*, in: D. Čepar and B. Ivanc (eds.), *ibidem*, pp. 289 *et seq.*

45 V. Mezřický, *Constitutional Guarantees of Freedom of Faith and Positions of Churches in the Czech Republic*, in: D. Čepar and B. Ivanc (eds.), *ibidem*, p. 55.

46 L. Friedner, *Constitutional Jurisprudence in the Area of Freedom of Religion or Beliefs*, in: D. Čepar and B. Ivanc (eds.), *ibidem*, p. 262.

47 R. Ringvee, *Administrative and Financial Matters in the Area of Religious Freedom and Religious Communities – Estonia*, in: D. Čepar and B. Ivanc (eds.), *ibidem*, p. 323.

48 Gazette of the National Assembly, No. 26/06, p. 42.

49 Compare with the so-called Endorsement Test in the case law of the Supreme Court of the United States of America (first established by Judge O'Connor in the concurring opinion in the case *Lynch v. Donnelly*, 465 U.S. 668), according to which a state measure violates the so-called Establishment Clause of the First Amendment to the Constitution of the United States when in the eyes of a reasonable observer the measure puts the adherents of another religion or non-adherents into the position of a less favoured member of the community.

nection of the mentioned categories. In the view of the Constitutional Court, one of the possible forms of supportive cooperation regarding religious spiritual care in prisons and public hospitals, which, although beyond the requirements of the first paragraph of Article 41 of the Constitution, is still constitutionally admissible, is the provision of monetary recompense to religious communities for the work performed by their priests in offering religious spiritual care to adherents in prisons and public hospitals.<sup>50</sup> In such case, the state is actually and symbolically – in the eyes of third parties – removed enough from the religious activities of the priests, and for the latter the religion and religious community remain the primary authority when offering religious spiritual care.

147. The level of admissible cooperation is, however, exceeded when the state (a ministry) concludes an employment agreement with a priest in order to ensure religious spiritual care in prisons and public hospitals when such is not necessary for the exercise of the human rights determined in the first paragraph of Article 41 of the Constitution. The wall between the state and religious communities provides protection on both sides: it protects religious communities from state influence, as well as the state from identifying with any of the religious communities, both in order to respect the religious freedom of individuals. state employment of priests in order for them to provide religious spiritual care in prisons and hospitals is a constitutionally unacceptable crack in the wall with effects on both of the mentioned sides. A priest employed by the state (or its bodies) to provide religious spiritual care will, merely due to being a state employee (and thus associated with the state already on a symbolic level), at least on the outside, in the eyes of third persons, lose something typically religious, certainly some of the autonomy of religion. When providing religious spiritual care, such priest is not loyal only to his religious community, but also to his employer – the state (in the broader sense). state employment of priests in order for them to perform religious services in prisons and public hospitals therefore inadmissibly undermines the autonomy of religious communities and their priests, which is a component of the principle of the separation of the state and religious communities in the broader sense. On the other hand, the employment of priests in a state body for the performance of religious services creates an important institutional link between the state and religious communities. A priest who provides religious spiritual care as a state employee symbolises the state to some extent, even though he is not a public official. It is important that this symbolic link is visible also on the outside, in relation to third persons (non-adherents and adherents of other religions). In this context, the institutional involvement of priests in the body of the state symbolises that the state itself, by

50 Thus, for example, the agreement concluded between the Federal Republic of Germany and the Protestant Church of Germany in 1996 determines that in five Lands of the Federal Republic of Germany (which were formerly part of the German Democratic Republic) military priests are employed and paid by the church, and the state later refunds such payment. In this respect, such regulation is therefore a departure from the older one determined in 1957, which is applicable in other Lands and on the basis of which priests are state employees. Cf. B. Küster, *Administrative and Financial Matters in the Area of Religious Freedom and Religious Communities*, in: D. Čepar and B. Ivanc (eds.), *ibidem*, p. 349.

means of its apparatus, directly provides religious spiritual care in these institutions and hospitals. This entails its symbolic identification with religion and religious communities and by this the negation of neutrality. Considering the above-mentioned, such an intense manner of supportive activities of the state in enabling religious spiritual care in prisons and hospitals exceeds the limits determined by the principle of the separation of the state and religious communities referred to in the first paragraph of Article 7 of the Constitution, and is therefore inconsistent with them. In the light of the foregoing, the Constitutional Court abrogated the third paragraph of Article 24 of the RFA to the extent that it allows for the employment of priests. Due to this, the fourth paragraph of this Article in the part governing the status of employed priests (i.e. the undisturbed performance of their functions and visiting detainees without supervision) also became irrelevant; therefore, the Constitutional Court abrogated it to that extent (Point 4 of the operative provisions). The first sentence of the second paragraph of Article 25 of the RFA enables only the employment of priests for the provision of religious spiritual care, but not different forms of financing of their work. The second sentence of the same paragraph of Article 25 of the RFA refers only to the position of employed priests (i.e. performing their function undisturbed and visits to persons receiving care in such institutions at the appropriate time), so the purpose of its existence was entirely exhausted when the first sentence was abrogated. Given this, the Constitutional Court abrogated the second paragraph of Article 25 of the RFA in its entirety (Point 4 of the operative provisions). Due to the abrogation of the provisions on the employment of priests, the last sentence of the first paragraph of Article 27 of the RFA became irrelevant as well to the extent that it excludes from the circle of beneficiaries of state financial aid for the purpose of paying the social security contributions of insured persons religious officials employed on the basis of Articles 24 and 25 of the RFA. It was therefore necessary also to abrogate the last sentence of the first paragraph of Article 27 of the RFA to the extent that it refers to Articles 24 and 25 of the RFA (Point 4 of the operative provisions).

148. The Constitutional Court suspended the effect of the abrogation for one year (Point 5 of the operative provisions). By this it prevented, in conformity with the principle of legitimate expectations (Article 2 of the Constitution), the possibility of sudden changes in the position of priests who might already be employed. At the same time, the legislature is given sufficient time to possibly regulate their situation differently after the abrogation takes effect and to perhaps regulate religious spiritual care in prisons and public hospitals in a different manner.

**Review of the Religious Spiritual Care in Prisons, Hospitals,  
and Social Welfare Institutions Providing Institutional Care  
(Articles 24 and 25 of the RFA) in the Light of the Principle of the Clarity  
and Precision of Regulations and in the Light of the Principle of Legality**

149. The applicant alleges that Articles 24 and 25 of the RFA are inconsistent with Article 2 and with the second paragraph of Article 120 of the Constitution. In its view, the contested provisions do not determine the criteria for defining those entitled to

religious spiritual care in these institutions. Allegedly, only a bare right (*nudum ius*) to religious spiritual care is determined, whereas the organisation of and conditions for its implementation are to be determined in an implementing regulation. Article 24 allegedly does not determine any criteria for the implementation of religious spiritual care in prisons and also does not provide for the issuance of regulations. A particular complaint is directed at the third paragraph of Article 24 as it allegedly does not sufficiently explicitly specify what the terms “a sufficiently large number of detainees of the same religion” and “the necessary number of priests” entail, by which it allegedly leaves the regulation of the right to the implementing regulation. The Constitutional Court did not review the same complaint directed at the second paragraph of Article 25 of the RFA since it abrogated that provision already due to the inconsistency with the first paragraph of Article 7 of the Constitution.

150. From Article 2 of the Constitution there follows, *inter alia*, the requirement that statutory provisions be clearly and precisely determined so that they can be implemented, that they do not allow for arbitrary conduct, and that they define in an unambiguous and sufficiently precise manner the legal position of the entities they refer to. The requirement that acts be precise is more emphasised the higher the disputed subject is valued (this position was adopted by the Constitutional Court already in Decision No. U-I-18/93, dated 11 April 1996, Official Gazette of the Republic of Slovenia No. 25/96, and OdlUS V, 40). The second paragraph of Article 120 of the Constitution (the so-called legality principle) requires that administrative bodies perform their work independently within the framework and on the basis of the Constitution and laws. This entails that the substantive basis for the issuance of implementing regulations by the executive power must be a legislative act. When adopting legal rules, administrative bodies are bound by the legislature’s intent regarding the substance of the matter. The value criteria for the implementation of an act must be taken into account and, in particular, the substance of the act must not be altered and rights and obligations must not be independently prescribed. The purpose and the criteria must be clearly expressed in the act and must be also clearly apparent from it. Similarly as the requirement that statutory provisions be clear, the requirement that the administration is bound by law also depends on the importance of the subject governed by such act.<sup>51</sup> The greater the interference or the effect of an act on an individual’s fundamental rights, the more restrictive and precise must be the authorisation contained in the act.
151. The complaint that the criteria determining who is entitled to religious spiritual care in prisons, hospitals, and social welfare institutions providing institutional care are not defined is unfounded. Firstly, it must be taken into account that the provisions of Chapter IV of the RFA, entitled “Rights of Registered Churches and Other Religious Communities and Their Adherents”, which also contain the challenged Articles 24

51 Cf. L. Šturm in: L. Šturm (ed.), *ibidem*, p. 872, who states that the German Federal Constitutional Court developed the so-called theory of importance or significance of a matter, according to which there must be a correlation between the importance of the statutory regulation and the form of the legal norm.

and 25 of the RFA, refer to registered religious communities and their adherents. Such follows from the historical, teleological, and systematic methods of interpretation. The express intention of the legislature to determine that the addressees of the rights determined in Articles 24 and 25 of the RFA are only registered religious communities follows from the legislative materials. The Draft Proposal of the RFA thus states that registration is not obligatory, but is “[...] a precondition for the recognition of certain rights”.<sup>52</sup> The chapter of the Draft Proposal of the RFA regarding the rights of registered religious communities and their adherents states that due to legal certainty and the protection of third persons, special rights guaranteed by the Constitution, international conventions, and acts are conferred only on registered religious communities. Further on, the RFA enumerates these rights, namely all those that are determined in Chapter IV of the RFA, including religious spiritual care in prisons, hospitals, and social welfare institutions providing institutional care. The same notion of the circle of those entitled is also confirmed by the Government as the proposer of the RFA, as is evident from its opinion concerning the request. Finally, such an interpretation is supported also by the system established in the RFA. Thus, in the first two chapters of the Act the basic principles, general provisions, and the exercise of religious freedom are regulated, which in general refer – if the individual provision does not determine otherwise<sup>53</sup> – to all religious communities and their adherents. Chapter III provides for the registration of churches and religious communities, and Chapter IV, as is stated explicitly in its title, governs the rights of registered churches and religious communities and their adherents. Taking into account these starting points, the circle of those entitled to regular individual and collective religious spiritual care is clearly defined in the first and sixth paragraphs of Article 24 and in the first paragraph of Article 25 of the RFA. Thus, all adherents of registered religious communities who are detained on the basis of a court decision or whose movement is limited and are in prisons, correctional institutions, juvenile correctional centres, training institutions, or are detained in juvenile detention centres, are entitled to religious spiritual care (the first and sixth paragraphs of Article 24 of the RFA). The same applies *mutatis mutandis* to Article 25 of the RFA: those adherents of registered religious communities who are in hospitals or social welfare institutions providing institutional care are entitled to individual or collective religious spiritual care (the first paragraph of Article 25 of the RFA). The social welfare institutions providing institutional care are those public social welfare institutions determined in Articles 50 to 54 of the Social Security Act (Official Gazette of the Republic of Slovenia No. 54/92 *et seq.*, hereinafter referred to as the SSA), as well as other social welfare institutions (Article 59 of the SSA) that provide institutional care. The concept of institutional care in institutions is determined by the first paragraph of Article 16 of the SSA and

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52 Gazette of the National Assembly, No. 26/06, p. 36.

53 Such is the case, for example, regarding the third paragraph of Article 6 of the RFA, which determines that registered religious communities are legal persons under private law and that also their constituent parts have the right to acquire legal personality.

namely entails all forms of aid provided in an institution by which the functions of the recipients' own home and family, in particular accommodation, organised meals, care, and health care are replaced or complemented.

152. By using methods of interpretation, it is also possible to determine the content and consequently also the extent of the right to regular individual and collective religious spiritual care (determined in the first paragraph of Article 24 and the first paragraph of Article 25 of the RFA) to a sufficient extent. By its nature, it is an undetermined legal notion that can be filled with substance when applied. It is namely undetermined merely on an abstract-regulatory level, but its substance can be determined when it comes into contact with a particular life situation.<sup>54</sup> The essence of the undetermined legal notions is that the legislature uses them in the abstract description of the factual situation when by such a concept it wishes to cover a variety of factual events and situations which have a common semantic substance (see Constitutional Court Decision No. U-I-136/07, dated 10 September 2009, Official Gazette of the Republic of Slovenia No. 74/09). The substance of the right to religious spiritual care is therefore determinable with regard to the purpose of the statutory regulation (to ensure the exercise of religious freedom to the detainees and occupants of the mentioned institutions because otherwise such would be impossible for them or their exercise would be significantly hindered) and by taking into account the variety of individual life situations (in particular, the diversity of the particular religious practices of individual religions and the diversity of forms ensuring these rights in actual situations, for example, due to the difference in the number of adherents in institutions or hospitals and their (lack of) opportunities to exercise religious freedom independently). Regarding this, the general meaning of religious spiritual care must be used as the starting point. The latter contains all the elements of positive religious freedom, namely the right to profess one's religion and to exercise it on both the individual and collective levels, which includes contact with priests and participation in the performance of religious rites. The legislature itself determined the particularities of some aspects of religious spiritual care (in the fifth paragraph of Article 24 of the RFA and in the fourth paragraph of Article 25 of the RFA), as it considered that they do not need to be determined only after the circumstances of specific cases are taken into account. Such are participation in religious rites performed at the institution and being able to receive books with religious content and guidance. The degree to which the concept of religious spiritual care is undetermined is therefore not significantly high.
153. The material conditions for the exercise of the right to regular individual and collective religious spiritual care by detained persons are provided by the ministry in charge of judicial affairs (the second paragraph of Article 24 of the RFA), while hospitals and institutions providing institutional care provide for the space and technical conditions for the religious spiritual care of the occupants in these institutions (the sixth paragraph of Article 25 of the RFA).

54 M. Pavčnik, *Teorija prava* [Theory of Law], Cankarjeva založba, Ljubljana 1997, p. 53.

154. In the first, second, fifth, and sixth paragraphs of Article 24 of the RFA and in the first, fourth, and fifth paragraphs of Article 25 of the RFA, those entitled to religious spiritual care as well as the substantive meaning of this right are thus sufficiently clearly and precisely determined. Taking the above-mentioned into consideration, the ministries have sufficient substantive basis in these provisions, as well as sufficient latitude (scope) in formulating the implementing regulation concerning organisational issues regarding the exercise of freedom of religion (which is expressly imposed by the third paragraph of Article 25 of the RFA for the occupants of social welfare institutions who cannot participate in religious rites outside the institution due to problems related to health or age, whereas Article 24 of the RFA does not address this issue). For these reasons, the alleged non-conformity with the principle of legality determined by the second paragraph of Article 120 of the Constitution regarding this part is not substantiated. The fact that Article 24 of the RFA does not contain an explicit “implementation clause” is unimportant. The Constitutional Court has repeatedly emphasised that there is no need for express authorisation for the executive branch of power in an act and that a so-called implementation clause (a statutory provision that the implementing regulations must be issued within a determined period) entails only that the legislature did not entirely leave the issuance of the implementing regulations to the discretion of the executive branch of power, but that by an act it imposed on the executive power the duty to regulate certain issues (*cf.*, for example, Decision No. U-I-58/98, dated 14 January 1999, Official Gazette of the Republic of Slovenia No. 7/99, and OdlUS VIII, 2).
155. The mentioned provisions of the first, second, fifth, and sixth paragraphs of Article 24 and the first, fourth, and fifth paragraphs of Article 25 of the RFA therefore ensure the right to religious spiritual care to detainees and occupants who are adherents of registered religious communities. In the part of the third paragraph that was not abrogated by the Constitutional Court, Article 24 of the RFA expressly envisages a possible additional way to guarantee this right where such is warranted by a sufficiently large number of detainees of the same religion on the level of the state. This refers to the possibility that religious spiritual care provided by priests paid by the state to provide continuous religious care in these institutions is to be ensured. The applicant complains that this provision does not determine the substantive criteria for the implementing regulation.
156. In this respect, two things must be emphasised. Firstly, state funding of the work of prison priests is not an element of the human right determined in the first paragraph of Article 41 of the Constitution, while at the same time it is not inconsistent with the first paragraph of Article 7 of the Constitution if it is not based on state employment of priests. Secondly, this provision does not entail the classic authoritative activity of the state, but refers to encouraging or promoting activities. Given this, the requirement of the precision and restrictiveness of statutory authorisation is less severe. In view of such starting points, the Constitutional Court assesses that the challenged provision provides sufficient criteria and sufficient directions to the Ministry of Justice, and at the same time also enough margin of discretion for responding to

changing circumstances. The criterion that must be considered is a sufficiently large number of detainees of the same religion on the level of the state. The purpose of the statutory authorisation given to the competent ministry is expressly foreseeable from the challenged provision, in particular in conjunction with the part of Article 24 of the RFA that was not abrogated and which determines that a priest can perform his function undisturbed and visit the detainees of the religion at issue at the appropriate time. The purpose is to ensure detainees continuous religious spiritual care by permanently engaging priests to provide such care if that proves necessary due to the number of adherents of the same religion. As such a number is highly dependent on the actual, changing situation, by defining such number [to be determined by the competent ministry] as a legal standard, the legislature justifiably left a wider margin of discretion to the competent ministry. In doing so, it obliged the Ministry to ensure such form of cooperation with priests if the standard “sufficiently large number” is fulfilled. When reviewing whether the standards of “a sufficiently large number” of adherents and “an appropriate number” of priests are fulfilled, the legislature’s purpose must be considered: to ensure religious spiritual care in a manner that is more preferable for detainees by means of the permanent involvement of priests. Although the Act does not impose strict constraints on ministerial decision-making regarding such, it does not allow for arbitrary determination of the conditions for permanently engaging priests to provide religious spiritual care. The competent ministry must take into account the various circumstances, in particular the actual and changing data on the number of detained persons and their religious adherence.

157. Due to these reasons, Articles 24 and 25 of the RFA are not inconsistent with the principle of the clarity and precision of regulations determined in Article 2 of the Constitution or with the principle of legality determined in the second paragraph of Article 120 of the Constitution (Point 6 of the operative provisions). The Constitutional Court did not review the issue whether the otherwise clearly defined circle of addressees, which is restricted to only adherents of registered religious communities (and thus excludes the adherents of unregistered religious communities), is consistent with other provisions of the Constitution (in particular, with the positive aspects of religious freedom determined by the first paragraph of Article 41 of the Constitution), because the applicant did not allege such.

## B – VI

### Review of Spiritual Care in the Army and in the Police Force

#### (Articles 22 and 23 of the RFA and the third paragraph of Article 52 of the DA)

158. The applicant principally alleges that Articles 22 and 23 of the RFA and the third paragraph of Article 52 of the DA, which govern religious spiritual care in the Army and the Police Force do not contain the criteria for determining who is entitled to religious spiritual care, and that they leave the regulation of the constitutional right to the implementing regulations. In addition, the applicant complains that the regulation of religious spiritual care in the Army is inconsistent with the freedom of conscience, as it allegedly continuously provides religious spiritual care

to members of the Army and not just at the times when they would in fact be prevented from exercising religious freedom. As the latter is ensured to the members of the Police Force by Article 23 of the RFA only in circumstances where the exercise of freedom of religion is rendered difficult (and not continuously), Articles 22 and 23 are allegedly inconsistent also with the principle of equality (the second paragraph of Article 14 of the Constitution).

**Review in the Light of the Requirement to Ensure the Principle of the Clarity and Precision of Regulations and in the Light of the Principle of Legality**

159. Article 22 of the RFA determines that the members of the Slovene Armed Forces have the right to religious spiritual care during their military service in accordance with the regulations on military service and national defence. In accordance with the third paragraph of Article 52 of the DA, military personnel have the right to religious spiritual care during their military service and the Minister determines the manner in which this care is organised and the manner of exercising the right to such care.
160. The complaint regarding the non-conformity of these provisions with Article 2 of the Constitution because the circle of those entitled is allegedly not clearly determined is unfounded.
161. The *sedes materiae* of the regulation of religious spiritual care in the Army is Article 22 of the RFA. This Article, which in relation to the rules on military service and national defence is a subsequent rule, determines this right (according to the historical, teleological, and systematic methods of interpretation – see Paragraph 151 of the reasoning) in Chapter IV of the RFA to be a right of adherents of registered churches and other religious communities. The members of the Slovene Armed Forces who are entitled to religious spiritual care are determined in more detail by the already mentioned third paragraph of Article 52 of the DA, as well as by the first and second paragraphs of Article 76 of the Service in the Slovene Armed Forces Act (Official Gazette of the Republic of Slovenia No. 68/07 – hereinafter referred to as the SSAFA), all of which Article 22 of the RFA refers to. This thus entails that those entitled to religious spiritual care are the following adherents of registered religious communities: military personnel during their military service (the third paragraph of Article 52 of the DA) and, to the extent that they are not covered by this definition, also regular military personnel, members of the military reserves when performing military service and undergoing training, persons doing voluntary military service, and other members of the Slovene Armed Forces if the SSAFA determines such (the second paragraph of Article 76 of the SSAFA). According to the DA, the terms military personnel and military service are determined in this Act itself (Article 48 and item 14 of Article 5 of the DA). The above mentioned is sufficient to conclude that the circle of those entitled is not undetermined.
162. All the standpoints the Constitutional Court stated in Paragraph 152 of the reasoning of this decision regarding the conformity of the undetermined legal notion of “the right to religious spiritual care” with the Constitution holds also regarding the review of the clarity and precision of Article 22 of the RFA and of the third para-

graph of Article 52 of the DA. The substance of the right to religious spiritual care can therefore be determined with regard to the purpose of the statutory regulation (i.e. to ensure the exercise of the religious freedom of members of the Army, as such would otherwise be rendered impossible or significantly more difficult for them, taking into account their special burdens related to the nature of their work) and taking into account the diversity of individual life situations (in particular, for example, the place and the circumstances in which the operational-level command, unit, or institution function – as expressly stated also by the second paragraph of Article 76 of the SSAFA). Given that the degree to which the concept is undetermined is not excessive, it is not in non-conformity with Article 2 of the Constitution. Due to fact that the challenged rules provide a sufficient substantive basis to the competent ministry regarding the right to religious spiritual care, as well as to the adequate openness (scope) for the regulation of the organisational aspects of its exercise (in particular, the place and circumstances), they are also not inconsistent with the principle of legality determined by the second paragraph of Article 120 of the Constitution.

- 163.** The above-mentioned holds *mutatis mutandis* also for the complaints made in a similar manner regarding the non-conformity of Article 23 of the RFA. It must only be added that the term *police officer* is determined in Article 3 of the Police Act (Official Gazette of the Republic of Slovenia No. 66/09 – official consolidated text, and No. 22/10 – hereinafter referred to as the PA) and that the “circumstances in which the exercise of religious freedom is hindered” are clearly also a legal standard that can be determined. The applicant does even not dispute the latter in concrete terms.
- 164.** Thus, Articles 22 and 23 of the RFA and the third paragraph of Article 52 of the DA are not inconsistent with the principle of the clarity and precision of regulations determined in Article 2 of the Constitution and the principle of legality determined in the second paragraph of Article 120 of the Constitution. The Constitutional Court did not review the issue of whether the otherwise clearly determined circle of addressees, which is restricted to only adherents of registered religious communities (and thus excludes adherents of unregistered religious communities), is consistent with other provisions of the Constitution (in particular, with the positive aspect of religious freedom determined in the first paragraph of Article 41 of the Constitution), as the applicant did not state such complaints.

**Review of Article 22 of the RFA in the Light of the Negative Aspect  
of Religious Freedom and of the Principle of the Separation of the State  
and Religious Communities**

- 165.** The applicant deems that the regulation of religious spiritual care in the Army determined in Article 22 of the RFA is inconsistent with the “principle of freedom of conscience” as it does not include just those Army members who in fact cannot avail themselves of such care outside the institution. With regard to this, the applicant refers to Decision No. U-I-68/98, in which the Constitutional Court decided, regarding the issue of religious instruction in public kindergartens and schools, that the negative aspect of the freedom of religion of children and their parents outweighs

the positive aspects, and held that the prohibition of religious activities in public schools and kindergartens is not inconsistent with the first and third paragraphs of Article 41 of the Constitution.

- 166.** The Constitutional Court deemed that the applicant in substance alleges a non-conformity with the so-called negative aspect of religious freedom determined in the second paragraph of Article 41 of the Constitution. The Constitutional Court has explained its significance in general terms already in Paragraphs 85 and 86 of the reasoning hereto. It ensures an individual, *inter alia*, the right to not have a religion, to not be obliged to declare one's views regarding this issue, and that it is not acceptable to force someone to profess a religion or to participate in acts entailing the exercise of religion. In case No. U-I-68/98, the Constitutional Court also adopted the standpoint that negative religious freedom obliges the state to prevent individuals from having any forced (unwanted) exposure to any kind of religious belief.
- 167.** Similar to the fact that not all actions that are inspired by religion are protected by positive religious freedom (see Paragraph 84 of the reasoning), also not every instance of an individual perceiving the profession or exercise of religion entails such exposure to religious beliefs that would constitute an interference with his negative religious freedom. Thus, the mere visual or auditory perception of religious symbols (e.g. viewing a church or mosque, a religious procession, an adherent wearing religious clothing, a muezzin's call to prayer, or the sound of church bells) cannot constitute forced exposure to a religion from which the state is obliged to protect the individual. Such also follows from the standpoint of the Constitutional Court in Decision No. U-I-111/04, i.e. that the mere existence of a building with external religious characteristics located on land that is intended for the construction of a religious building in accordance with a spatial planning regulation cannot in itself constitute an interference with the negative aspect of freedom of religion. A different, broader concept of interference with negative religious freedom would be incompatible with the constitutionally protected value of ensuring a pluralistic democratic society. The case law of the ECtHR has recognised as an inadmissible interference with negative religious freedom, for example, a compulsory oath on the Bible when assuming state office<sup>55</sup> and the display of crucifixes in public school classrooms.<sup>56</sup> Similarly, German constitutional case law found the display of crosses and crucifixes in the classrooms of compulsory state schools to be an inadmissible interference with the negative freedom of religion,<sup>57</sup> and American case law found the same, for instance, regarding prayers and blessings during graduation ceremonies in public schools.<sup>58</sup> The common aspect of all of the mentioned cases is the more or less indirect compulsory exposure to religious elements or even participation in the exercise of religion.

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55 The case *Buscarini and Others v. San Marino* (Judgment dated 18 February 1999).

56 The case *Lautsi v. Italy* (Judgment dated 3 November 2009; the case was referred to the Grand Chamber).

57 Judgment of the German Federal Constitutional Court, dated 16 May 1995, No. 1BvR 1078/91.

58 Judgment of the Supreme Court of the United States in the case *Lee v. Weisman*, 505 U. S. 577 (1992).

- 168.** Although the Army as a body affiliated with the Ministry is a symbol of the state (also externally, in relation to third parties), there can be no interference with the negative freedom of religion of a member of this body who is an atheist or an adherent of another religion only due to the knowledge that other (religious) members of the same body may avail themselves of religious spiritual care – including also participation in a religious rite ensured in organisational or financial terms by the state. It is essential that there is no element of compulsory exposure to the profession and exercise of religion which is enabled by the state. Negative religious freedom is already ensured in full to the members of the Army in that it is left to their free choice whether they exercise or not their right to religious spiritual care. For example, it would constitute an interference with this aspect of religious freedom if the state influenced the will of the members of the Army in deciding whether they will exercise their right to religious spiritual care or if it, for instance, placed religious symbols in premises not intended for religious rites or if it allowed religious symbols already placed in such premises. The right guaranteed by Article 22 of the RFA does not require anything of such nature and an interpretation of this right that is consistent with the Constitution does not allow for anything of such nature.
- 169.** The applicant also does not explicitly allege that the extent to which religious spiritual care in the Army is ensured is inconsistent with the principle of neutrality (as the central component of the principle of the separation of the state and religious communities determined in the first paragraph of Article 7 of the Constitution). Nevertheless, given the content of its complaints, it must be concluded that such non-conformity also does not exist. It has already been explained in general terms that the state must, if such is necessary for the exercise of positive religious freedom, neutralise the curtailed freedom of individuals by active conduct intended to reduce the resulting disadvantages. Everything that is required by the right determined by the first paragraph of Article 41 of the Constitution cannot be considered inconsistent with the principle of separation that follows from this right and is also a tool for ensuring this right. However, even if the scope required by the Constitution in the first paragraph of Article 41 is exceeded, this in itself does not constitute a violation of the principle of the separation of the state and religious communities as long as the state does not identify itself with any religion and as long as it treats all of them equally. The applicant does not even claim that some of these requirements are not respected in ensuring the right to religious spiritual care in the Army.
- 170.** In the case of public kindergartens and schools, the Constitutional Court interpreted the protection of negative religious freedom and the principle of the separation of the state and religious communities broadly, as was in substance pointed out already by the applicant. It deemed that the public premises of such kindergartens or schools already represent the state and that therefore the principled prohibition of denominational activities does not constitute an inadmissible disproportionality between the positive aspect of freedom of religion and the rights of parents to raise their children in accordance with their religious persuasion, on one hand, and the negative aspect of freedom of religion, on the other hand. However, the situation regarding

the premises of public school classrooms and kindergartens, in which the education and upbringing of children whose personalities are starting to develop and who (in general) do not yet have a completely developed ability to form their own will, is carried out, whereas the consequences of their susceptibility to impulses from such environment are not predictable, is substantially different from the situation at issue, which concerns responsible adults who have full capacity to form their own will. It also follows from the case law of the ECtHR (e.g. the cases *Dahlab v. Switzerland*, decision dated 15 February 2001, and *Lautsi v Italy*)<sup>59</sup> that in the public school environment, in particular where younger children are concerned, special emphasis must be placed on the protection of the neutrality of the school system, taking into account the fact that it is compulsory for everyone irrespective of their religion and that its aim is supposedly to foster critical thinking in pupils.

**Review of the Admissibility of the Distinction between Religious Spiritual Care in the Army and in the Police Force (Articles 22 and 23 of the RFA)**

171. In the section that follows, the Constitutional Court reviewed the conformity of the alleged inequality between the regulation of religious spiritual care in the Army and in the Police Force with the Constitution. Concerning this issue, it assessed on the basis of the principle of equality determined in the second paragraph of Article 14 of the Constitution whether the circumstances of members of the Army and members of the Police Force are equal in this respect and if they are, whether there exists a sound reason justified by the nature of things for the different regulation of the scope of religious spiritual care of the former compared to the latter.
172. The reason why the legislature enacted the right to religious spiritual care of members of the Army and the Police Force is the combined effect of two types of circumstances. The first are the circumstances constituted by the closed environment in which the work is performed. Such significantly hinder or even render impossible, in particular, the collective aspect of the exercise of religious freedom (residence in special closed institutions, limitations regarding leave, the distance to the respective religious community). The second are related to the nature of military or police service. Due to some of their features (e.g. being faced with interferences with the inviolability of human life, dealing with the fleetingness of one's own life, etc.), such may raise intense moral and ethical dilemmas and considerations in individuals that are answered by religious beliefs. The compared situations are therefore similar, as the mentioned circumstances (might) occur in the performance of both of the two professions.

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59 In the case *Dahlab v. Switzerland*, the ECtHR held that the principle of denominational neutrality, on which Switzerland relied when prohibiting a teacher in a public elementary school from wearing an Islamic headscarf, allows that certain restrictions are imposed on some public officials regarding the expression of their religious freedom, in particular in a school environment where younger children are concerned, who are more easily influenced than older ones. In the case *Lautsi v. Italy*, the ECtHR decided that the compulsory display of crucifixes in compulsory public schools, in particular in classrooms, violates the students' freedom of religion and the right of parents to educate their children in accordance with their own beliefs.

173. Since the conscript system is no longer in force, the accessibility of religious spiritual care is not significantly diminished for members of the Army when in peacetime they are stationed in the territory of the state (and a so-called state of alert is not at issue). Since that time, members of the military and voluntary military reserve are no longer subject to compulsory residence in closed military bases that separate them physically and socially from the ordinary flow of life.<sup>60</sup> Thus, the access of members of the Army and Police Force – during peacetime and when there is no so-called state of emergency – to religious care is significantly hindered primarily during periods of (long-term) training abroad or while participating in various operations outside the state. The legislature took as the starting point that the amount of time spent in a closed environment – i.e. during training and operations abroad – is longer for an average member of the Army than for an average police officer. Such is already clear from the statutory regulation determining the participation of the members of both forces in such tasks. The first paragraph of Article 19 of the PA determines that, at the request of international organisations or on the basis of international treaties, the Police participate abroad in the exercise of police or other non-military tasks. On the other hand, participation in international security alliances which are the basis for the participation of the members of the Army in operations abroad is defined in Article 2 of the DA as one of the tools to achieve the basic purpose of defence. The assumption that an average member of the Army spends more time in a remote closed environment than an average police officer is, in particular, confirmed by data on the number of (past and present) missions and international operations and the number of members of the Army and the Police Force involved in them. In 2009, from 427 to 528 members of the Slovene Armed Forces were involved in ten international operations and missions all together,<sup>61</sup> while on 1 September 2009, there were 22 Slovene police officers on missions.<sup>62</sup> 293 police officers were involved in all peacekeeping missions from 1997 to 2009. The average in the last eight years has been around 30 police officers per year, which constitutes 0.3% of all employed police officers.<sup>63</sup> On the other hand, in the peacekeeping operations of the United Nations from 1997 to 2009, more than 4,200 Slovene soldiers were involved (the highest point was in 2008, when 961 members of the Slovene Armed Forces were posted abroad, which constituted more than 13% of all soldiers).<sup>64</sup>

60 The exemption applies only to those individuals who volunteered for three-month military service, but they, as well, generally do not spend their weekends at a military post.

61 S. Konobelj and J. Slapar, *Sodelovanje držav v mirovnih operacijah OZN v luči članstva v varnostnem svetu OZN* [The Cooperation of States in Peace Operations of the UN in the Light of Membership in the UN Security Council], in: R. Bric (ed.), *Zbornik Sodelovanje Republike Slovenije v mednarodnih operacijah in misijah* [Collected Papers on the Cooperation of the Republic of Slovenia in International Operations and Missions], Ministry of Defence of the Republic of Slovenia, Ljubljana 2009, pp. 37-38.

62 Available at <http://www.slovenskavojska.si/mednarodno-sodelovanje/mednarodne-operacije-in-misije/> (accessed on 24 September 2009).

63 Available at <http://www.policija.si/index.php/mednarodno-sodelovanje/mednarodne-civilne-misije> (accessed on 25 September 2009).

64 Available at <http://www.policija.si/index.php/mednarodno-sodelovanje/mednarodne-civilne-misije> (accessed

174. The difference in the nature of typical military and typical police work is also reflected in the legislature's different assessment of the frequency and intensity of experiencing moral and ethical dilemmas and questions of conscience by the members of the Army, on the one hand, and by police officers, on the other. The Army fosters international peace, security, and stability, its main task is to deter military aggression and to carry out military defence. Military defence entails defence utilising weapons and other military means (the first paragraph of Article 5 of the DA). The Ministry of Defence, for example, states that the purpose of combat forces is "[...] to defeat the enemy in direct combat with firepower and by using manoeuvres."<sup>65</sup> An important defining element of the mission of soldiers, junior officers, and officers, constituting the core of the members of the Army, is that they first consent to exposing the inviolability of their own life to risk and their willingness to interfere with the inviolability of the lives of others. Certainly, such situations also occur in the work of police officers. However, given the generally known typical nature of police work,<sup>66</sup> it is not unreasonable to assess that the situations determined by the legislature using the criterion of what is predominant as typical for military service, are not typical of police service, as they do not occur to a predominant, but only to a lesser extent.
175. Generalising or determining typical cases according to the criterion of predominant characteristics is a natural element of the legislative competences. Making such generalisations is not an unsound reason for the difference in determining the amount of religious spiritual care for each of the situations compared. The legislature, therefore, assessed that the greater frequency of separation from the general social environment (the higher number of operations abroad) and the typical nature of military service (which involves moral and ethical dilemmas of conscience, which may be facilitated by religious spiritual care, more intensively and more often) require a broader scope of provision of religious spiritual care. By this, the legislature enabled the executive branch of power to organise religious spiritual care in the Army in a manner that ensures its continuity (e.g. by the permanent presence of appropriate priests). If the exercise of religious spiritual care is organised in such manner that it is constantly available, also those members of the Army whose movement is not limited can participate in such by the very nature of things. Regarding police officers, due to the smaller scale or intensity of their circumstances, the legislature used as the starting point the presumption that situations requiring such care are exceptional rather than typical. Therefore, it provided for such care more narrowly and the executive branch of power can ensure it by organising it in an *ad hoc* manner only for those persons who need it in such particular situations. The different frequency and intensity of the circumstances requiring religious spiritual care is a sound reason for the different determination of the extent of this care.

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on 25 September 2009).

65 Available at <http://www.slovenskavojska.si/struktura/sile-za-bojevanje/> (accessed on 24 September 2009).

66 According to the first paragraph of Article 3 of the PA, such work entails ensuring the safety of persons and property, the prevention, detection, and investigation of minor offences and crimes, maintaining law and order, carrying out border control, and the regulation and supervision of road traffic.

176. As the legislature's determination of the different extent of ensuring the right to religious spiritual care in the Army and in the Police Force is founded on reasonable criterion based on the nature of things, Articles 22 and 23 of the RFA are not inconsistent with the Constitution.
177. In the light of the above-mentioned, the Constitutional Court decided that Articles 22 and 23 of the RFA and Article 52 of the DA are not inconsistent with the Constitution (Point 7 of the operative provisions).

## B – VII

### **Review of the Freedom to Build and Use Facilities and Buildings for Religious Purposes (Article 26 of the RFA)**

178. The first paragraph of Article 26 of the RFA determines that churches and other religious communities have the right to build and maintain premises and buildings for worship, other religious rites, and other gatherings, and that they have the right of free access to them. The second paragraph determines that in the drafting of spatial planning acts concerning the foreseen spatial regulation, with regard to the new urban planning zones, particularly those intended for housing and residences, the needs, recommendations, and interests of churches and other religious communities are ascertained and harmonised on the basis of mutual agreement, taking into account the number of adherents of the respective churches and other religious communities. The body drafting the proposal must include in it an assessment of the need for religious buildings. In accordance with the third paragraph of the same Article, the spatial planning acts determined in the second paragraph which were in force when the RFA came into force must be amended and corrected accordingly within a reasonable time if the churches and other religious communities which are present in the area and to which these spatial planning acts refer have an interest and need for such.

### **Review in the Light of the Principle of the Clarity and Precision of Norms**

179. The applicant opines that it is not clear whether the contested provisions refer only to registered or also to unregistered religious communities.
180. The Constitutional Court deems that the addressees of the rules determined in Article 26 of the RFA are clearly defined. In the same manner as it has already explained regarding some of the other provisions of Chapter IV of the RFA, entitled "The Rights of Registered Churches and Other Religious Communities and Their Adherents", Article 26 of the RFA, which is contained in the same chapter, refers to registered religious communities and their adherents. A more extensive argumentation why such follows from historical, teleological, and systematic methods of interpretation is contained in Paragraph 151 of the reasoning and applies *mutatis mutandis* also to the reviewed situation. The Constitutional Court therefore will not reiterate such.
181. The applicant deems that the second paragraph of the same Article is undetermined and unclear, as in its opinion it does not specify the criteria for exercising the right to construct buildings and facilities, it does not determine what "a large number of

adherents” entails, it does not determine which spatial acts are concerned, nor which authorities are competent, and does not state whether religious communities are parties in the procedure for adopting spatial planning acts.

- 182.** These complaints are unfounded as well.
- 183.** This provision must be interpreted together with the regulations on spatial planning. Thus, the Spatial Planning Act (Official Gazette of the Republic of Slovenia, No. 33/07 *et seq.* – hereinafter referred to as SPA) clearly defines spatial planning acts in Article 14 (such are, in general, national, municipal, and inter-municipal spatial planning acts). In Articles 23 to 26, 29 to 37, 46 to 53, 57 to 61a, and 66 to 68 it provides for the procedure of their drafting and adoption, as well as the bodies competent to draft and decide on them.
- 184.** It is also not unclear what the term large number of adherents, which is to be considered in coordinating the needs, recommendations, and interests of religious communities in the procedure for drafting the relevant spatial planning act, entails. Such entails that the number of adherents of a registered religious community in the territory covered by the drafted spatial planning act is a criterion for coordination, on the basis of mutual agreement, of the needs and interests of the registered religious community to build structures in a certain territory.
- 185.** Finally, the manner of implementation of the cooperation of registered religious communities with the bodies drafting spatial planning acts is also not unclear. It must be taken into account that spatial planning acts are general and not individual acts. The procedure for drafting and adopting them is thus not an administrative procedure. Therefore, a registered religious community is not a party in such procedure.<sup>67</sup> The requirement determined in the second paragraph of Article 26 of the RFA that the needs and interests of the registered religious community be determined and coordinated on the basis of mutual agreement in the procedure for drafting the spatial planning act is a particularly emphasised obligation of the body drafting the spatial planning act which in general terms stems already from the SPA. Namely, in accordance with the principle of the public nature of spatial planning determined in Article 5, the latter Act already obliges the competent state and municipal bodies to enable the expression of the interests of individuals and groups of residents, and the participation of all interested persons in the procedures for drafting and adopting spatial planning acts. It also guarantees everyone the right to be informed of the procedures for drafting spatial planning acts and the right to participate in these procedures with initiatives, opinions, and in other manners, all in accordance with the provisions of the latter Act. The competent state and municipal bodies must, in accordance with the SPA and the act governing access to public sector information, enable everyone to have access to spatial planning acts, technical documents,

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<sup>67</sup> The Constitutional Court has already stated on several occasions that spatial planning acts are general acts and that in the procedure for drafting and adopting general acts, an individual is not a party in the procedure (e.g. Order No. U-I-105/98, dated 22 June 2000, OdlUS IX, 174, and Order No. U-I-246/08, dated 13 November 2008).

and other documents related to spatial planning and to inform the public of spatial planning matters. It also determines the duty of the body drafting the spatial planning acts to ensure that the public is informed of the draft of the spatial planning act by publicly presenting and holding a public discussion. This body must closely examine the comments and suggestions made by the public in the process of public presentation and take a position thereon. This duty is concretised in Article 32 of the SPA regarding a municipal spatial plan, a detailed municipal spatial plan, and a regional spatial plan. Given these provisions of the SPA, as the main act regulating these issues, the manner in which the needs, recommendations, and interests of the registered religious community are to be ascertained and coordinated on the basis of mutual agreement is determined in a clear and precise manner. The procedure for amending and supplementing a spatial planning act is, in accordance with Article 18 of the SPA, the same as the procedure for its drafting and adoption. This entails that the described manner of coordinating such on the basis of mutual agreement when drafting a spatial planning act also holds for amending and supplementing an act referred to in the third paragraph of Article 26 of the RFA.

- 186.** It consequently follows that the complaint regarding the lack of clarity of Article 26 of the RFA is unfounded. Therefore, this Article is not inconsistent with Article 2 of the Constitution.

#### **Review in the Light of the Principle of Separation of the State and Religious Communities**

- 187.** In the second paragraph of Article 26, the RFA determines that in the drafting of spatial planning acts of new building planning areas, particularly those intended for housing and residence, the needs, recommendations, and interests of churches and other religious communities are to be obtained and harmonised on the basis of mutual agreement, taking into account the number of adherents of the churches and other religious communities.
- 188.** In the view of the applicant, the mentioned provision is inconsistent with the principle of the separation of the state and religious communities for two reasons. Firstly, because it is the state authority and not the religious community itself that decides on the religious community's needs for religious buildings. According to the applicant, state authorities should only decide on the suitability of the building in relation to the spatial planning and building requirements. Secondly, in the view of the applicant, the regulation according to which the state authorities and religious communities must agree on the needs and interests of the religious communities is also inconsistent with the same constitutional principle. The applicant states that such imposes upon the state the obligation to achieve a specific result. The third paragraph of Article 26 of the RFA, which allegedly determines that the competent authorities are obliged to accordingly amend the existing and applicable spatial acts, allegedly also demonstrates that such an obligation exists.
- 189.** In order to review whether the form of participation of registered religious communities in the development of the spatial measures provided for in the second para-

graph of Article 26 of the RFA is inconsistent with the principle of the separation of the state and religious communities, as is claimed by the applicant, it must first be assessed what is ensured by the positive aspect of freedom of religion determined in the first paragraph of Article 41 of the Constitution in relation to the construction of religious buildings. Given the starting points of constitutional law regarding the regulation of religious freedom and the position of religious communities in relation to the state, everything that is required by this human right cannot be considered inconsistent with the principle of separation of the state and religious communities.

190. In Decision No. U-I-111/04, the Constitutional Court adopted the position that the construction of religious buildings in a manner that is traditional for the profession of a particular faith is an integral part of the right to freedom of religion (determined by the first paragraph of Article 41 of the Constitution) and the freedom of activity of religious communities (which is determined as a fundamental principle by the second paragraph of Article 7 of the Constitution).<sup>68</sup> It emphasised that it is essential for the enjoyment of the free manifestation and exercise of religion (which also includes religious teaching, worship, and practicing religious rites) that religious communities are allowed to build their own buildings that correspond to their religious worship, religious rites, and customs. The Constitutional Court also stated that it must be taken into account that the construction of these buildings also must be planned and built in accordance with the applicable legal regulation of spatial planning and building construction. This human right, which therefore entails the right of religious communities to build, own, and maintain buildings that correspond to their beliefs and traditional manner of individual and in particular collective exercise of their religion, is enjoyed by all religious communities, regardless of the manner of organisation and irrespective of their registration.
191. The right to construct buildings for the profession and exercise of religion, which stems from positive religious freedom (and the principle of the freedom of religious communities that is a component of this freedom) presupposes the obligation of the authorities (state and local) not to overlook the needs of the constitutionally

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68 This right also follows from the case law of the ECtHR (see B. Vermeulen, *ibidem*, p. 769). The same position is also found in some non-binding international instruments. For example, the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, proclaimed by Resolution No. 36/55, dated 25 November 1981 (published in: *Človekove pravice, Zbirka mednarodnih dokumentov, I. del, Univerzalni dokumenti* [Human Rights, International Collection of Papers, Part I, Universal Acts], Društvo za Združene narode za Republiko Slovenijo [United Nations Association of Slovenia], Ljubljana 1995, p. 96) determines in paragraph (a) of Article 6 that the right to freedom of thought, conscience, religion, or belief includes, *inter alia*, the freedom “to worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes”, and in paragraph (e) “to teach a religion or belief in places suitable for these purposes”. The Concluding Document of the Vienna Meeting 1986 of Representatives of the Conference on Security and Cooperation in Europe, adopted in 1989 (available at the webpage [http://www.osce.org/documents/mcs/1989/01/16059\\_en.pdf](http://www.osce.org/documents/mcs/1989/01/16059_en.pdf) (as accessed on 7 October 2009)), determines in section 16.4 the principle that freedom of religion also entails that religious communities must be allowed to establish and maintain free access to places of worship or assembly.

protected religious communities in spatial planning. Such is enacted through their involvement in the procedure for adopting spatial planning acts, in which they must be ensured the possibility to express and argue the need for the placement of a religious building in a certain area. The body drafting the spatial planning act must take this into account and adopt a position regarding the expressed needs. The general requirement that the competent authorities must, in the spatial planning procedure, enable the expression of the interests of individuals and groups of residents, as well as their participation in such procedures, stems already from the human right to participate in the management of public affairs determined by Article 44 of the Constitution (see Decision No. U-I-372/06, dated 13 November 2008, Official Gazette of the Republic of Slovenia, No. 111/08, Medobčinski uradni vestnik Štajerske in Koroške regije [Official Gazette of the Municipalities of the Štajerska and Koroška Region], No. 27/08, and OdlUS XVII, 58).

192. However, locating buildings in an area cannot be left to different (and often conflicting) private interests. It is up to the authorities to ensure a balanced spatial development by planning such placements of buildings in an area. Therefore, the authorities must review and coordinate the different developmental needs and interests with the public interest as regards the areas of environmental protection, conservation of the natural and cultural heritage, the protection of natural resources, national defence, and protection against natural and other disasters (the first paragraph of Article 3 of the SPA). Spatial planning must be carried out in such a manner that it, *inter alia*, enables sustainable development in the area and the rational use of land, quality living conditions, spatially coordinated and mutually complementary positioning of various activities, the preservation of characteristic features of the space, the rehabilitation of degraded areas, protection of the environment and natural resources, nature conservation, overall conservation of the cultural heritage, etc. (the second paragraph of Article 3 of the SPA). In doing so, the competent authorities must take into account public as well as private interests and carefully weigh them in accordance with the aims of spatial planning, while private interests must not affect public interests (Article 7 of the SPA).
193. The constitutionally guaranteed freedom to construct buildings for religious purposes therefore cannot be unlimited. It does not give religious communities the right to build any number of religious facilities wherever they would like regardless of the public interest in sustainable spatial development, which is determined on a general level by the SPA as religiously neutral and which takes into account the universal needs of present generations and also protects the needs of future generations against endangerment. This freedom is, however, enacted in a manner that takes into account the protection of the public interest through general, religiously neutral spatial planning, based on expert findings regarding the properties and capacities of the space (the principle of professional competence determined by Article 10 of the SPA).<sup>69</sup> The body drafting the spatial planning act must

<sup>69</sup> It follows also from the case law of the ECtHR that such regulations in principle do not interfere unjustifiably

– through the participation of religious communities – when coordinating the needs of religious communities regarding the building of religious facilities with other interests regarding spatial development, take into account the constitutional starting points of this human right of the religious community, in particular the third paragraph of Article 15 of the Constitution concerning the admissibility of limitations of human rights.

- 194.** The human right determined in the first paragraph of Article 41 of the Constitution thus prohibits the state and local authorities from neglecting the needs of religious communities in relation to building religious facilities. However, the right does not go so far that the authorities would not even be allowed to assess from an expert point of view whether the placement of a religious building in an area is justified or that the authorities are bound by the consent of religious communities regarding spatial planning. The second paragraph of Article 26 of the RFA must be understood by taking into account the mentioned constitutional starting points. It must be interpreted together with the SPA, which provides, *inter alia*, that decisions on spatial planning are made by the competent institutions of local and state authorities. Consequently, the second paragraph of Article 26 of the RFA must be understood exclusively in the manner that registered religious communities are included in the procedures for drafting spatial planning acts in a manner which imposes a duty on the bodies drafting these acts to communicate and coordinate with the registered religious communities regarding their needs, interests, and recommendations concerning the building of religious facilities. A commitment determined in such a manner does not entail the requirement to achieve a consensus between the body drafting the spatial planning act and the registered religious communities. It does not entail, as the applicant suggests, that the result of the participation must be a solution with which the registered religious community at issue agrees. The freedom to build religious facilities ensured by the first paragraph of Article 41 of the Constitution presupposes the necessary scope of participation of religious communities in the spatial development planning procedure. The relationship between the authorities and registered religious communities regarding coordination on the basis of mutual agreement in the procedures for drafting the spatial planning acts as determined by the second paragraph of Article 26 of the RFA is not such that it would be inconsistent with the principle of the separation of the state and religious communities. The authorities do not incorporate religious elements in their own actions merely by taking into account the needs and interests of registered religious communities regarding the construction of buildings when adopting a position regarding these needs and interests and striving to mutually coordinate them when assessing these needs. By doing so, they also do not establish such institutional or functional connections with religious communities that would indicate that they (symbolically) identify with them. However, a different interpretation of

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with the exercise of freedom of religion. See B. Vermeulen, *ibidem*, p. 769, and the Judgment in the case *Vergos v. Greece*, dated 24 June 2004.

the contested second paragraph of Article 26 of the RFA (as alleged by the applicant), which would entail that the body drafting the spatial planning act must reach an agreement with the registered religious community on how to take into account the needs, recommendations, and interests of the latter, would be constitutionally inadmissible. Such would namely exceed the boundaries of state neutrality (which is a central component of the principle of the separation of the state and religious communities), as the registered religious community would thus indirectly co-decide on spatial planning that affects everyone.

195. The third paragraph of Article 26 of the RFA determines that the spatial planning acts determined in the second paragraph of the same Article which were in force when the RFA came into force must be amended accordingly within a reasonable time if churches and other religious communities present in the area to which these acts apply have an interest or need for such. This provision as well is not inconsistent with the principle of the separation of the state and religious communities. According to an interpretation of the second paragraph of this Article that is consistent with the Constitution and taking into account that it must be construed together with the provisions of the SPA (which, *inter alia*, determine that spatial planning is decided by the competent authorities of the state or local communities), it is clear that it is the body drafting the spatial planning act that decides whether such a need or interest of registered religious communities is founded, taking into consideration that the latter participate in such procedure.

**Review of the Admissibility of the Distinction between  
Registered and Unregistered Religious Communities  
(the second paragraph of Article 7 of the Constitution)**

196. The addressees of Article 26 of the RFA are only registered religious communities. However, this does not entail that unregistered religious communities do not have the right to the freedom to build and use religious facilities, as determined in the first paragraph of Article 26 of the RFA merely because this Article does not refer to them, nor that they do not have the right to participate in the preparation of spatial planning acts. It must be established whether unregistered religious communities have essentially similar entitlements in substance as conferred on the registered religious communities by Article 26 of the RFA on the basis of other legal provisions.
197. The right to the free profession of religion determined in the first paragraph of Article 41 of the Constitution and the freedom of activity of religious communities determined in the second paragraph of Article 7 of the Constitution include the right of individuals and religious communities to profess their religion individually or collectively in facilities that are commonly and generally accepted (traditional) for the profession of their religion and performance of religious rites. As the Constitutional Court emphasised already in Decision No. U-I-111/04, it is crucial for the exercise of the right to the free profession of religion that religious communities are allowed to construct their own buildings which correspond to their manner of religious worship, religious rites, and customs. That aspect of the

freedom to build and access religious facilities which prohibits the authorities from intervening therewith is therefore ensured to all religious communities – registered and unregistered – already by the first paragraph of Article 41 of the Constitution alone and by the principle of the freedom of activity of religious communities determined in the second paragraph of Article 7 of the Constitution. This requirement regarding the restraint of the state in relation to all (i.e. also unregistered) religious communities is demonstrated also in the first paragraph of Article 6 of the RFA, according to which the activity of a religious community is free regardless whether it is registered or active without registration.

- 198.** Religious communities – registered and unregistered – also have the possibility already under the general rules determined in the SPA to participate in planning which is in substance essentially similar to the possibility determined in the second and third paragraphs of Article 26 of the RFA. The principle of the public nature of such matters determined in Article 5 of the SPA, which requires that the competent state and municipal authorities allow individuals and population groups to express their interests and ensures the participation of all interested persons in procedures for drafting and adopting spatial planning acts and which is given concrete form in the procedural provisions of the SPA (in particular, in Articles 32 and 50) regarding the drafting and adoption of state, municipal, and regional spatial plans, is namely applicable also to religious communities. In general, the same procedure for the drafting and adoption of spatial planning acts is also applicable to the amendments to these acts (Article 18 of the SPA). This entails that unregistered religious communities can express their needs and interests and the body drafting the spatial planning act must adopt a position on such, also in the procedure for amending spatial planning acts.
- 199.** The exercise of the freedom to build of registered religious communities determined in Article 26 of the RFA as interpreted consistently with the Constitution is in essence ensured in the same manner to unregistered religious communities on the basis of the first paragraph of Article 41 of the Constitution, Article 6 of the RFA, and Articles 5, 32, and 50 of the SPA. Therefore, Article 26 of the RFA is not inconsistent with the principle of the equality of religious communities determined in the second paragraph of Article 7 of the Constitution.
- 200.** The same provisions of the SPA enable anyone, thus also “other voluntary and charitable associations and organisations active in spiritual areas”, to participate in the manner so described (as an element of the right determined in Article 44 of the Constitution). Article 26 of the RFA is not inconsistent with the general principle of equality before the law (the second paragraph of Article 14 of the Constitution) already for this reason. Therefore, with regard to the freedom to build, the Constitutional Court was not required to review whether religious communities are in an essentially similar position as one of the types of association with diverse goals, to which the applicant compares them.
- 201.** In view of the above, the Constitutional Court decided that Article 26 of the RFA is not inconsistent with the Constitution (Point 8 of the operative provisions).

## B – VIII

### Review of the Fifth Paragraph of Article 27 of the RFA

**202.** In Article 27, the RFA determines the right to state financial aid intended for the payment of the social security contributions of insured person employed by churches and other religious communities and the conditions for obtaining this right. In the fourth paragraph of this Article a reasonable proportionality between the number of the employees and the number of adherents of the registered religious community who are citizens of the Republic of Slovenia where they are also registered as permanent residents is determined as a criterion for enjoying this right. The condition of such reasonable proportionality is, in accordance with this provision, fulfilled if a ratio of at least 1,000 adherents of the registered religious community to one employee is established. The challenged fifth paragraph of Article 27 of the RFA in addition determines that the condition of a reasonable proportionality between the number of employees of a religious community and the number of adherents of a church or religious community is fulfilled also for one employee thereof if the religious community has been active in the Republic of Slovenia for at least eighty years before the RFA came into force. The applicant states that this provision is intended only for the Jewish religious community and that it therefore entails an unfounded positive discrimination at the expense of other, younger religious communities. Such allegedly violates the principle of the equality of religious communities (the second paragraph of Article 7 of the Constitution).

**203.** It follows from the Draft Proposal of the RFA<sup>70</sup> that the purpose of the benefits determined in the fifth paragraph of Article 27 of the RFA is to enable a registered religious community to receive payments that due to historical circumstances cannot demonstrate the required number of adherents determined in the third paragraph of Article 27 of the RFA, but can demonstrate at least eighty years of activity in the territory of the Republic of Slovenia before the RFA came into force. It is expressly stated that this provision will enable the Jewish community to receive payment of the social security contributions for their employee. In this regard, the Government stated in its opinion on the applicant's request, *inter alia*, that this provision, by maintaining the Holocaust in our conscience, can help to maintain the Jewish culture in Slovenia.

**204.** The fifth paragraph of Article 27 of the RFA is written in a general and neutral manner for all the registered religious communities that correspond to the abstract definition of the factual circumstances. However, the legislative preparatory materials clearly show that the intention of the legislature was to ensure a more favourable position for a particular religious community, that is, the Jewish community. The Government has confirmed such intention in its opinion and the National Assembly in its response does not mention this issue. In view of this, the Constitutional Court has found that the challenged regulation – even though it is written in a general manner – differentiates between religious communities in order to give preference to the Jewish community. Such differentiation of the legislature is there-

<sup>70</sup> Gazette of the National Assembly, No. 26/06, p. 58.

fore based on religion, which is a personal circumstance (as determined in the first paragraph of Article 14 of the Constitution).

- 205.** The principle of the equality of religious communities determined in the second paragraph of Article 7 of the Constitution must be, as already stated, interpreted in connection with the first paragraph of Article 14 of the Constitution (which prohibits discrimination on the basis of personal circumstances when exercising a human right or fundamental freedom) and in connection with the second paragraph of the same Article (which states that all are equal before the law). In order to review whether the legislature's differentiation of the Jewish community in relation to other registered religious communities is consistent with the Constitution, it is first necessary to determine whether the state financial aid intended for the payment of social security contributions in respect of which the legislature differentiates on the basis of religion entails the exercise of a human right. Namely, if different treatment based on religion relates to the exercise of a human right, its conformity with the Constitution must be reviewed according to the strict test of proportionality, as required by the first paragraph of Article 14 of the Constitution. If, however, it is established that the legislature differently regulated an issue that does not entail the exercise of a human right on the basis of religion, such is constitutionally admissible if it does not violate the general principle of equality before the law determined in the second paragraph of Article 14 of the Constitution.
- 206.** Just as such applies to the funding of registered religious communities due to their general benefits to society, this human right (determined in the first paragraph of Article 41 of the Constitution) also does not require that registered religious communities be given state financial aid intended for the payment of the social security contributions of their employees. Such entails that the contested provision does not differentiate between the Jewish community and other registered religious communities regarding the exercise of a human right, but regarding the regulation of additional benefits, namely the encouraging activities of the state. In so doing, the legislature is constitutionally bound by the prohibition on arbitrary, unreasonable differentiation between those religious communities that can obtain additional benefits and those that cannot qualify for them (in accordance with the principle of the equality of religious communities determined in the second paragraph of Article 7 of the Constitution as a particular expression of the general principle of equality before the law determined in the second paragraph of Article 14 of the Constitution). In the case at hand, this entails that the Constitutional Court had to determine what the reason is for the different treatment of the Jewish community in comparison to other registered religious communities in relation to state financial aid for the payment of the social security contributions of the employees of religious communities, and then review whether this reason is sound and derives from the nature of the matter.
- 207.** It follows from the legislative preparatory materials and the opinion of the Government that the key factor for differentiation is the historical fact of the Holocaust during the period of World War II that gravely affected Jews, also on the territory of Slovenia.

208. The historian Dr Andrej Pančur, from the *Inštitut za novejšo zgodovino* [Institute of Contemporary History], states that before World War II, around 1,000 Jews lived on the territory of Slovenia, almost half of them in Prekmurje. He states that in the Auschwitz concentration camp 1771 people from Slovenia were killed, a quarter of whom were Jews. Eighty-five percent of the Jews from Prekmurje therefore did not survive the Holocaust.<sup>71</sup> In the 2002 census in Slovenia, 99 persons identified themselves as adherents of Judaism.<sup>72</sup> The horror of the Holocaust genocide deeply and gravely affected the Jewish population also in Slovenia. It led to its near disappearance from Slovene territory. That the legislature took into account this extreme crime against humanity and its implications as a differentiating reason for the Jewish community to not need to fulfil the condition regarding the number of adherents when applying for financial aid in respect of one employee is therefore reasonable and justified due to the nature of the matter. In view of this, the fifth paragraph of Article 27 of the RFA is not inconsistent with the Constitution (Point 9 of the operative provisions).

## B – IX

### Review of the Regulation of the Competent Authority (Articles 30 and 32 of the RFA)

209. The applicant is of the opinion that Articles 30 and 32 of the RFA are inconsistent with Article 2 of the Constitution because they do not clearly enough determine which body is competent to perform the duties determined in the RFA. It allegedly does not follow clearly from the RFA that such is the Office of the Republic of Slovenia for Religious Communities. Regarding such, the applicant further states that the Office is a executive government agency, which allegedly cannot perform administrative tasks and that therefore the RFA is inconsistent also with the first paragraph of Article 120 of the Constitution.
210. In Article 30 of the RFA the tasks carried out by “the competent body” are determined and one of the powers of this body (i.e. the competences of the minor offence authority) is determined separately in Article 32 of the RFA.

71 A. Pančur: *Da se genocidna dejanja ne bi ponovila* [That the Genocide Acts Would Not Be Repeated], available at [http://www.zrss.si/doc/ZGO\\_Holokavst-Svobodna%20misel%202009.doc](http://www.zrss.si/doc/ZGO_Holokavst-Svobodna%20misel%202009.doc) (accessed on 7 October 2009). Similar conclusions follow from the data in the studies of the victims of World War II in Slovenia collected by the *Inštitut za novejšo zgodovino* [Institute of Contemporary History], i.e. that during World War II 550 Jews were killed on Slovene territory, 394 of them (166 men and 228 women) in the Auschwitz concentration camp. After the German occupation of Hungary in the spring of 1944, from Murska Sobota District alone, 394 Jews were moved to this concentration camp and only 25 survived. In the Jewish community of Lendava, there were 132 victims of the Holocaust, only 23 Jews from Lendava survived the war. Cited from D. Hančič and R. Podberšič, *Žrtve nacionalsocializma in boljševizma med slovenskimi Judi* [Victims of National Socialism and Bolshevism among Slovene Jews], available at: [http://www.zrss.si/doc/ZGO\\_%C5%BDRTVE%20NACIZ-MA%20MED%20SLOVENSKIMI%20JUDI.doc](http://www.zrss.si/doc/ZGO_%C5%BDRTVE%20NACIZ-MA%20MED%20SLOVENSKIMI%20JUDI.doc) (accessed on 5 October 2009).

72 Available at: [http://www.stat.si/popis2002/si/rezultati/rezultati\\_red.asp?ter=SLO&st=8](http://www.stat.si/popis2002/si/rezultati/rezultati_red.asp?ter=SLO&st=8) (as accessed on 7 October 2009). The number of Jews in terms of ethnic origin is unknown, but is certainly higher than the cited number of adherents of Judaism.

- 211.** The applicant's complaint is unfounded. It is indeed true that it does not follow clearly from the RFA which body exercises the competences determined in this Act as the body is referred to only as "the competent body". However, the transitional and final provisions make it clear that the duties determined in the RFA are exercised by the Office. The sixth paragraph of Article 33 of the RFA thus determines that all churches and other religious communities which on the date the Act was to come into force were not recorded in the register of religious communities kept by the Office and established on the basis of the Decision on the Establishment of the Office of the Government of the Republic of Slovenia for Religious Communities, can register on the basis of this Act. As it can be established from the statutory provisions which body is competent to perform the duties determined in the Act, the RFA is not inconsistent with the requirement that regulations be clear and precise as determined in Article 2 of the Constitution, nor with the first paragraph of Article 120 of the Constitution regarding the legality of the organisation of the state administration, which determines that the state administration is bound by law when determining its own organisation.<sup>73</sup> The applicant argues the unconstitutionality of these provisions of the RFA also by stating that the Office is a executive government agency, which are not established to perform administrative tasks. However, these allegations cannot justify why the challenged statutory provisions are inconsistent with the first paragraph of Article 120 of the Constitution in view of the fact that it is possible to determine from the RFA which the competent body is and what the substance of its competences entails. The Decision that is the target of the substance of the applicant's complaints, however, is not challenged by the applicant.
- 212.** In view of the above, Articles 30 and 32 of the RFA are not inconsistent with either Article 2 of the Constitution or the first paragraph of Article 120 of the Constitution (Point 10 of the operative provisions).

### C

- 213.** The Constitutional Court reached this decision on the basis of Articles 21 and 43 of the CCA, composed of: Jože Tratnik, President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. Points 1, 2, 3, 6, 8, 9, and 10 of the operative provisions were adopted unanimously. Points 4 and 5 of the operative provisions were adopted by five votes against four; judges Klampfer, Pogačar, Deisinger, and Mozetič voted against. Point 7 of the operative provisions was adopted by six votes against three; judges Krisper Kramberger, Petrič, and Tratnik voted against. Judges Krisper Kramberger and Mozetič submitted partly concurring and partly dissenting opinions.

*Jože Tratnik*  
*President*

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<sup>73</sup> The ordinary courts also interpret the Act in the same manner; see the standpoint in the Judgment of the Administrative Court No. U 1524/2007, dated 17 June 2008, according to which "[...] also under the new statutory regulation the Office is the state body that performs the duties of the authority competent for religious communities determined in the RFA, as follows also from the Decision on the establishment of the Office [...]"

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**PARTIALLY CONCURRING AND PARTIALLY DISSENTING OPINION  
OF JUDGE MAG. MOZETIČ, JOINED IN THE PARTIALLY DISSENTING  
PART BY JUDGE DR DEISINGER**

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1. I voted for Point 1 of the operative provisions of the cited Decision, which abrogates with suspended effect for a period of time the first paragraph of Article 13 and the first and fifth items of Article 14 of the Religious Freedom Act (RFA), because I agree with the standpoint that due to their rigorousness these provisions inadmissibly interfere with the right of religious communities to acquire a legal personality as an integral part of the freedom of establishment determined in the first paragraph of Article 41 in conjunction with the second paragraph of Article 42 of the Constitution. I cannot agree, however, with the greater part of the reasoning that refers to this point of the operative provisions (B – III), as it is unnecessary to a large degree and also misleading.
2. The standpoint expressed in Paragraphs 114 and 116 of the reasoning of the Decision is not problematic.<sup>1</sup> All in all, the RFA follows such a constitutional starting point. The first paragraph of Article 6 expressly determines that the activities of churches and other religious communities are free regardless whether they are registered or active without being registered. The RFA also ensures religious communities that they can organise themselves in such a legal form that allows for their greatest possible autonomy and enables them to acquire a legal personality upon registration. I therefore believe that pondering whether the organisation meets the mentioned constitutional starting point on the basis of the Associations Act (AA-1) is redundant,

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1 “114. This registration or another form of acquiring a legal personality is not a precondition for the establishment and activity of religious communities. Religious communities can be active in a completely informal manner and such forms of associations already enjoy constitutional protection. However, the Constitutional Court has already stated (Paragraph 94 of the reasoning) that the constitutionally protected freedom of activity of religious community obliges the state to establish a mechanism for religious communities that wish to do so to acquire a legal personality. This is required by the collective aspect of the human right to freedom of conscience determined in the first paragraph of Article 41 of the Constitution, understood in the light of the second paragraph of Article 42 of the Constitution, which guarantees the right to freedom of association. In this regard, the second paragraph of Article 42 of the Constitution substantively codetermines the first paragraph of Article 41 of the Constitution.”

“116. The Constitutional Court deems that religious association is not just exercise of the general constitutionally guaranteed right to freedom of association (the second paragraph of Article 42 of the Constitution), but is also an exercise of the right to freedom of religion determined in the first paragraph of Article 41 of the Constitution. The freedom of activity of religious communities derives already from the human right to freedom of conscience, and in particular their autonomy is determined as a fundamental constitutional principle also in the second paragraph of Article 7 of the Constitution. This entails that the requirement to provide such legal forms of religious communities that allow for the greatest possible autonomy of religious communities in the exercise of religious freedom follows from the first paragraph of Article 41 in conjunction with the second paragraph of Article 42 of the Constitution and from the second paragraph of Article 7 of the Constitution. This essentially entails the requirement that the legal order must in principle respect the autonomous internal structure of a religious community and recognise legal personality to it as such.”

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since the legislature provided for a special type of organisation and did not prohibit religious communities from organising themselves also on the basis of the AA-1. Therefore, the last sentence of Paragraph 120 of the reasoning is somewhat unclear, as it can also be understood to mean that religious communities must not register (be organised) on the basis of the AA-1. Such understanding is wrong. It would be inconsistent with the Constitution, however, if the legislature had not regulated a specific legal form for religious communities by an act.

3. In addition, I think that the reason for the established unconstitutionality of the challenged statutory provisions determining the conditions for registration is not clear enough from Paragraphs 123 to 126 of the reasoning. Is the reason that the legislature also makes the exercise of human rights and fundamental freedoms that belong to individuals and religious communities regardless of registration conditional upon registration, or is the reason in the fact that the conditions for registration are too difficult (too demanding) and therefore as such inadmissibly interfere with this human right? I myself believe that the RFA does not make the exercise of the right to freedom of religion or the freedom of activity of religious communities conditional upon their registration; on the contrary, as I stated in the preceding paragraph, in the first paragraph of Article 6 it explicitly determines that the activities of religious communities are free regardless whether they are registered or not. I opine, however, that the conditions determined by the Act for registration are clearly too demanding and as such constitute an inadmissible interference with this human right. My vote for Point 1 of the operative provisions is based on this standpoint.
4. Although I voted against Point 4 of the operative provisions, I agree almost entirely (except in some details) with the starting points of the constitutional review (B – II). I voted against because I am convinced that the constitutional starting points described in the Decision cannot lead to the conclusion that the challenged provisions listed in Point 4 of the operative provisions are inconsistent with the Constitution, i.e. with the principle of the separation of the state and religious communities therein. Thus the (majority) Decision of the Constitutional Court states in Paragraph 146 of the reasoning: “The preference of the legislature [*As an aside, who is the legislature? It is the representative of the people, elected in a universal election. Thus, it is the representative of all the citizens regardless of their beliefs.*] regarding (financial) support for the exercise of the religious life of individuals may therefore only reach the border delineated by the principle of the separation of the state and religious communities, in particular by the guarantee of state neutrality. It may not reach the point where the provision of support would entail (even symbolic) identification of the state with religion or religious communities. **It is precisely the manner (the modality or the form) of the provision of such support that may lead to a qualitative leap:** financial support which is acceptable from the perspective of the principle of the separation of the state and religious communities may result due to the state providing such in a **manner** entailing a constitutionally unacceptable connection of the mentioned categories [emphasised by Mozetič]. In the view of the Constitutional Court, one of the possible forms of supportive cooperation regard-

ing religious spiritual care in prisons and public hospitals, which, although beyond the requirements of the first paragraph of Article 41 of the Constitution, is still constitutionally admissible, is the provision of monetary recompense to religious communities for the work performed by their priests in providing religious spiritual care to adherents in prisons and public hospitals. In such a case, the state is actually and symbolically – in the eyes of third parties – removed enough from the religious activities of priests, and for such their religion and religious community remain the primary authority when offering religious spiritual care.”

5. I agree that the guarantee of state neutrality requires that the state must not identify itself with religion or religious communities, nor with other beliefs. However, the standpoint regarding the “qualitative leap” in which a certain manner (form) of provision of otherwise constitutionally admissible support may lead to constitutionally inadmissible support is in my opinion unconvincing. I opine that any manner (form) of support could be constitutionally inadmissible if the state identified itself with a particular religion, religious community, or other belief (e.g. atheism). Consequently, the manner (form) itself cannot lead to a violation of the principle of state neutrality. The manner, form, modality of ensuring the exercise of a certain human right, or, if you prefer, the “preference of the legislature”, is more an issue of the appropriateness of a certain regulation, the issue whether the exercise of a constitutional right can be regulated in another, perhaps even more appropriate manner. Therefore, the fact that the state ensures the exercise of human rights in one way or another, including the employment of priests or other representatives of religious communities, cannot in itself be inconsistent with the principle of the separation of church and state or even imply that the state identifies itself with a particular religious community. The arguments (allegations) that by employing priests or other representative of a religious community for the provision of religious spiritual care in hospitals, prisons, and other social welfare institutions, the state identifies itself with this religious community, and this is due to the fact that “a public official symbolises the state to some extent” and that therefore the employment of priests “in the body of the state symbolises that the state itself, by means of its apparatus, directly provides religious spiritual care in these institutions and hospitals” and that such entails “symbolic identification with religion and religious communities and by this the negation of neutrality” are not convincing.
6. Similarly, the standpoint that already by employing a priest the state communicates to non-adherents and the adherents of other religions that it identifies itself with this religious community, or at least can create in them such an impression or even communicates to them that it “puts the adherents of another religion or non-adherents in the position of a less favoured member of the community” is also not convincing. In my opinion, the message is different and is a necessary and positive one in this state which has its origins in the Socialist Federal Republic of Yugoslavia (SFRY), which the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia established did not function as a state governed by the rule of law and that within it human rights were grossly violated. And it is the right to religious freedom that was grossly and systematically violated in the SFRY, the right

to profess religion publicly was even often persecuted and religious members of the community justifiably and often had the impression (but not just the impression) that they were a less favoured member of the community. Consequently, such a regulation can also be understood as the message that all members of this community, even those with a certain or other religion or belief, are equally favoured and that the state takes the first sentence of Article 5 of the Constitution – in its own territory, the state shall protect human rights and fundamental freedoms – seriously.

*Mag. Miroslav Mozetič*

*Dr Mitja Deisinger*

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**PARTIALLY CONCURRING AND PARTIALLY DISSENTING OPINION  
OF JUDGE MAG. KRISPER KRAMBERGER**

1. The request for a review of the constitutionality of the Religious Freedom Act (RFA) was submitted by the National Council, which was granted privileged access to the Constitutional Court by the legislature in the third indent of the first paragraph of Article 23a of the Constitutional Court Act (CCA). The Constitutional Court adopted the position that it can be justifiably expected from such an applicant that its requests are expertly and qualitatively reasoned, however the request at issue does not fulfil these criteria. Therefore, the Constitutional Court decided to review, with regard to constitutional law, only those allegations that fulfil these criteria.<sup>1</sup>
2. I did not fully agree with this method of review of the Constitutional Court, but I remained in the minority. By approaching the review of the request in such manner that it only extracted the sufficiently expertly reasoned allegations, while omitting a review of the allegations of the applicant for which the sense was clear enough, in my opinion the Constitutional Court inadvertently created new or preserved certain existing unconstitutionality. Such starting point entails that the decision of the majority, despite the fact that all the allegations of the applicant are summarised in its reasoning,<sup>2</sup> and despite the comprehensive theoretical approach to the interpretation of Articles 7 and 41 of the Constitution and also of Article 14 of the Constitution in conjunction with the two mentioned Articles,<sup>3</sup> cannot be construed as a decision by which all (or a majority of) the unconstitutionality alleged by the request are established or remedied.
3. Due to these reasons, my separate opinion is partially concurring and partially dissenting.

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1 See Paragraphs 71, 72, and 73 of the reasoning.

2 Up to Paragraph 44 of the reasoning.

3 Up to Paragraph 110 of the reasoning; by quoting a substantial amount of literature, the hitherto case law of the Constitutional Court and of the ECtHR, and a number of standpoints that are not related with the constitutional law review of individual Articles of the RFA. As *obiter dicta*, these reasons may become an obstacle to a subsequent constitutional review of the RFA.

4. An equilibrium between the rights guaranteed by the Constitution to the religious communities is difficult to achieve. This is particularly true for the right to equality, as in this context the rights determined in the second paragraph of Article 7, Article 41, and Article 14 of the Constitution intersect. The Constitutional Court devotes a great deal of space in the reasoning to this right on the level of a principle,<sup>4</sup> however, it does not complete the review to the end regarding individual Articles of the RFA. The foundation of the interrelationship between the mentioned provisions should be a clear connection between these provisions, which ensure an individual – in the framework of expressing his religious adherence, of religious communities that make this possible for him, and of the broader aspects of state activities – complete equality regardless of such personal circumstance. The equality of individuals regarding the free expression of religion determined in Article 41 of the Constitution is ensured in accordance with the first paragraph of Article 14 of the Constitution, therefore it is admissible to interfere with this right only under the conditions determined in the third paragraph of Article 15 of the Constitution and in accordance with the so-called strict test of proportionality. It is exactly this requirement of a strict review of equality that is expressed in the second paragraph of Article 7, insofar as it refers to religious communities that enable an individual, and as far as they enable an individual, to express his religion - that is, with regard to their religious activities. As far as it refers to activities that transcend the framework of religion and the profession of religion, such are performed by the religious communities in accordance with the principle of equality before the law determined in the second paragraph of Article 14 of the Constitution under the same conditions both in relation to other religious communities and to other entities that may perform activities in the public interest (e.g. education, social activities, etc.). It is exactly these relationships between the cited articles of the Constitution that prohibit, therefore, the state from providing any religious community with a more favourable position as far as religious activities are concerned, whereas these provisions enable religious communities to act freely and equally, because such constitutes the collective expression of the exercise of the religious freedom of each individual.
5. These are the reasons I voted for Point 1 of the operative provisions.
6. The [state] funding of religious communities shows most apparently whether the legislature ensured such equality. I agree with the majority that Article 20 of the LSRCA and the third paragraph of Article 29 of the RFA are consistent with the Constitution and I voted for Point 3 of the operative provisions. I am also for the most part convinced with the reasons set out in section B – IV of the Decision. In particular, in my opinion the connection between these two Articles and Article 5 of the RFA adequately is explained in Paragraph 129 of the reasoning. This refers to [state] funding due to the generally beneficial purpose [of such communities],

4 See in particular Paragraphs 108, 109, and 110 of the reasoning of the decision, and also Paragraphs 95, 98, 99, and 102.

as determined in Article 5 of the RFA. The Constitutional Court states that there are two elements that must be fulfilled at the same time. The first is spiritual, the second cultural, educational, didactic, philanthropic, charitable, and other activities in the scope of the social state. The Constitutional Court particularly emphasises in Paragraph 130 of the reasoning that funding religious communities is not an obligation of the state. It also states that the state may provide financial support to religious communities while respecting the equality of religious communities, if this is not contrary to the principle of the separation of the state and religious communities.

7. It is exactly the principle of the separation of the state and religious communities that separates religious spiritual care (religious activity) from other generally beneficial activities performed by religious communities. Therefore, this principle is violated if the state employs a religious official, as is specifically determined in the Act in the third and fourth paragraph of Article 24 and the second paragraph of Article 25. The Constitutional Court abrogated these provisions in Point 4 of the operative provisions.<sup>5</sup> I agree with such decision and I voted for it. However, the provision of that part of the third paragraph of Article 24, which in addition to employment also ensures that different remuneration is provided for work performed remains unclear. If such refers only to religious spiritual care, also this part of the provision is unconstitutional, which is not included in the operative part of the Decision, and I do not agree with the reasoning.<sup>6</sup> In accordance with the first paragraph of Article 7 of the Constitution, the core of the separation of the state and religious communities is that the state does not pay religious communities to provide services connected to religious activities. Payment for such services entails that the state also directly encourages the activities of a certain religious community with public funds and by state aid it enables such to secure a peculiar privileged position that it should not enjoy in a modern secular state. Whether such payment is given to the religious community directly or indirectly in the form of employing priests to perform such tasks is of secondary importance.
8. In addition, it must be emphasised that it is questionable also from the point of view of the religious communities themselves if the performance of religious activities is understood as some sort of a commercial service that is carried out only in the event of payment for its performance. This is in particular true if for the performance of such the state must pay with public funds. The fundamental starting point must remain the conceptual interpretation of the Constitution that the religious activities of the religious communities are carried out for the adherents of such religious communities regardless whether the state pays for them. Therefore, it cannot be considered that such funding is a part of the (admissible) positive obligations of the state resulting from Article 41 of the Constitution.

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5 In relation to employing priests in prisons, hospitals, and social welfare institutions providing institutional care.

6 Paragraph 146 of the reasoning of the Decision.

9. For these reasons I also voted against Point 7 of the operative provisions, in which the Constitutional Court found that Articles 22 and 23 of the RFA are not inconsistent with the Constitution even to the extent to which regarding funding religious spiritual care in the Army they refer to the regulations of military service and national defence (Article 22) and to which regarding the Police they refer to the regulations issued by the Minister of the Interior (Article 23). The applicant in particular pointed out the violation of Articles 87 and 120 of the Constitution, as a law should determine “the organisation and conditions” for the exercise of the right determined in Articles 22 and 23.<sup>7</sup> The third paragraph of Article 52 of the Defence Act namely leaves the regulation of this issue to the Minister of Defence, who issued the Rules on the Organisation of Religious Spiritual Care [in the military].<sup>8</sup> It is determined in Article 3 of these Rules that such care is organised by the Chaplaincy of the Slovene Armed Forces, headed by the chief military chaplain. The military personnel in this chaplaincy consist of the chief chaplain, the deputy chief chaplain, the assistant to the chief chaplain, a military chaplain, and a pastoral assistant, in accordance with the regulations on employment in the Armed Forces of the Republic of Slovenia.<sup>9</sup> This issue is regulated similarly also by the Rules on the Organisation and the Manner of Provision of Religious Spiritual Care in the Police.<sup>10</sup> In accordance with Article 3 of these Rules, religious care is organised by an employee of the General Police Directorate (first paragraph). A detailed description of the duties and obligations of such employee of the General Police Directorate is determined in the act on the internal organisation and classification of job positions (third paragraph). Such, also in this instance, entails the employment of religious officials in the Police.
10. By such decision, the Constitution created an unequal position of two categories of subjects for which there is no sound reason. This part of the two provisions should also be abrogated. Since the operative provision is a uniform one and refers to the text of the Article as a whole, I voted against Point 7 of the operative provisions as a whole, although the text of the cited Articles, inasmuch as they ensure the right to religious spiritual care, are in themselves consistent with the Constitution. However, the freedom of religious spiritual care of these subjects follows clearly also from other provisions of the RFA, such that the special regulation determined in Articles 22 and 23 is, in my opinion, intended only for referral to the special regulation of the Army and Police and consequently to the funding of religious activities (as well).
11. However, I do agree with the regulation stemming from the provisions on the social state determined in Article 2 of the Constitution that religious communities can apply for the right to financial support from the state for the payment of the social security contributions of religious officials for whom such is their only occupation. And yet even at this point the legislature fails to respect the principle of equality.

7 Paragraph 41 of the request.

8 Official Gazette of the Republic of Slovenia, No. 58/03 - the Rules.

9 Similar provisions are contained in the Agreement between the Slovene Bishops' Conference and the Government of the Republic of Slovenia on Spiritual Care for Military Personnel in the Slovene Armed Forces.

10 Official Gazette of the Republic of Slovenia No. 72/07 - the Rules.

The legislature namely decided on “reasonable proportionality”, a condition which is allegedly fulfilled if a ratio of at least 1,000 adherents of the registered church or other religious community to one religious official of such is established. This entails that even the registered smaller religious communities will not have the right to the payment by the state of the social security contributions of a religious official of such community if they do not have at least 1,000 adherents. The applicant specifically alleges the unconstitutionality of this provision in Paragraph 21 of the request and in my opinion provides sufficiently clear arguments for such. The Constitutional Court did not overlook this allegation, as it did summarise the allegations from the request in Paragraph 21 of the reasoning of the Decision, but it did not review them later on. The applicant argues that such regulation constitutes illegal discrimination against smaller religious communities. Equality is allegedly violated by determining as a condition for the right to the payment of such contributions the number of adherents and not the work actually done. Therefore, I disagree with the omission of a review of the fourth paragraph of Article 27 of the RFA.

12. Furthermore, inequality is created by Article 33 of the RFA (Paragraphs 29 and 30 of the request) due to the fact that as a transitional provision it simply “runs over” the conditions determined in the other provisions of the Act. This is particularly true for the third paragraph. The regulation under the RFA therefore applies only to new religious communities, as Article 33 of the RFA allows the existing state of funding for all those that were registered with the Office of the Government of the Republic of Slovenia for Religious Communities on the day this Act came into force, regardless of its number of adherents. It is namely determined in the third paragraph of this Article that such applies “regardless of whether the church or other religious community fulfils the conditions determined in the fourth and fifth paragraphs of Article 27 of this Act, and regardless of whether such person fulfils the conditions determined in the first and second paragraph of Article 27 of this Act”.
13. I also cannot agree with the fact that the Constitutional Court in its decision does not pay any attention to the terminology of the Act, but follows the text of the Act without adding any special commentary. A legislature that wishes to respond to the requirements of Articles 41 and 7 of the Constitution must be very conscientious regarding the naming of the persons to whom it provides specific rights in relation to the performance of various religious practices. Article 7 of the RFA (“the Definitions”) determines in the second paragraph that a “religious official” is an adherent of a registered church or other religious community who in his religious community is dedicated exclusively and fully to religious-ritual, religious-educational, and religious-organisational activities in accordance with the regulations, rules, required qualifications, and powers of the supreme authority of his church or other religious community. If this is so, this designation should remain the same throughout the Act or the legislature should have explained why it used another term. Priests, monks, etc., as terms used by the legislature only in individual articles without an explanation of such (e.g. in the third and fourth paragraphs of Article 24, the second paragraph of Article 25, and the second paragraph of Article 27 of the RFA) may constitute a hidden

inequality. In paragraph 40 of the request the applicant justifiably also warns about a violation of Article 2 of the Constitution, because the Act also links to this term various rights and thereby “causes insecurity and undermines legal certainty”.<sup>11</sup>

14. Finally, allow me to also mention Article 36 of the RFA: “This Act will enter into force fifteen days after its publication in the Official Gazette of the Republic of Slovenia and it shall begin to apply three months after entering into force, except for Article 27 of this Act, which will begin to apply on 1 January 2007”. The Act was published in the Official Gazette on 16 February 2007 and began to apply on 16 May 2007. Special comment on these provisions is probably not required.
15. In view of all of the above, I think that the RFA needs to be written anew and all the rights and obligations stemming from Articles 7 and 41 of the Constitution in conjunction with Articles 2, 14, and 15 of the Constitution must be determined with complete accuracy. And of course, it should be done with such clarity that its application will be possible already by using the rules of interpretation established in legal theory and practice, as one of the fundamental requirements of the principle of a state governed by the rule of law. I agree with the applicant that the RFA is unclear, that certain provisions are contradictory, and that the Act is terminologically not harmonised. Such conclusion is clear from the mere fact that the Constitutional Court too often referred to the legislature’s preparatory materials for the adoption of the Act regarding the interpretation of individual articles.<sup>12</sup> Without such a prop certain provisions could not even be understood.<sup>13</sup> Also for these reasons I believe that the Constitutional Court should not have omitted a review of the provisions referred to in this separate opinion or it should have rejected the request. It must not be overlooked that individual articles are so interconnected that the review (abrogation or establishment) of the unconstitutionality of only some of them leads only to further lack of clarity. However, I would like to emphasise that the legislature will have a sufficient foundation in this comprehensive Decision for reflecting upon which findings of the Constitutional Court are essential regarding the adoption of an Act that is consistent with the Constitution.<sup>14</sup>

*Mag. Marija Krisper Kramberger*

U-I-92/07

15 April 2010

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- 11 It also argues that the Standard Classification of Professions does not use the term religious official, but only the occupation of religious professional (Paragraph 40 of the request). As an example, I myself wish to quote the Pension and Disability Insurance Act (Official Gazette of the Republic of Slovenia, No. 109/06), which in Article 15 under self-employed persons enumerates also priests and persons performing other religious work and in the last indent of Article 189 refers to priests, monks, nuns, or other persons in the religious community who professionally perform religious work.
  - 12 Gazette of the National Assembly, No. 26/06, in which the Proposal of the Religious Freedom Act and the reasoning of the purpose of the legislature were published.
  - 13 For example, the fifth paragraph of Article 27 of the Religious Freedom Act.
  - 14 In particular under section B – II of the Decision.

**DECISION**

At a session held on 15 January 1998 in proceedings to decide upon the constitutional complaint of IDZ-DDI [*Istrski Demokratski Zbor – Dieta Democratica Istriana*], after a public hearing held on 12 January 1998, the Constitutional Court

*decided as follows:*

1. Supreme Court Judgment No. U-1262/95, dated 12 September 1996, and Decision of the Ministry of the Interior No. 0001-2/1-S-28/533-95, dated 17 July 1995, are annulled.
2. The fourth paragraph of Article 3 of the Political Parties Act (Official Gazette RS, No. 62/94) is abrogated.

*Reasoning***A**

1. By the Decision dated 17 July 1995, the Ministry of the Interior (hereinafter referred to as the Ministry) rejected the complainant's application for registration in the register of political parties. By its Judgment dated 12 September 1996, the Supreme Court rejected the complainant's lawsuit in the proceedings for the judicial review of administrative acts. The complainant believes that the challenged decision violates its right to equality before the law, its right of association, and its acquired rights. The complainant states that it had already been entered into the register of political organisations before the Political Parties Act was adopted. According to the complainant, the finding of the Supreme Court and the Ministry that a part of the party's programme was unconstitutional is unacceptable. The complainant, as a political party, is seeking redress for injustices which were inflicted upon those individuals who lived on the territory of the Slovene part of Istria during the post-war period. The complainant has fought for the recognition of the continuity of Slovene citizenship of these persons, the return of their property, and the recognition of all other rights that derive from their civic status, i.e. including the right of domicile. In

particular, the complainant asserts that its right to equality before the law has been violated because it was prevented from being registered in the register of political parties despite having already been registered as a political organisation in the same way as other parties that, in contrast, did not have any problems with registration. According to the complainant, the decisions of the Supreme Court and the Ministry resulted from an arbitrary interpretation of part of the party's programme and the completely unsubstantiated designation of this programme as unconstitutional. The complainant argues that the right of association has been violated because the party's completely legitimate programme, i.e. the fight to redress injustices suffered by persons who lived on the territory of the Slovene part of Istria, is being misinterpreted to its detriment, thereby preventing a group of people from organising themselves in an association in order to seek redress of injustices. In its opinion, the acquired rights of the complainant have been violated by denying it, as a political organisation, the right to continuity and the right to exist as a political group.

2. In its Decision, the registration authority (the Ministry) found that the complainant's political programme, according to which "the party will endeavour to secure immigration priority for those persons who have left Istria as political or economic emigrants, and their descendants and relatives ...", is contrary to the provisions of Article 12 of the International Covenant on Civil and Political Rights and Article 32 of the Constitution regarding freedom of movement and the freedom to choose one's place of residence. Furthermore, it was established in the Decision that the provision of Article 14 of the Constitution on equality before the law irrespective of personal circumstances had also been violated. Therefore, on the basis of Articles 13 and 33 of the Political Parties Act (Official Gazette RS, No. 62/94 – hereinafter referred to as the PPA), the registration authority rejected the complainant's application for registration in the register of political parties on the grounds that it had not fulfilled the condition of the fourth paragraph of Article 3 of the PPA. In the reasoning of the Decision, the party's name (i.e. simply the translation of the name of a foreign party) was also found to be inconsistent with the law, and that amendments to the party's Statute were not adopted by the authorised body (i.e. not by the party's assembly or its council but, in fact, by its extended executive committee). These statements were, however, written as findings in relation to the party's complaints against an alleged delay in the proceedings, and not as justification for refusing the application for the registration.
3. In the challenged Judgment, the Supreme Court stated that the principal condition for registering a party in the register is determined by the fourth paragraph of Article 3 of the PPA. If this condition is not fulfilled, the registration authority must refuse the application for the registration. Moreover, according to the Supreme Court, the programme objective that accords immigration priority to the former inhabitants of a specific part of the country (Istria), or their descendants and relatives, is unconstitutional because it placed these persons in an unequal (i.e. privileged) position when compared to persons who had emigrated from other areas of Slovenia for the same (political or economic) reasons. However, Article 14 of the Constitution does not permit such different treatment. In the opinion of the Supreme Court, it is irrelevant to the refusal

of the application for registration in the register of political parties whether such programme objective is also contrary to any other constitutional right, or whether, in addition to a party's intention to be engaged in unconstitutional activities, there exists any additional statutory restriction on registering the political party in the register.

4. By the Order dated 2 December 1996, the panel of the Constitutional Court accepted the constitutional complaint for consideration and, upon the complainant's petition, issued a temporary injunction according to which no legal consequences resulting from the final decision on the refusal of registration should arise for the complainant until a final decision is adopted.
5. In the proceedings to decide on the constitutional complaint, acting on the basis of the second paragraph of Article 59 in conjunction with Article 30 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the Constitutional Court initiated proceedings for a review of the constitutionality of the provisions of the PPA, on which the challenged Judgment is based.
6. Regarding the disputed statutory regulation, the Secretariat of the National Assembly for Legislation and Legal Matters explains that the relevant subject matter is regulated by the PPA and the CCA. The former determines the rules that apply in the establishment and registration procedures, and the latter regulates the manner in which the unconstitutionality of the acts and activities of political parties is determined after a party has already begun to operate as such. The Secretariat deems that Article 160 of the Constitution and Article 68 of the CCA do not grant the Constitutional Court direct power to decide in the procedure for establishing a political party before the party is registered. Such was the reason for the refusal of the initial proposal for a regulation, according to which the registration authority had the authority to suspend a registration procedure and request a Constitutional Court decision whenever it deemed that the submitted acts of a political party were unconstitutional. The Secretariat further deems that the registration procedure includes regular procedural rules for exercising rights or freedoms and, at the same time, respects the judicial protection of human rights and freedoms and the right to a legal remedy. In the Secretariat's opinion, the provision of the fourth paragraph of Article 3 of the PPA is somewhat imprecise in the part that reads as follows: "or it nevertheless intends to operate unconstitutionally, or has already been operating in such way". However, it is allegedly only possible to understand this provision in the context of the whole text, and, in the opinion of the Secretariat, it is therefore not unconstitutional.

## **B – I**

7. Owing to the painful historical experience endured by Slovene society during the former totalitarian system, the historical mission of the Slovene Constitution also included its fundamental aim – to prevent any attempt to restore a totalitarian regime. The right of free association constitutes one of the fundamental constitutional values that must be afforded particular respect and consistently implemented. This is even more important due to the fact that, after assuming power in 1945, the communist regime fictitiously assured freedom of association, including the establishment of

political parties and their freedom to pursue their activities, on the constitutional level and also through statutory regulation; however, in reality, the communist authorities completely suppressed the activities of opposition parties through repressive measures, thereby excluding them from the political process. In its Decision Od-IUS I, 102, the Constitutional Court already established that the then government had prevented political parties from carrying out their activities after the war, and that, contrary to the legal order in force at that time, it had removed political opponents using pseudo-legal proceedings and distorted legal remedies. The prevention and suppression of the opposition was not only inconsistent with the Constitution in force at that time but also explicitly unlawful, and resulted in a permanent and severe violation of human rights and fundamental freedoms.

8. The Communist Party used the political system to deal with the bourgeois opposition and subordinate its wartime political allies. The party in power used judicial proceedings against the potential opposition. The main purpose of politically motivated proceedings was to deal with class enemies and confiscate their property. These politically motivated judicial proceedings shared many of the characteristics of show trials instigated by Stalin. Politicians viewed the courts as their “battle agency” who fought the class enemy (Zdenko Čepič *et al.*, *Ključne značilnosti slovenske politike v letih 1929 do 1955: Znanstveno poročilo* [Basic Characteristics of Slovene Politics between 1929 and 1955: A Scientific Report], Inštitut za novejšo zgodovino, Ljubljana 1995, p. 89). By March 1945, the Politburo of the Central Committee of the Communist Party of Slovenia had already decided (J. Vodušek Starič, *Prevzem oblasti* [Assuming the Power], pp. 170, 331) that it would not allow the restoration of political parties in Slovenia but would instead preserve the unity of the Liberation Front (unlike, for example, in Serbia where Grol’s Democratic Party, the Radicals, Jovanović’s Peasant Party, etc., operated). The OZNA [the Department of National Security] monitored the relationships between these politicians and the leaders of parties abroad (J. Vodušek Starič, *Prevzem oblasti*, pp. 164–169). A series of events, such as the fate of the Tito-Šubašić Agreement, electoral manipulation (manipulation of electoral registers), the resignation first of the deputy, M. Grola, and then the Minister of Foreign Affairs, I. Šubašić (*ibidem*, pp. 331, 351, 353), as well as the presence of OZNA at polling stations (*ibidem*, p. 364), all indicated that there was no future for political parties in Yugoslavia. Nevertheless, attempts were made in Ljubljana at that time to increase interparty connections and contacts with the Yugoslav opposition, with OZNA monitoring events closely – it designated smaller opposition groups by a common name: the “reaction” (*ibidem*, pp. 351–352). In order to combat the internal enemy, OZNA created a special service – Section II, which included the notorious Subsection 2, which was responsible for the fight against the interior reaction that also included the so-called remnants of bourgeois political parties (J. Pučnik, *Iz arhivov slovenske politične policije* [From the Archives of Slovene Political Police], Veda, Ljubljana 1996).<sup>1</sup> The post-war Yugoslav authorities strived

1 Among the first Slovene politicians who were charged collectively were the politicians of *Mladina JNS* [the

to prevent domestic Yugoslav and Slovene politicians from establishing contact with politicians who emigrated in 1945 or remained abroad.<sup>2</sup>

9. Immediately after the end of the Second World War, the Slovene political elite demanded that the UDV [the State Security Administration] carry out detailed monitoring of the activities of all political parties in Slovenia. After a first wave of brutal methods, the UDV began to apply significantly subtler methods: multiple interrogations, psychological pressure, threats of court action, blackmail with pressure on family members, professional colleagues, or friends, tailing, and, in particular, the denunciation among people belonging to the same group, ideology, or party, which was referred to as differentiation (J. Vodušek Starič, *Prevzem oblasti po vojni in vloga OZNE - obračun* [Assuming the Power after the War and the Role of the OZNA - Settlement of Accounts], in: *Slovenija v letu 1945, Zbornik referatov* [Slovenia in 1945, Collection of Papers], Zveza zgodovinskih društev Slovenije, 1996, pp. 93–110). In this regard, the UDV was influencing or directing activities within specific groups and, at the same time, informing its superiors and leading political fora (the Central Committee of the Slovene Communist Party, the Politburo, and the Supreme Committee of the Liberation Front) of the activities and atmosphere in the former political groups, church circles, ministries, etc. (*ibidem*, p. 96).
10. The UDBA [Translator's note: UDBA is the Serbian translation of UDV, i.e. the State Security Administration.] [the State Security Administration] and the Slovene Communist Party perceived Christian Socialism as a threat. In 1949 the UDBA carried out two reports on Christian Socialism, and began to closely monitor the activities of individuals from the Christian-Socialist group (*ibidem*, p. 100). They had been gathering information on Kocbek from 1946 onwards (*ibidem*, p. 101). In 1951, the Slovene Party leadership decided to "eliminate" the Faculty of Theology from the university. On 20 January 1952, they poured gasoline on Ljubljana's Archbishop, Anton Vovk, and set fire to him when he was on his way to Novo Mesto (*ibidem*, p. 107). At the Party's plenary meeting, in 1952, the then Minister of the Interior and a member of

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Youth section of the Yugoslav National Party], who were sentenced at the Christmas Trial in December 1945 (J. Vodušek Starič, *Prevzem oblasti*, p. 415; Vodušek Starič, *Dosje Mačkovšek* [The Mačkovšek File], pp. 15, 33, 42, 52). Before the elections to the Slovene Constitutional Assembly, connections between the Slovene opposition and the opposition-circles in Zagreb and Belgrade had been established (L. Sirc, *Med Hitlerjem in Titom* [Between Hitler and Tito]; CZ, Ljubljana 1992, pp. 253, 257–9, 269, 273); because of these attempts the Nagode-Furlan group was also put on trial in 1947 (L. Sirc, *Sodba* [The Judgment], pp. 471–505). In a series of smaller scale judicial proceedings, some leading politicians were tried, such as Dr Jože Pučnik, one of the leading politicians of the JNS, in 1946, Vinko Vrhunec (J. Vodušek Starič, *Dosje Mačkovšek*, pp. 23, 43), and others. All these proceedings were prepared by the OZNA, which also interrogated the accused (J. Vodušek Starič, *Prevzem oblasti*, p. 257).

- 2 Those were led by Dr Miha Krek, who founded the multiparty Slovene National Committee in Rome (J. Vodušek Starič, *Prevzem oblasti*, p. 342). In order to prevent these contacts, the OZNA or UDBA also kidnapped some of these politicians in Trieste or Zone A of the Free Territory of Trieste: Dr Albin Šmajd (a member of the Slovene National Committee in Rome) at the beginning of 1946 (J. Vodušek Starič, *Dosje Mačkovšek*, p. 53), Andrej Uršič in 1947 (J. Vodušek Starič, *Dosje Mačkovšek*, p. 35), and others. These individuals have never been tried; they disappeared without a trace.

the Politburo, Boris Kraigher, considered lawyers, various writers, artists, and scientists, who were considered to be Catholic (the Academy of Sciences, the University, Institutes, in particular those with a humanistic orientation), and “the espionage centre of our predominantly bourgeois emigrants in Trieste and Klagenfurt” to constitute reactionary circles, i.e. those “who represent, in my opinion, the most dangerous attempt to organise activities directed against us” (*ibidem*, p. 108). On 19 July 1952, the Slovene UDV prepared a plan of proceedings to be initiated against Dr Jakob Šolar, a member of the Slovene Academy of Sciences and Arts. They accused him of treason (*ibidem*, p. 110). The arrest was thoroughly prepared by the Committee for the Remnants of Bourgeois Parties (RBP) of the Slovene UDV. On 24 November 1952, the UDBA first arrested Dr Janez Fabijan and then, on 11 December 1952, Dr Jakob Šolar, for their alleged intention to destroy the state and the social order of the Federal People’s Republic of Yugoslavia (FPRY) (*ibidem*, p. 111). The court sentenced Dr Šolar to ten years and Dr Fabijan to six years in prison. During that time, Edvard Kocbek was relieved of all his political offices (*ibidem*, p. 113). This concluded the fight against the Christian Socialists as a political group.

## B – II

11. The right of assembly and association referred to in Article 42 of the Constitution is a fundamental human right that allows for the free expression of opinion, the formation of political will, and self-organisation. The right of association, which also encompasses the right to establish political parties and that they carry out their activities, is the starting-point of a multiparty political system, without which a free democratic society cannot exist.
12. A free democratic society is a constitutional system, which, by excluding any violence and arbitrariness, represents the social order of a state governed by the rule of law based on the self-determination of its people according to the will of the majority, freedom, and equality. In addition, at least the following key predispositions have to be included among the underlying principles of such an order: respect for human rights as determined by the Constitution, an individual’s right to life, the inviolability of personality rights, the sovereignty of the people, the separation of powers, the accountability of the Government and the lawfulness of the activities of the executive branch of power, the independence of the courts, a multiparty political system, and equal opportunities for all political parties, including the right to establish an opposition and participate in it according to the Constitution. These principles were expressed in point V of the Declaration of Independence, which was adopted by the first democratic parliament on 25 June 1991 (Official Gazette RS-I, No. 1/91).
13. A system of legally determined rules of conduct established on the basis of the aforementioned principles during the course of a long period of historical development in accordance with the democratic heritage of the European legal civilisation ensures the functioning of the free democratic system. Political freedom of opinion, expression, the formation of political will and association, which is guaranteed in various ways, leads to a multiparty system and an organised political opposition.

Free elections held at relatively short intervals guarantee that people have control over the use of power by the political majority. The government is accountable to the parliament. The implementation of the principle of the separation of powers, which ensures that the different branches of power check and balance each other, prevents an excessive concentration of power in one place within the state. Every citizen is provided a sphere of freedom of conduct through the recognition of fundamental human rights and extensive protection ensured by independent courts. The protection of the entire system is above all entrusted to the Constitutional Court.

14. As a free social order may also be jeopardised due to its openness and the fact that it guarantees various types of rights, freedoms, and influences, its protection against forces that may seriously threaten its fundamental values, fundamental order, and rules of conduct is justified. A constitutional or statutory limitation of the right to free association constitutes a very sensitive interference with fundamental constitutional freedoms, which may only be justified through the protection of the free democratic society as a whole. In this respect, a statute cannot go beyond the limitations determined by the third paragraph of Article 42 of the Constitution – i.e. for reasons of national security (if an association is acting against the constitutional order, the state's territorial integrity, and sovereignty) or public safety – or if such is necessary for the protection of the rights of others (the third paragraph of Article 15 of the Constitution).
15. The essential element of every association is a common purpose reflected in the fundamental constitutive acts of the association: a statute or programme. The constitutionality of the association's activities is assessed according to the decisions and actions of its bodies or members. When defining the concept of “unconstitutional activity” tolerance is required. It is not sufficient for an association to reject, contradict, or not recognise the constitutional order. Active operation with the intention of destroying (eliminating) the existing constitutional order is required. Mere criticism, regardless of whether it is real and substantiated, is not enough. A serious threat to the underlying principles of a free democratic society has to be established.
16. Owing to the special significance of political parties for the existence of a free democratic state, it is not possible to exclude them from political life as long as they employ legal means to fight specific regulations or even specific constitutional institutions. Such exclusion is only permitted if these parties intend to undermine the fundamental values of a free democratic constitutional state.
17. Political parties have to be guaranteed freedom of establishment, with regard to their programmes, the pursuit of their activities, and the exertion of influence on the formation of political will. The state has to guarantee the effective implementation of these predispositions; in other respects, however, it must abstain from interfering with or influencing the sphere of political parties.
18. Compared to other associations, political parties have a special position because only the Constitutional Court may decide that their activities are unconstitutional (the tenth indent of the first paragraph of Article 160 of the Constitution). This so-called parties' privilege protects the existence of a party until the Constitutional Court es-

establishes the unconstitutionality of its acts or activities. By a decision the Constitutional Court abrogates the unconstitutional act of a political party or prohibits its unconstitutional activities (the third paragraph of Article 68 of the CCA). The establishment of the unconstitutionality of acts or activities does not, however, simultaneously entail that the party must be removed from the register, i.e. prohibited from operating. Pursuant to the fourth paragraph of Article 68 of the CCA, the Constitutional Court must decide on that issue separately by a two-thirds majority vote of all judges. The first indent of the first paragraph of Article 17 of the PPA may therefore only be interpreted in such a way that a mere decision on the unconstitutionality of an act of a political party, without a special order of removal from the register, cannot constitute the basis for removing a party from the register.

19. Therefore, there is no doubt that only the Constitutional Court can decide on the prohibition of the functioning of a political party (i.e. its removal from the register), by a two-thirds majority vote of all the judges, provided it finds that the acts or activities of the party contradict the Constitution so severely that the mere abrogation of the unconstitutional act or the prohibition of the unconstitutional activity does not suffice, and it is necessary to eliminate the party from political life.
20. It is evident from the legislative procedure and the statements made by the National Assembly representative at the public hearing that the intention underlying the inclusion of the fourth paragraph of Article 3 in the PPA was primarily to prohibit the registration of political parties whose acts or activities were unconstitutional. In this way, the Act determined a substantive condition for the registration of a party, the fulfilment of which is decided on by administrative authorities.
21. An affected party has the possibility to initiate proceedings for judicial review of administrative acts and to lodge a constitutional complaint against a registration authority's decision on the refusal of the party's registration (as the petitioner did in the case at issue). In constitutional complaint proceedings, if paragraph 4 of Article 3 of the PPA were still applicable, the Constitutional Court could also have considered whether the acts and activities of the association were really unconstitutional. However, the question that was raised is whether it is constitutionally admissible for the administrative authority to decide on the fulfilment of such substantive constitutional conditions for the establishment of a political party, as such could entail that the establishment and activities of a party were unacceptably dependent on the prior authorisation of an administrative authority.
22. A registered party cannot be impeded in its political activities until the Constitutional Court, which is the only authority that can prohibit a party's activities, reaches a decision on such. As a result, administrative interference with the existence of a political party is excluded, regardless of how hostile its actions are with regard to a free democratic constitutional order. In this way, the activities of each party are allowed to continue until their unconstitutionality is established in order to guarantee the highest possible degree of political freedom. A party still operates within the framework of the constitutionally admissible tolerance, even if it propagates aims that are hostile (contrary) to the Constitution in a constitutionally admissible manner.

23. The refusal to register a party due to the alleged unconstitutionality of its acts or its allegedly intended unconstitutional activities is, in terms of its content, the same as the prohibition of the functioning of the party. If an administrative authority establishes the unconstitutionality of a party's act, it must refuse its registration. However, the Constitutional Court has the possibility to initially only abrogate a specific unconstitutional act without also ordering, at the same time, the removal of the party from the register. Furthermore, the Constitutional Court may prohibit a specific activity of the party without ordering, at the same time, its removal from the register.
24. According to the PPA, a political party is an association of individuals organised with the intention of realising their political aims. It is left to the founders of an association to define it as a political party. Yet the PPA prescribes the mandatory registration of political parties. In this way, a political party becomes a legal entity, and only from the day of its registration may it commence operation as a political party (the first paragraph of Article 3 and the third paragraph of Article 12 of the PPA). This entails that a political party is created on the day of its establishment but that it cannot operate as such until its registration, except in proceedings and activities intended for its registration (including its active standing to lodge legal remedies against a decision to refuse registration). The registration authority issues an administrative decision on the registration of a party in the register (the first paragraph of Article 12 and Article 13 of the PPA). In such a decision, the registration authority may merely establish whether a political party has met the formal conditions prescribed by statute; however, only the Constitutional Court may decide on the fulfilment of the substantive conditions, i.e. on the conformity of the acts and activities of a political party with the Constitution.
25. As a political party comes into existence before its registration, the Constitutional Court may, pursuant to Article 68 of the CCA, also decide on the unconstitutionality of its acts during the period between its establishment and its registration, provided a petition or request for such a review is submitted (e.g. a request by the Government as an applicant who may submit a request pursuant to Article 23 of the CCA). If the party had already been entered into the register by the time the Constitutional Court decision was reached, the Constitutional Court could also have ordered its removal from the register on the basis of the fourth paragraph of Article 68 of the CCA; however, only if it had found that the party's acts exceed the limits of constitutionally admissible tolerance (particularly in the sense of Paragraphs 14, 15 and 22) to the extent that the mere abrogation of the unconstitutional parts of these acts would not suffice, and that the party has to be eliminated immediately from the legal order. If by the time the Constitutional Court reached a decision the party had not yet been registered, in such an extreme case, the Constitutional Court could have applied the fourth paragraph of Article 68 of the CCA *mutatis mutandis* to prohibit its registration, instead of ordering its removal from the register. Certainly, such extreme cases in which the contents of a party's acts would require the immediate use of the strictest measure possible are less probable. In all other cases, the Constitutional Court has the possibility, pursuant to the third paragraph of Article 68 of the CCA, to merely

abrogate a party's unconstitutional acts or their parts, and to prohibit the party, perhaps even in advance, from operating in such a direction as indicated by these acts, especially if the party or its members had already unlawfully begun such activities before its registration, when their party activities were still prohibited.

26. In the case at issue, the registration authority had decided on the question of the constitutionality of the programme as a condition for registration on the basis of the statutory provision that the Constitutional Court abrogated as unconstitutional. Therefore, the challenged individual acts had to be annulled. The registration authority will have to decide again on the application of the complainant for registration in the register of political parties, without taking into account the abrogated fourth paragraph of Article 3 of the PPA. It will be allowed to review only the fulfilment of the formal statutory conditions and, if it finds that these are fulfilled, it will have to register the party.
27. It was necessary to abrogate the fourth paragraph Article 3 of the PPA in the part where this statutory provision refers to the administrative registration of a party, on the grounds that have been explained in the previous paragraphs of this reasoning. If only the words "must not be registered (either)" were abrogated in this statutory provision, the prohibition would still apply to the activities of parties which "advocate violence, the subversion of the constitutional order, or request the separation of some part of Slovenia, or intend to operate or have already been operating unconstitutionally." This statutory prohibition had to be abrogated because the first part thereof was not consistent with the hierarchy of values as established by the Constitution and the second part thereof was not sufficiently clear and could, with such a sensitive topic, easily lead to an erroneous understanding of which political parties' activities are really prohibited, which political parties' activities may be prohibited by the Constitutional Court with a decision pursuant to Article 68 of the CCA, or which activities would cause the Constitutional Court to order the removal of a party from the register. More specifically, a party, as has already been stated above in Paragraph 22, "operates within the framework of the constitutionally admissible tolerance, even if it propagates aims that are hostile (contrary) to the Constitution in a constitutional manner." Article 63 of the Constitution is the only constitutional provision that explicitly declares incitement to national, racial, religious, or other discrimination, and the inflaming of national, racial, religious, or other hatred or intolerance, and incitement to violence and war, as unconstitutional; however the aforementioned statutory provision has chosen to only include "the propagation of violence" in its wording and, instead of the other unconstitutional activities determined by Article 63 of the Constitution, refers to the propagation of the subversion of the constitutional order and the request for the secession of part of Slovenia, and therefore the first part of the statutory provision is inconsistent with the constitutional hierarchy of values. The issue of whether, on the basis of the aforementioned criteria, some other political party activity of this kind could be and should be prohibited as unconstitutional or whether the removal of the political party from the register should be ordered due to such activity, is to be, according to the Constitution, decided on by the Constitutional Court in concrete cases. For these reasons, the fourth paragraph of Article 3 of the PPA had to be abrogated in its entirety.

28. In the opinion of the Supreme Court the part of the IDZ programme that reads as follows: “The party will endeavour to secure immigration priority to those persons who had left Istria as political or economic emigrants, as well as their descendants and relatives” is contrary to Article 14 of the Constitution, because it places some individuals (i.e. political and economic emigrants from the territory of Istria) in an unequal, i.e. privileged, position when compared to persons who had emigrated from other parts of Slovenia for political or economic reasons.
29. The prohibition of the functioning of the complainant as a political party is therefore based on the assessment that a single sentence from its programme declaration was unconstitutional. Such a decision is unacceptable from the start. If such a programme provision were found to be unconstitutional, the Constitutional Court could also merely abrogate it, without ordering, at the same time, the removal of the party from the register. The review of the unconstitutionality of the acts and activities of the complainant as a political party is not a subject of review in these constitutional complaint proceedings; however, it could be the subject of review in the proceedings pursuant to Article 68 of the CCA, if and when they are initiated.

### C

30. The Constitutional Court adopted this Decision on the basis of Article 59 of the CCA, composed of: Dr Lovro Šturm, President, and Judges Dr Miroslava Geč-Korošec, Dr Peter Jambreč, Dr Tone Jerovšek, Mag. Matevž Krivic, Mag. Janez Snoj, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. The decision was reached unanimously. Judges Krivic, Šturm, and Ude submitted concurring opinions.

*Dr Lovro Šturm*  
*President*

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### CONCURRING OPINION OF JUDGE DR UDE

1. I voted for the operative provisions of the Decision because I believe that the fourth paragraph of Article 3 of the Political Parties Act is contrary to the Constitution insofar as it allows an administrative authority to review the constitutionality of the acts and activities of a political party during the procedure for the party’s registration. Only a decision of the Constitutional Court may abrogate an unconstitutional act of a political party or prohibit a party’s unconstitutional activities. For this reason, it was also necessary to annul Supreme Court of the Republic of Slovenia Judgment No. U 1262/95 and Decision of the Ministry of the Interior No. 0001-2/1-S-28/533-95. I do not agree, however, with the reasoning of the Decision, especially the reasoning in Paragraphs 7 to 10, under Section B – I of the Decision. The point of this reasoning is to establish that after the Second World War the regime in power introduced a one-party system.

2. I believe that this part of the reasoning is irrelevant for the Decision of the Constitutional Court because it has no direct link with its content. Such a part of the reasoning is also rare in constitutional decisions, and it would be difficult to find a decision of another constitutional court that would consider issues that were not the subject of discussion and decision-making to such an extent and through such extensive citing of historical sources. In fact, none of the participants to the proceedings referred to a historical evaluation of the period after the Second World War or the regime in power at that time, which was undoubtedly undemocratic and responsible for gradually establishing a one-party system. The mentioned part of the Decision is solely the contribution of the Constitutional Court to the discussion on the issue of the registration of political parties. As such, it is also part of a general heated discussion that is currently ongoing in our country. It could also be viewed as support to a specific political group.

In relation to this issue, it would, in my opinion, have been possible to only briefly establish that the registration of political parties and the assessment of the unconstitutionality of their acts and activities is a particularly sensitive issue in our legal system, because the experiences of Slovene society with political association in the past, i.e. before the Second World War and thereafter, were not democratic.

3. A more comprehensive discussion of these historical experiences might also have been relevant if there was a risk in our society that the state authorities would attempt to introduce a one-party system by prohibiting some parties or not registering them in the register of political parties. It is evident that none of the participants in the proceedings considered that risk. Why should historical evaluations then be included in the reasoning of the judicial decision?
4. If, however, history is being discussed, the experiences of Slovene society with the pre-war political system were also not democratic. In the Kingdom of Yugoslavia in 1920, an *Obznana* [public pronouncement] was adopted that prohibited the workers' party. In 1931, the Electoral Act prohibited the activities of political groups that did not enjoy royal support. Article 13 of the Constitution of the Kingdom of Yugoslavia from 1931 prohibited association "on the basis of religion, tribal affiliation, or region for party and political purposes". Even this short sentence demonstrates that the political regime of the time did not even recognise nations, since it referred to tribal affiliation, and that the *Istrski demokratski zbor – Dieta Democratica Istriana* would not have had any possibilities to be registered or to pursue its activities. There was therefore no democratic system in place before the Second World War. To continuously emphasise the undemocratic nature of the political system after the Second World War, however, gives the impression that it was only after the war that the system departed from the previously democratic order and practice.

Dr Lojze Ude

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### CONCURRING OPINION OF JUDGE KRIVIC

I fully agree with the Decision and its reasoning. I am of the opinion, however, that only the first paragraph, i.e. Paragraph 7 of Section B – I belongs in the reasoning of this decision. The content of the three paragraphs that follow (i.e. Paragraphs 8–10) is certainly very interesting and substantively indisputable (e.g. how the post-war authorities suppressed political parties and, in general, any opposition); however, it does not actually serve any purpose in the reasoning of the present decision (i.e. that only the Constitutional Court, and not the Ministry of the Interior, may currently prohibit political parties in Slovenia by a two-thirds majority). In my opinion, this could be likened to the situation where in a present-day decision on the protection of the constitutional right to private property it would be deemed necessary to first describe in the reasoning the historical details and interesting facts regarding how and through what means the post-war government destroyed private property, on the grounds that the person, to whom the decision is addressed, and other readers of the decision will only then sufficiently understand why it is necessary in the present-day political and constitutional system to consistently protect private property as a vital important constitutional right. In my opinion, such a “educational” approach underestimates the citizens and is, as such, questionable. A legal and historical analysis of the circumstances during and after the war was naturally necessary and had its purpose in cases where the Constitutional Court has decided and is still deciding on the constitutionality of various regulations applicable during and after the war, insofar as these are still currently applicable; in cases, such as the case at issue, however, an excessive description of the historical reminiscences may entirely needlessly raise various doubts as to the motives of such writing and I believe, as I have already stated, that this serves no purpose and is superfluous. In the case at issue it was found that the refusal to register the *Istrski demokratski zbor* [Istrian Democratic Assembly] on the grounds that one sentence in their programme was allegedly unconstitutional, was in fact unconstitutional in itself. In my opinion, it is entirely inappropriate to compare the conduct of the present day Ministry of the Interior – that was not a reflection of its political arbitrariness and systematic suppression of the opposition, but primarily a consequence of the implementation of an unconstitutional statutory provision – with the post-war brutality and suppression of the entire opposition, which was illegal even pursuant to the then applicable regulations. As a result, the attention is at least partially diverted from what is really important in this Decision in relation to the present time and circumstances.

*Matevž Krivic*

The operative provisions and the reasoning have my full support. This case represents one of the most important decisions of the Constitutional Court in recent years, as it is the first time that the Constitutional Court has exhaustively and convincingly defined the constitutional premises and principles of a free democratic society and the freedom of political association. The reasoning under Section B – I, Paragraphs 7 to 10, is apt, as it is the first Constitutional Court decision of its kind. Like other European constitutional courts, some of which have been adopting positions on previous totalitarian systems even decades since their removal (e.g. the German, Italian, Spanish, Czech, and Bulgarian constitutional courts), the Constitutional Court has done the same in specific cases on numerous occasions. Allow me to draw attention to the decisions in the following cases:

- OdlUS I 102, Official Gazette RS, No. 61/92 (U-I-69/92) – Peter Urbanc and others (Citizenship Act)
- OdlUS III 33, Official Gazette RS, No. 23/94 (U-I-6/93) – Public prosecutor of the Republic of Slovenia (Decree on Military Courts)
- OdlUS III 123, Official Gazette RS, No. 73/94 (U-I-172/94) – Supreme Court (the Petan case)
- OdlUS IV 20, Official Gazette RS, No. 18/95 (U-I-158/94) – the Deputies of the National Assembly
- OdlUS IV 54, Official Gazette RS, No. 41/95 (U-I-344/94) – Sergij V. Majhen (the Notary Act)
- OdlUS V, 31, Official Gazette RS, No. 24/96 (U-I-67/94) – Public prosecutor of the Republic of Slovenia (the Combating Illicit Trafficking, Illicit Speculation, and Economic Sabotage Act)
- OdlUS V 174, Official Gazette RS, No. 1/97 (U-I-107/96) – The Roman Catholic Diocese of Maribor and others, and in recent Decision U-I-25/95, dated 27 November 1997, Official Gazette RS, No. 5/98, dated 23 January 1998 – Miha Brejc and others (the Criminal Procedure Act – police tapping)

If there were no such decisions of the Constitutional Court in the Slovene constitutional and legal space (these decisions were published in the Official Gazette RS and in the annual official collected decisions and orders of the Constitutional Court), a casual observer might get the impression as though there had been no communist totalitarian system in Slovenia and that a democratic system had been in place after 1945, with individual excesses, which were more or less severe, and human rights violations.

In this separate opinion, I focus on some constitutional, comparative, and historical facts and positions in order to completely clarify the issues discussed in Decision No. Up-301/96.

Historical reasons that are based on the empirical generalisations from some countries of the European continent in the 20<sup>th</sup> century are of great importance for the restrictions imposed on intolerant groups or undemocratic political parties. Experi-

ence suggests that democracy can be overthrown, as was the case when Hitler came to power in the 1930s. Constitutional safeguards against political parties, the programmes and activities of which are contrary to the principles of a free democratic society, were incorporated into the constitutional system by the Federal Republic of Germany (second paragraph of Article 21 of the Basic Law from 1949) and the Italian Republic (Transitional Provision XII of the Italian Constitution from 1947). The Portuguese Republic imposed similar safeguards based on historical experiences (Article 46 of the Constitution from 1976).

*Two typical cases on the prohibition of political parties and their activities from German constitutional case law*

The German Federal Constitutional Court prohibited the Socialist Reich Party (*Sozialistische Reichspartei* – SRP), which was the national socialist party, and the German Communist Party (*Kommunistische Partei Deutschlands* – KPD) on 23 October 1952 and 17 August 1956, respectively. Both of the mentioned judgments on the prohibition of the right and left extremist political parties gave the German Federal Constitutional Court an opportunity to define the concept of a free democratic society and the concept of democracy in general. This definition namely allowed the German Constitutional Court to substantiate the key reasons for prohibiting their activities. In the judgment on the prohibition of the national socialist party SRP (BVerfGE, 2, 1 *et seq.*), the German Constitutional Court established the principle that, owing to the special significance of political parties for the existence of a free democratic state, their exclusion from political life is not possible if they employ legal means to fight specific regulations or even specific constitutional institutions. Such exclusion is only permitted if these parties intend to undermine the fundamental values of a free and democratic constitutional state. These fundamental values are integral to a free democratic fundamental system, which deems the constitution to be the foundation of the entire state system. The fundamental constitutional order is linked with values. It is the antithesis of a totalitarian state that, as the only authority, rejects human dignity, freedom, and equality. The claim made by the SRP's representative that there may be different free democratic constitutional orders is erroneous. That claim is based on the confusion between the concept of a free democratic fundamental system and the forms in which it can be implemented within a democratic state. In this way, a free democratic fundamental system can be determined as a system that, by excluding any violence and oppression, represents the social order of a state governed by the rule of law and based on the self-determination of the people in accordance with the will of the majority, freedom, and equality.

The judgment on the prohibition of the German communist party, the KPD (BVerfGE, 5, 85 *et seq.*), refers to this premise. A free democracy rejects the notion that historical development is determined by a final objective which can be scientifically determined, and that, as a result, this final objective also determines specific community decisions as steps towards the realisation of this objective. It is rather the people themselves who determine their own development through community decisions, and these decisions

can only be made if absolute freedom is guaranteed. This further requires that every community member is free to be involved in the creation of community decisions. The freedom of community decision-making is only possible if community decisions (i.e., in practice, majority decisions) leave the greatest possible degree of freedom, in terms of content, to each individual. As to what must be done in practice is determined through a continuous dialogue between all the people and groups who participate in shaping social life. This struggle escalates into a fight for political power in the state. However, it is not limited only to such. During this fight for power, an underlying process of clarification and transformation of these ideas is taking place. The decisions that are finally adopted will certainly correspond more to the wishes and interests of one or another group or social class; the purpose of the regulation and the possibility of free agreement between all real and intellectual forces provided thereby serves to balance and protect everyone's interests. The welfare of the community cannot therefore be equated *a priori* with the interests and wishes of a particular class; in principle, it strives to promote the welfare of all the citizens more or less equally and an approximately equal distribution of burdens. The ideal of democratic society exists in the form of a state governed by the rule of law.

A state system with a free democracy must therefore be systematically oriented towards continuous adjustment and improvement and social compromise; in particular, it must prevent the abuse of power. Its function is essentially to leave all doors open for every possible solution and to always enforce the will of the actual majority of people regarding specific decisions; however, it must also force the majority to substantiate its decision before all the people, i.e. even before the minority. This is the purpose of the guiding principles of such a system as well as its specific institutions. The will of the majority is established on a case-by-case basis in a carefully regulated procedure. However, the majority's decision is preceded by demands made by the minority that are followed by open discussion, for which a free democratic system provides, desires, and supports several different possibilities, and offers such to the members of the minority with as little risk as possible. Since the majority can always change, minority opinions have a real chance of becoming relevant. As a result, it is possible to positively come to terms with the critique of what currently exists, i.e. dissatisfaction with people, institutions, and specific decisions, to a significant extent within the existing system. The finally adopted majority decision is always linked to the critique of the minority in the opposition and its creative cooperation and intellectual work. Since there exist different, even drastic, ways of expressing discontent and critique, the awareness of the majority that its position is fragile also forces it to consider, in principle, the interests of the minority.

The functioning of such system, its ability to ultimately ensure the community's welfare in a manner that is acceptable to all, is ensured through a system of rules of the game that was legally determined in advance and established on the basis of the described principles over a long period of historical development.

Political freedom of opinion, expression, and association, which is guaranteed in various ways, leads to a multiparty system and organised political opposition. Free

elections held at relatively short intervals guarantee that the people have control over the use of power by the political majority. The government is accountable to the parliament. The implementation of the principle of the separation of powers, which ensures that the different branches of power check and balance each other, prevents an excessive concentration of power in one place within the state. The same aim is also pursued by the transfer of state functions from the central leadership to institutions which, in principle, assume responsibility for the performance of such functions. Citizens are guaranteed freedom not only by being granted fundamental rights but also by the extensive protection of their rights through independent courts. The protection of the entire system is above all entrusted to the constitutional court. As such a system, which is open and guarantees all kinds of freedoms and influence, is thus also a threatened system, it protects itself from forces which, in essence, deny its highest principles and ground rules, by way of provisions such as Articles 18 and 21 of the German Basic Law.

The dictatorship of the proletariat is not compatible with a free and democratic social order. Both government systems are mutually exclusive. In the KPD's opinion, a proletarian dictatorship represents the highest form of democracy. Such assessment depends on the conceptualisation and criteria applied. Evidently, the form of democracy that was to exist as a proletarian dictatorship is not a democracy in accordance with the principles of the German Basic Law (BVerfGE 5, 195–196). The aim of the KPD is to establish a form of government that is not compatible with the free democratic system of the Basic Law (BVerfGE 5, 207). Furthermore, the KPD is, in principle, hostile to a free and democratic system, which follows from a substantive and structural analysis of Marxism and Leninism (BVerfGE 5, 298 *et seq.*). Convincing evidence of the genuine opinion of the KPD regarding a free and democratic system is evident from the party's declarations, especially its political style and party tactics, which are clear from its agitation and propaganda (BVerfGE 5, 380).

These declaratory statements are an expression of planned incitement with the aim of overthrowing and eliminating the constitutional order. Their purpose is to undermine the trust of the people in fundamental values, and it is crucial that they do not entail individual aberrations but a systematic whole (BVerfGE 5, 384).

The prohibition of the German communist party was explicitly not extended to other dependent organisations, supporter movements, or organisations, which served as a disguise for its activities. More specifically, these organisations were not political parties and therefore did not enjoy the special protection afforded to political parties in the context of freedom of association. If such organisations violated the constitutional order, it would be necessary to apply the constitutional and statutory regulation of associations (BVerfGE 5, 392).

In its judgment on the prohibition of the SRP, the Federal Constitutional Court also found that the requirement for democracy within parties prohibits a party from organising itself in a way that would substantially deviate from democratic principles. If a party deviates from the fundamental principles of the democratic internal organisation of parties to such extent that it is only possible to interpret the deviation as the expres-

sion of an action that is, in principle, hostile to democracy, then a state of facts arises (especially, if other circumstances also confirm such orientation of a party) that justifies the establishment of the unconstitutionality and prohibition of a political party.

In its decision on the prohibition of both extremist political parties, the German Federal Constitutional Court ordered the dissolution of the neo-national-socialist party (SRP) as well as the communist party (KPD) and the confiscation of their assets for the benefit of the state. Furthermore, the court declared a prohibition on establishing any substitute organisations for both extremist political parties or any further activities of the existing organisations as substitute organisations. The judgment in the SRP case also resulted in the termination of their deputies' terms of office in the federal and state assemblies.

*A retrospective on the prohibition of the Communist Party of Yugoslavia*

In the context of the above-mentioned constitutional premises and as a comparison with the prohibition of extremist political parties in the Federal Republic of Germany, an examination of the prohibition of the former Communist Party of Yugoslavia [hereinafter referred to as the CPY] could be interesting. The question that we are interested in is whether this prohibition withstands assessment in terms of the modern notion of the admissibility, or rather the inadmissibility, of political parties and their activities, in particular from the viewpoint of the present constitutional order and principles of a free and democratic social order.

On 29 December 1929 by the special public pronouncement No. 29282, known as the *Obznana*, the Council of Ministers of the Kingdom of Serbs, Croats, and Slovenes prohibited communist propaganda and communist organisations, their publications and any other document produced by those organisations that could breach the peace in and outside the state, or justify and approve of dictatorship, revolution or any violence. It further prohibited any calls for a general strike and demonstrations of a disruptive or disturbing nature during the Constitutional Assembly in Belgrade. In particular, it imposed the requirement for all weapons to be registered, announced drastic measures against riots designed to overthrow the government, determined that foreigners involved in riots would be deported, and dismissed all officials from the state services who spread Bolshevik propaganda in the country. Even students who were communists were deprived of financial support for their studies. A prohibition of any press that would diminish the importance of these measures was issued separately. The Council of Ministers explained that the then state authorities learned from reliable sources that disruptive elements were preparing an attack on the state, its structure, and social order with the intention to destroy – following the example of the Russian Bolsheviks – all its laws, institutions, and public and private goods, and to establish a proletarian dictatorship. It also referred to the then turbulent situation in the state and abroad, especially in Hungary and Czechoslovakia. Due to the announced general strike, which was to begin at the same time as the Constitutional Assembly in Belgrade and develop into a general riot, bloody revolution, and collapse, the Council of Ministers decided to act immediately.

Seven months later, on 1 August 1921, the Yugoslav Assembly adopted the Act of the Kingdom of Serbs, Croats, and Slovenes on the Protection of Public Security and State Order (*Službene Novine Kraljevine SHS* [Official Gazette of the Kingdom of the Serbs, Croats, and Slovenes], No. 170 A, dated 3 August 1921). This Act represented the confirmation of the public pronouncement, dated 29 December 1920; the provisions of this Act were similar to the pronouncement in terms of content, but were legally more structured. It also included elements of criminal sanctions and determined criminal offences. It reiterated that members of communist parties were prohibited from being employed in public services; however, those affected could appeal against the minister's decision before the State Council. Types of conduct that constituted criminal offences under this Act were tried by judges in regular state courts on the basis of the judges' free assessment of the evidence.

Owing to the very long time that has passed since then, it is difficult to assess the situation that existed when the CPY was prohibited. In any event, this is primarily the task of the historical sciences. It is easier to carry out a constitutional review of the acts of the Communist Party of Yugoslavia. Article 1 of the Statute of the Communist Party of Yugoslavia from 1920 defined the aim of the CPY. It expressly stated that the aim of the CPY, as a member of the Communist International, was to completely liberate the working class and all the suppressed social classes of working people through uncompromising class struggle and the dictatorship of the proletariat and by establishing a communist order to replace its capitalist equivalent. Article 2 provided, *inter alia*, that members of the CPY could only be those persons that accepted the programme, statute, and tactics of the party and undertake by a written declaration that they will be active within the party (The Second Congress of the CPY, p. 118).

The first chapter of the CPY Programme stated that the ultimate objective of all the activities of the international communist party, as a wilful expression of the class movement, is social revolution, i.e. to replace capitalist relations of production with their communist equivalents.

The proletarian dictatorship, i.e. establishing the political power of the proletariat required to enable it to break any resistance of the exploiters, was a prerequisite for this social revolution to occur. The international communist party, the assignment of which was to train the proletariat to carry out its historic mission, had to organise the proletariat into an independent political party against all bourgeois parties, and lead and direct its class struggle (The Second Congress of the CPY, pp. 74–76).

The second chapter of the CPY Programme emphasised that a new era had arrived: the downfall of capitalism and an era of global proletarian revolution.

The second chapter concluded with the finding that the proletariat had to persist in constant economic and political struggle in order to be finally liberated, with all means available that were to be determined with regard to the social situation and the balance of forces between the proletariat and the bourgeoisie. The third chapter emphasised that the CPY, as a member of the Communist International, accepted the requirements of the world revolution as the starting point of its struggle. Therefore, it was the duty of the working class of the entire world to establish a socialist order. To this end, the

proletariat had to first destroy the political power of the bourgeoisie and take political power into its own hands. The takeover of state power could not be confined solely to the replacement of persons holding power in the state authorities; it had to also entail the destruction of the alien state apparatus and the replacement of the bourgeois courts with proletarian courts, the destruction of the reactionary bureaucracy, and the establishment of new proletarian authorities. The victory of the proletariat was guaranteed by the organisation of the proletarian authority. It was supposed to lead to a complete breakdown of the bourgeois apparatus and the establishment of the state proletarian apparatus (see The Second Congress of the CPY, pp. 78–80).

The fourth chapter of the CPY Programme emphasised that the lessons learned from the Russian Revolution demonstrated that it is only possible to establish a new social order through a social war against those in power.

Through their dictatorship, the supporters of the new order were to ensure the transition from the old to the new order. Socialism could not be established by means of bourgeois democracy or parliamentary institutions, but only through workers' councils. It was therefore the duty of the CPY to lead, through words and actions, the proletariat towards a revolutionary battle until the dictatorship of the proletariat was established in the form of Soviet republics (see The Second Congress of the CPY, p. 81). The sixth chapter of the CPY Programme expressly stated that it was fighting for the Soviet Republic, i.e. for the transition to socialism by means of a dictatorship of the proletariat in the form of Soviet power.

The Soviet republic was to give all powers – legislative, executive, and judicial – to the working people, who were organised in workers', military, and farmers' councils. Immediately after assuming political power, the proletariat was to confiscate the means of production from the bourgeoisie (see The Second Congress of the CPY, p. 84).

The seventh chapter of the CPY Programme determined that the revolutionary era required the proletariat to use methods of fighting that engage large proletarian masses in major fights and incidents that end in open conflict with the bourgeois state. The idea that socialism could be introduced by making a compromise with the bourgeoisie was utopian. The working class was to actively participate in the movement and lead and conclude its struggle with the activation of the masses, subordinating, in the critical stage of the revolution according to the movement of the masses, all other means that are primarily used for class struggle during peaceful times. Representative bodies were also included among these (subordinated) means. In principle, the CPY opposed parliamentarism as a way to impose class rule. After the takeover of political power, parliamentarism was no longer possible (see The Second Congress of the CPY, pp. 85–86).

A comparative analysis reveals that a political party with such a programme, or a similar one, that operated in the same manner as the former CPY would be inconsistent with the principles of a free and democratic social system that is very tolerant towards the freedom of activities of political parties, and with the democratic European constitutional systems that exist today. In this light, the prohibition of the CPY was also justified at that time. Specific measures resulting from the prohibition of the

CPY, which were directed against certain students and government officials, would now be deemed excessive and unacceptable in terms of constitutional democracy. However, such does not affect the principled finding that the prohibition of the CPY as a party and all its activities was constitutionally admissible.

*Dr Lovro Šturm*

SOURCES:

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- Cristian TOMUSCHAT in: MACDONALD, *et al.*: The European System for the Protection of Human Rights, M. Nijhoff, 1993, pp. 493–513.

Decision No. **U-I-106/95**, dated 25 January 1996

### DECISION

At a session held on 25 January 1996, in proceedings to review constitutionality and legality initiated upon the request of the deputies to the National Assembly, Dr Ciril Ribičič and others, the Constitutional Court

*decided as follows:*

1. The provision of the second paragraph of Article 93 of the National Assembly Elections Act (Official Gazette RS, No. 44/92) is not inconsistent with the Constitution.
2. The National Assembly Elections Act is inconsistent with the Constitution, insofar as it does not determine the mandatory publication of the lists of candidates determined by the second paragraph of Article 93 in public media and at polling stations. The National Assembly must remedy this inconsistency with the Constitution no later than by 1 August 1996.

*Reasoning:*

#### A

1. The applicants (31 deputies) believe that the provision of the second paragraph of Article 93 of The National Assembly Elections Act (Official Gazette RS, No. 44/92 – hereinafter referred to as the NAEA) is not consistent with the principles of equality before the law (Article 14 of the Constitution), constitutional democracy (Articles 1 and 3 of the Constitution), and equal suffrage (Articles 43 and 80 of the Constitution) because it enables political parties to submit lists of candidates (the so-called national lists of candidates) on the basis of which, in the opinion of the applicants, certain candidates are given priority over other candidates of the same party who achieved a better result in the elections. In the applicants' opinion, the Act violates the principle of equality before the law as it gives priority to some candidates over others. The Act violates the principle of equal suffrage as it places in an unequal position voters who voted for candidates who did not become deputies solely due to the option of political parties to decide that candidates from their national lists become deputies. In the

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applicants' opinion, this further violates the principles of a democratic constitutional order since the national lists result in a composition of the National Assembly that is inconsistent with the will of the voters. On the basis of these arguments, the applicants propose that the Constitutional Court abrogate the provision of the second paragraph of Article 93 of the NAEA.

2. The Secretariat for Legislation and Legal Affairs of the National Assembly replied to the request. The reply states that the Committee of the National Assembly for Domestic Policy and Justice considered the request and various opinions regarding the constitutionality of the challenged provision were expressed during a session thereof. Some of the participants at the session considered that the challenged provision is not inconsistent with the Constitution. On the other hand, it was "assessed" during the session that "the submitted request or petition was significant and a review of the constitutionality of the provisions of the law regulating elections should be conducted." Finally, the Committee supported the position that the Secretariat for Legislation and Legal Affairs adopted regarding the request. The Secretariat is of the opinion that the challenged regulation does not violate the principle of equal suffrage, which entails that the vote of each voter has the same value or that all voters have the same chance to influence the election result. In the opinion of the Secretariat for Legislation and Legal Affairs, the challenged provision does not entail a violation of the equality of the candidates for deputies, as "in democracies that are conceptualised and implemented in a contemporary manner" political parties "decisively influence the election results." With regard to a violation of the constitutional principle that Slovenia is a democratic republic, the reply states that it is necessary to consider thoroughly whether the provision of the second paragraph of Article 93 of the NAEA can be included, without reservation, among the provisions that fulfil the requirement that the will of the people as expressed at elections is to the greatest extent possible also expressed by the result of the elections. On the basis of Article 300 of the Rules of Procedure of the National Assembly, the Committee on Domestic Policy and Justice adopted a resolution whereby it petitioned the National Assembly to amend the NAEA, in order to ensure that at elections voters can consult the parties' national lists of candidates or at least lists of ten to fifteen candidates in the order in which they appear on the parties' national lists of candidates.

## **B**

3. The Constitutional Court already decided on the constitutionality of the second paragraph of Article 93 of the NAEA in Case No. U-I-36/94 (OdIUS III, 23). In that Case, the petition was rejected because it was manifestly unfounded. However, in the request at issue, the applicants presented new reasons substantiating the alleged inconsistency of the second paragraph of Article 83 of the NAEA with the Constitution, therefore the Constitutional Court considered the request and decided it on its merits.
4. Article 1 of the Constitution declares that Slovenia is a democratic republic. The principle of constitutional democracy entails that public affairs are decided by the citizens directly (by referendum) or indirectly (through elected representatives). The

provision of Article 43 of the Constitution, which guarantees citizens universal and equal suffrage, is important for the exercise of indirect democracy. Article 80 of the Constitution determines that deputies to the National Assembly are elected by universal, equal, direct, and secret voting. The Constitution does not regulate the electoral system, but establishes the fundamental principles that the legislature is bound to observe when adopting electoral legislation. In accordance with the provision of the fourth paragraph of Article 80 of the Constitution, the regulation of the electoral system is entrusted to the National Assembly. The National Assembly adopts the law regulating the electoral system by a two-thirds majority vote of all deputies. The legislature enjoys a certain degree of freedom when regulating the electoral system. It may choose any kind of electoral system, provided that in doing so it remains within the constitutionally determined framework – the electoral system must be in accordance with the principles of universal and equal suffrage, and the principles of free, universal, equal, direct, and secret voting.

5. The system of elections to the National Assembly is regulated by the NAEA. The legislature chose an electoral system of proportional representation and modified it in such a manner that the state is divided into 8 constituencies, whereby not all candidates [of each party or list of candidates] (up to 11) are listed on the ballot papers in every constituency, but in each of the 11 districts within a constituency only one candidate can be listed by a party or list. By voting for that candidate, the voter primarily votes for the list that this candidate represents in that electoral district – and in the event that this list wins only one seat in the entire constituency, the candidate from that specific electoral district will only be awarded this seat if, of all 11 (or fewer) candidates from the list, that candidate received the highest share (percentage) of votes in the election. The votes cast for individual candidates from a list of candidates are namely added up on the level of the constituency. Some of the seats are allocated on the level of the constituency to the lists that attained the electoral quotient (at least once). The seats thus obtained by the lists of candidates are allocated to the individual candidates according to their order with regard to the proportion of votes they received in the electoral districts. The remaining seats are allocated on the level of the state in relation to the sums of the remaining votes of lists of candidates of the same party, namely according to the so-called d'Hondt system of calculation. The seats obtained by the individual lists of candidates are allocated to the candidates who were the most successful in the constituencies in which the list of candidates achieved the highest relative remainder of the votes. The challenged second paragraph of Article 93 of the NAEA, however, determines an exception to this rule that provides that the proposers of the lists can compose a list that determines the order of the candidates from the lists of candidates submitted in the individual constituencies. Up to one half of the seats that are allocated to the lists of candidates on the basis of the distribution at the state level can be allocated to candidates from the national list of candidates.
6. The challenged provision of the Act does not violate the principles of equal, universal, and direct elections. Moreover, contrary to the applicants' opinion, it does not violate the principle of equality before the law and constitutional democracy.

7. The principle of constitutional democracy (Article 1 of the Constitution) entails that power is vested in the people, who exercise this power directly or indirectly – through their representatives (Article 3 of the Constitution). With regard to indirect (representative) democracy in the field of elections, the principles of free, universal, and equal suffrage, as well as the principles of direct and secret elections derive from the principle of democracy. If the electoral system is in accordance with the cited principles and the law guarantees periodic elections and the equal opportunity of all political parties in the state to compete at elections, elections are democratic.
8. The principle of universal suffrage entails that the active and passive right to vote are not restricted by conditions that are based on an individual's personal circumstances (religious belief, sex, property, ideology, profession, education, etc.). However, some exceptions are admissible (e.g. the conditions of citizenship and a minimum age). By the provision of Article 7 of the NAEA, according to which every citizen who has attained the age of 18 by the day of the elections and has not been declared legally incompetent has the right to vote and to be elected a deputy, the legislature fully respected the principle of universal suffrage.
9. The principle of equal suffrage derives from the general principle of equality before the law, but due to its special significance it has certain particularities. The principle of equal suffrage entails that each voter has the right to cast a vote and that the vote of each voter must have the same weight with regard to the election result. In electoral systems of proportional representation, the observance of this principle can be ensured through the establishment of appropriate constituencies and the application of an appropriate method of calculation for allocating the seats. Article 2 of the NAEA determines that “deputies shall be elected according to the principle that one deputy shall be elected per an approximately equal number of inhabitants.” In accordance with Article 20, the cited principle also applies to the establishment of constituencies. The provisions of Articles 2 and 20 of the NAEA and the system of counting votes and allocating seats, according to which all votes have the same weight, satisfy the requirements of equal suffrage. The national lists can lead to deviations from the principle that the seats are awarded to eleven candidates from each constituency. However, the principle of equal suffrage does not guarantee the equal representation of individual regions within the state (i.e., in the case at issue, constituencies), but only the equal consideration of each voter's vote. If a smaller number of deputies is elected from among the candidates in some constituencies, such does not entail that the votes of the voters in such constituencies had a lesser value since they are taken into account as part of the remainder of the votes at the state level. The possibility of determining national lists does not violate the principle of the equality of active voting rights.
10. The principle of equality also includes the equality of passive voting rights (the right to stand for election). Also with regard to passive voting rights, the electoral system may not discriminate against individuals. The principle of the equality of passive voting rights is not violated by the possibility of determining national lists of candidates. The applicants allege that the NAEA allows for the possibility that, among candidates from a list, candidates who achieved poorer election results are elected in-

stead of those who achieved better election results. This allegation is not true, as the allocation of the seats to the deputies is based on the electoral success of lists of candidates, and not individual candidates. Voters in electoral districts primarily choose from among the lists and they do not have the possibility to choose from among the individual candidates from a list, therefore it is not possible to deem with certainty whether the electoral success of a candidate in an electoral district should be ascribed to the candidate's popularity or to the popularity of his or her list of candidates, i.e. the political party. The success of an individual candidate is thus connected with the success of the list of candidates and *vice versa*. Despite the complexity of the electoral system, the provisions of the NAEA are clear and unambiguous. A voter who is acquainted with the electoral system knows that by choosing a candidate, even though he or she circles the number in front of the name of the candidate on the ballot paper, he or she casts a vote for the list of candidates. As a voter's vote is primarily a vote for the list of candidates, this vote may in reality assist the electoral success of another candidate (not the one for whom the voter voted). However, this can already occur at the level of the constituency, and not necessarily at the level of the allocation of seats with regard to the remaining votes from constituencies. The situation wherein the vote of an individual voter can contribute to the electoral success of a candidate for whom the voter did not vote is not only a result of the possibility enacted by the legislature of a party or list to determine a national list of candidates (as the applicants believe), but a logical consequence of the electoral system as a whole. The principle of the equality of passive voting rights is not violated by the possibility of a party or list to determine a national list of candidates, since in accordance with the NAEA, any adult Slovene citizen with legal capacity has the right to stand for elections regardless of any personal circumstances – i.e. also including the right to appear on a national list of candidates on the basis of a political party's democratic decision.

11. The applicants' allegation that national lists of candidates result in the National Assembly having a composition that is inconsistent with the will of the voters and that thereby the principle of constitutional democracy is violated is not true. By casting a vote for a candidate a voter casts a vote for a list of candidates. It is not possible to conclude that by determining a national list of candidates a political party gains the possibility to shape the appearance of the National Assembly in disregard for the will of the electorate, as according to the electoral system in force it is not possible to ascertain the will of the voters in relation to the question of which of the candidates from the lists they wish to cast their vote for.
12. The principle of direct elections entails that voters have the right to decide on the composition of the representative body without the mediation of special electoral bodies (electoral colleges) or electors. This principle is not violated by the possibility of determining lists of candidates in which the proposers determine the order of the candidates who will be allocated the seats obtained by the list of candidates (a so-called closed list), since the voters still make the final electoral choice. The applicants' claim that due to the national lists of candidates the composition of the National Assembly is inconsistent with the expressed will of the voters thus also does not hold

true. The principle of directness is observed, provided that the structure of the list is known to the voters in advance and the list cannot be changed after the voting has been carried out. Under this condition, a voter influences the election result directly with his or her vote (without the mediation of a third party). In democratic states it is normal that political parties influence the choice of candidates. When forming closed lists, parties may, for example, positively influence the structure of the representative body by including a comparable number of men and women, members of various professions, social classes, etc.

**13.** However, in order to satisfy the requirements arising from the principle of direct elections the following conditions must be fulfilled:

- the national lists of candidates must be prepared an appropriate period of time before the day of the election;
- the national lists of candidates must be public; and
- the national lists of candidates cannot be changed subsequently.

The regulation under the NAEA fulfils the first and third conditions. In constituencies, the lists of candidates have to be submitted to the constituencies' electoral commissions no later than twenty-five days prior to the day of the elections (Article 54). The lists of candidates in accordance with the second paragraph of Article 93 (i.e. the national lists) have to be submitted to the Electoral Commission of the Republic of Slovenia within the same time limit. Subsequent changes to their composition are not allowed.

**14.** However, the NAEA does not regulate the procedure for the publication of the national lists of candidates. Mandatory publication is only prescribed for lists of candidates in constituencies and lists of candidates standing for election in individual voting districts. Article 61 of the NAEA determines that both shall be published in the public media no later than fifteen days prior to the day of the elections. The fourth paragraph of Article 64 determines that announcements of the lists of candidates standing for election have to be posted at the polling stations. The public media that are selected by the Electoral Commission of the Republic of Slovenia are obligated to publish the lists of candidates containing the information determined by the NAEA. Voters are thus informed of the composition of the lists in their own constituency, even though only the name of one candidate from each list of candidates is printed on the ballot paper. In contrast, the legislation contains no obligation to publish national lists of candidates. Consequently, voters are not guaranteed the possibility to inform themselves of the names of the candidates on these lists of candidates. The principle of direct elections is thus violated, as voters are not informed of the choice made by those who proposed the lists (i.e. political parties). Only mandatory publication of the national lists of candidates can ensure, in accordance with the principle of direct elections, that the final decision on who is voted for remains in the hands of the voters. Otherwise, a third party (a political party) comes between the voter and the person who is awarded the office of deputy, as the voter casts his or her vote without knowing what effect this will have on the result of the elections (the distribution of the seats).

15. The Constitutional Court therefore assessed that, although the institution of a national list of candidates is in principle consistent with the constitutional principles in relation to elections, these principles require the enactment of the mandatory publication of national lists of candidates (i.e. the lists of candidates in accordance with the second paragraph of Article 93) in public media and at polling stations in the same sense as such is regulated with regard to the lists of candidates in constituencies. The Court thus required the legislature to remedy this inconsistency no later than by 1 August 1996.

### C

16. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 21 and Article 48 of the Constitutional Court Act (Official Gazette RS, No. 15/94), composed of: Dr Tone Jerovšek, President, and Judges Mag. Matevž Krivic, Mag. Janez Snoj, Dr Janez Šinkovec, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. Point 1 of the operative provisions was adopted by seven votes against two. Judges Krivic and Šturm voted against. Judge Krivic submitted a dissenting opinion. The Constitutional Court adopted the Point 2 of the operative provisions unanimously.

*Dr Tone Jerovšek*  
President

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### DISSENTING OPINION OF JUDGE KRIVIC

#### I

In my opinion, the challenged provision (the second paragraph of Article 93) of the National Assembly Elections Act (the NAEA) that regulates the so-called national lists is inconsistent with the Constitution.

The institution of national lists of candidates as such may be constitutionally admissible – within the framework of an at least relatively “normal” electoral system of proportional representation as such are established elsewhere in the world – provided it does not undermine the proclaimed statutory or even constitutional principles of the electoral system in force. If in an electoral system of proportional representation the state is divided into constituencies in which more than one deputy is elected (i.e. multi-member constituencies), but the act regulating elections does not promise voters in either its principles or its operative provisions that territorial representation will also be observed in the final allocation of the seats, but, to the contrary, it clearly states that the principle of territorial representation is to a certain extent corrected by the provisions on national lists of candidates, then such a regulation probably cannot be constitutionally disputable – unless the requirement of equal territorial representation followed already from the Constitution itself. However, even if the law were not as clear as in the above hypothetical example, such would not necessarily

entail the unconstitutionality of national lists of candidates. In such an instance their constitutionality would depend on whether and to what extent the Constitutional Court deems – similarly as the German Federal Constitutional Court has done on some occasions – a statutory regulation unconstitutional, namely inconsistent with the principles of a state governed by the rule of law, also in the event of a so-called systemic inconsistency (*Systemwidrigkeit*, *Systemgerechtigkeit*, *Systemtreue*<sup>1</sup>) when statutory provisions are internally contradictory, when some of them contradict the proclaimed principles of the regulation of the field in question, or in similar cases.

Our case does not concern even the above-mentioned rather subtle question, which is quite difficult to resolve (however, due to its importance, I will return to it below in Section II), but, in addition to the fact that the provision regarding national lists of candidates (which is “hidden” in the second paragraph of Article 93) is *prima facie* inconsistent with “the principle that one deputy shall be elected per an approximately equal number of inhabitants” (Article 2 of the NAEA), which Article 20 also applies as the principle governing the establishment of constituencies, our also concerns something more than merely the question of *Systemtreue* (loyalty to the proclaimed system) in the above-mentioned sense. It not only concerns the question of whether national lists of candidates, which may be compatible with a “normal” system of proportional representation, are also compatible with a system of proportional representation that determines by statute that 11 deputies are elected in each of the eight constituencies (whereby subsequent interpretations according to which the Act only promises that in each constituency candidates for 11 deputy seats “merely” stand for election without also necessarily being elected are certainly not acceptable). This case concerns even more than that – namely the fact that the provision on national lists of candidates was included (only in the last reading of the draft act) in an electoral system whose essence is, even without this provision, incomprehensible to the average voter to such a degree that the majority of voters – as is demonstrated by numerous public reactions of both laymen and professionals – do not even understand the electoral system as being one of proportional representation, but as a system that above all enables a choice among individual candidates in (single-member) electoral districts – in accordance with the principle “one deputy is elected in each electoral district”. Many voters simply did not read or understand the explanations that such is only an appearance and that the truth is different. When they were faced with 10 or 15 names on the ballot paper in the voting booth, they chose primarily from among those names – and the majority of journalists’ comments from the elections until today also commented on the election results (and criticised the electoral system) as having enabled the election of candidates who obtained fewer votes than other candidates. All those comments thus proceeded and still continue to proceed from a premise that, while being legally incorrect, is to a large extent in line with reality and according to which voters primarily voted for individual candidates rather than for political parties.

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1 Cf. e.g. H. Meyer: *Demokratische Wahl und Wahlsystem* in: Isensee/Kirchhof: *Handbuch des Staatsrechts*, Band II, Muller, Heidelberg 1987, p. 264.

When the institution of national lists of candidates is included in such a system, which is a system of “proportional representation” already deformed beyond recognition from the perspective of the average voter so that the majority cannot even perceive it as a system of proportional representation (thereby disregarding the probably not small number of voters who do not understand the difference between systems of proportional representation and systems of majority election even in their pure forms or who are not capable of comprehending it), then in such a deformed electoral system this is no longer a subtle constitutional law question of “loyalty to the system”, but already a question of – roughly phrased – fraud against the majority of voters or – put nicely – the transparency (plainness, comprehensibility, clarity) of the electoral system. The system did not defraud the voters with regard to the composition of the parliament as regards political parties, but with regard to its composition as regards the persons elected. It promised them precisely an increased influence on the composition of parliament as regards the persons elected (the “personalisation” of elections), which was the main reason why the system of proportional representation was “camouflaged” beyond recognition through the introduction of apparently single-member electoral districts – and finally the institution of national lists of candidates was included in this context.

The question of whether, without the inclusion of national lists of candidates and despite its fundamental non-transparency, this deformed, distorted electoral system could still be deemed to be constitutionally admissible or not has not been raised and I can therefore leave it aside. Even in such a system many voters would have voted for one of the candidates in their electoral district without knowing that by doing so they actually would not be voting directly for the candidate but primarily for the entire list of candidates of his or her party in the entire constituency or the entire state – however, the number of votes cast for that particular candidate would still determine whether that candidate or someone else would be elected from among the candidates on the relevant list. The promised and expected “personalisation” of elections would be implemented at least to such an extent – however, the introduction of national lists also “cheated” those legitimate expectations of the voters for a list as regards one-half of the seats that the list won on the basis of the remainder of the votes. Instead of a party candidate who managed to secure a considerably higher number of votes for the party or list in his or her electoral district, a candidate who obtained a significantly worse result in his or her district may be elected due to the order in which the candidates appear on the national list.

As is known, the public greeted such election “results” with great dismay, criticism, and resistance. The fact that people disagree with a certain statutory regulation in itself certainly does not entail that the regulation is unconstitutional. However, the situation is somewhat different as regards the electoral system. In addition to referenda, elections are namely the only manner in which the fundamental constitutional principle that “power is vested in the people”, i.e. the principle of democracy as regards the relation between people and power (not as regards relations among state authorities), can be exercised. And if the electoral system is non-transparent,

namely confusing and incomprehensible for the people who feel “cheated” when they learn who was elected – then the Constitutional Court should also not deem such a system to be constitutionally admissible in a democratic state. As the subject of such a fundamental misunderstanding or disagreement between the voters and the electoral system was precisely and primarily the institution of national lists of candidates, which was the only aspect challenged before the Constitutional Court, in my opinion the Constitutional Court could have rendered a negative assessment with a clear conscience at least regarding such (if it did not also extend the review *sua sponte* to other disputable elements of the electoral system).

Allow me to return from the argument of non-transparency (it is precisely due to the national lists of candidates that the non-transparency of the electoral system reached a level that, in my opinion, is no longer compatible with democratic principles) to the first argument, i.e. the argument of the “non-systemic character” [of national lists of candidates].

One can speak of two aspects of the “non-systemic character” of the introduction of national lists of candidates (in the sense that it undermines the foundations of the proclaimed electoral system). Firstly, the institution of national lists of candidates nullifies the anticipated and proclaimed effect of the “personalisation” of the elections in the law or electoral system. While this “personalisation” is significantly limited and problematic already as regards its content in accordance with the basic concept of the law (the order of a party’s candidates within a constituency is not determined by which of them enjoys greater support among the party’s voters, but each of them stands for election in one of the 11 electoral districts – the results are thus to a large extent incomparable), the lodging of a national list of candidates to an important extent completely nullifies even this limited “personalisation” of the elections, which is also problematic as regards its content. This first aspect of the “non-systemic character” [of national lists of candidates] is only weaker than the second one because the principle of “personalisation” is not explicitly listed as one of the main principles of the law in Article 2 thereof or in its general provisions – it is, however, strongly emphasised in lay and political as well as expert interpretations of our electoral system.<sup>2</sup>

The second aspect of the “non-systemic character” [of national lists of candidates] is more prominent and thus also of greater constitutional significance (also) from this point of view. The national lists of candidates namely entail an interference – which is absolutely manifest, can be proven by numbers, and is above all significant – with two fundamental principles that are explicitly proclaimed by Article 2: the principle that “deputies are elected in constituencies” (the first paragraph of Article 2) and the principle “that one deputy shall be elected per an approximately equal number of inhabitants” (the first part of the second paragraph of Article 2). The national lists of candidates do not affect the third principle proclaimed by that pro-

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2 Dr Franc Grad: *Novi volilni sistem z volilno zakonodajo* [The New Electoral System and Electoral Legislation], Ljubljana 1992, pp. 14 and 62.

vision (i.e. the proportional representation of political interests). The second of the mentioned principles is also not violated as such (as in spite of the national lists of candidates the party obtains a number of seats that is in accordance with the principle of proportionality) – it is, however, violated if we understand and consider it in connection with the first principle (i.e. election in constituencies). That such was also intended is clearly supported by the second paragraph of Article 20 of the NAEA, which reads as follows: “Constituencies are established in accordance with the principle that one deputy shall be elected per an approximately equal number of inhabitants.” As the application of national lists of candidates in the 1992 election led to a situation where in one constituency only 8 candidates were elected instead of 11, while in another constituency 16 candidates were elected instead of 11, it is evident how deeply the challenged statutory provision regarding national lists interfered with the statutory principle of elections in constituencies – namely with the principle of the equal territorial representation of the inhabitants in the parliament. While this principle is not a constitutional principle, it is implicitly contained in the first and second statutory principles mentioned and their mutual connection, therefore, as I already mentioned at the beginning, a violation of this principle can only be deemed to be constitutionally inadmissible if we deem that the “non-systemic character” of the statutory regulation constitutes a violation of the principles of a state governed by the rule of law.<sup>3</sup> At least with regard to electoral legislation, I believe this to be necessary – especially when (as is the case in the case at issue) this “non-systemic character”, which violates the principles of a state governed by the rule of law, at the same time produces such a high degree of non-transparency as regards the electoral system that it simultaneously also entails a violation of the principle of ensuring a democratic state order.

The “non-systemic character” in the above-mentioned sense also clearly follows from the currently only scientific work regarding our electoral system that was written by one of the experts who were the authors of the system (See note 2). Therein, with regard to the fundamental principle of elections in equal constituencies, Dr Grad, *inter alia*, wrote the following: “It is particularly emphasised that the establishment of constituencies is not only a necessary technical means for carrying out elections, but further that as a general rule deputies are elected in constituencies (such entails that as a general rule seats are allocated in constituencies), **which is allegedly intended to provide for a closer connection between the voters and their deputies**” (pp. 13–14), and later on when describing the manner of “the second round of allocating seats” (the ones that have not already been allocated during the calculation of the results within the individual constituencies, but are allocated only after adding up the remainder [of the votes] at the state level), he added that this rule is allegedly intended “to ensure that also in the second allocation round the seats are allocated

<sup>3</sup> Such is generally also disputed in Germany, however, the situation is allegedly different precisely as regards the review of the constitutionality of electoral systems (see the citation in note 1 – see further below in Section II).

to the lists of candidates in constituencies in accordance with voters' support, **which is allegedly intended to also ensure a connection between the voters and those deputies who obtained their seats only in the allocation on the level of the state**" (p. 62; emphasis added by M.K.). Although he explicitly writes only about "the connection between the voters and their deputies," and not directly about the principle of the equal territorial representation of the inhabitants in parliament, it is clear that such (also) concerns the latter, despite the fact that candidates may stand for election in a constituency even though they do not reside therein.

This is even more evident from the Chapter "Designing constituencies in accordance with the regulation in force", which on pp. 66–67 states that: "In accordance with the new electoral legislation, the constituency is an extremely important element of the electoral system. The principle that deputies are elected in such a manner that one deputy shall be elected per an approximately equal number of inhabitants has namely been enacted. **Such entails the implementation of the principle of equal suffrage, as well as the requirement that each constituency has to be guaranteed the number of deputy seats as is determined by law. The allocation of seats in accordance with this principle should not be such that some constituencies would be allocated a different number of seats than others.**" That constituencies are not merely a technical necessity for carrying out the elections, but that the legislature also saw them as a means for creating a stronger connection between the voters and the deputies (i.e. [equal] territorial representation in the parliament) is also evident from the third paragraph of Article 20 of the NAEA, which reads as follows: "In drawing up constituencies and electoral districts, their geographic completeness and their common cultural and other characteristics have to be taken into account."<sup>4</sup>

How strongly the idea of the necessity to respect the principle of equal territorial representation (i.e. the principle that 11 deputies are elected in each constituency) was anchored in the minds of the authors of our electoral system is particularly evident from the conclusion of Chapter "3.8. The electoral system in force", where on p. 63 the following is stated with regard to national lists of candidates: "The law contains no provisions on the manner in which the thus obtained seats are distributed among the constituencies. However, an analogous application of the rule on the basis of which other seats are distributed seems indicated ... Also with regard to

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4 Dr Grad, however, adds the following: "The larger question with regard to the adopted idea of the representative nature of deputies' office is naturally what this condition is intended to ensure, as it does not concern the election of representatives of territorial interests." (p. 67). I would reply to this question as follows: deputies are in fact "representatives of all the people" (Article 82 of the Constitution), unbound by any kind of instructions (the representative nature of office), however, this does not entail that consequently an electoral system that would nevertheless attempt to ensure an equal territorial representation of the inhabitants in the parliament – as our system does – would not be constitutionally admissible. And if such is an evident goal of the electoral system (proceeding from Articles 2 and 20), then the provisions that negate the implementation of this goal can be deemed to be "non-systemic" to such an extent that they render the act so internally contradictory that it is no longer consistent with the principles of a state governed by the rule of law.

this irregular allocation of seats one must namely proceed from the law's fundamental principle that one deputy shall be elected per an approximately equal number of inhabitants. In practice, such entails that (taking into account the above-stated rule) seats have to be allocated to those constituencies in which not all of the seats reserved for those constituencies have been allocated." However, this comment is not true and it is unfortunately not possible to act in such a way, as the challenged second paragraph of Article 93 of the NAEA explicitly determines that on the basis of "national lists of candidates" the seats are allocated "regardless of the provision of the preceding paragraph," i.e. also without considering in which constituencies the candidates who are to obtain a seat on the basis of a "national list of candidates" stood for election. This error in the commentary is obviously the result of hastiness (the manuscript was already completed in October 1992, namely immediately after the law had been adopted – and before it could be tested in practice) and it may no longer be found on p. 111 in Chapter "5.4. Determining the election results in the entire state" – I only refer to it to reinforce my position that the principle "11 deputies from each constituency" was in fact intended as one of the fundamental principles of the entire electoral system and that, with regard to the content of the fundamental principles enshrined in the law, it must be deemed as such, and the challenged provision regarding the national lists of candidates must thus be deemed to be inconsistent with this principle and therefore to be "non-systemic" and as such inconsistent with the principles of a state governed by the rule of law, and due to its significant negative effect on the electoral system's transparency, also inconsistent with the principles of a democratic state.

Finally, the challenged regulation also violates the constitutional right to equal suffrage, namely the equality of the passive right to vote (everyone's right to stand for elections and the right of every candidate to compete at elections with the other candidates under equal conditions). From such perspective, does every "national list of candidates" entail an interference with this right? This problem does not occur in electoral systems where candidates stand for election separately in constituencies for one half of the seats and on "federated state lists of candidates" for the other half of the seats (e.g. the German system).<sup>5</sup> In the former Italian system, where candidates stood for election for all the seats in constituencies, while the candidates on the national list of candidates were given precedence in the allocation of the seats, such a regulation should certainly have been deemed an interference with the constitutional right to the equality of candidates or their formal chances to succeed (*Chancengleichheit*). That the Italian Constitutional Court did not abrogate it for such reason is perhaps due to the fact that it was never challenged – it is, however, also possible that had such been challenged an interference with a constitutional right might have been established, but the Constitutional Court would not have deemed it inadmissible. An interference with a constitutional right is namely

<sup>5</sup> The Swedish system is similar, however, therein 310 seats are distributed in constituencies, and only 39 on the basis of "national lists of candidates".

admissible if it is necessary for the protection of other constitutional rights or other “constitutional values” (in accordance with the principle of proportionality). Therefore, it would have to be reviewed whether in such a case the interest of political parties in having their leaders assume a seat in the parliament, even if they were not elected in their constituencies, could also be deemed a public interest and thus a sort of “constitutional value” (for example, the public interest in parties’ leading politicians being active within the parliament and not outside of it) – and if this were answered in the affirmative, subsequently a “weighing” would have to be performed as to whether this “constitutional value” is so much more important than the protection of the constitutional right of candidates’ equal opportunities to be elected that it could justify an interference with such. As an interference with the equality of candidates at least indirectly also affects the rights of the voters who voted for these candidates, at first glance a negative answer to the preceding question seems to present itself – on the other hand, however, other circumstances would nevertheless have to be carefully considered as well, for example the fact that in a democratic state the democratic election of a party’s leadership representing the interests of several hundred thousand party members in the state as a whole might be more important than the votes of a few thousand or ten thousand voters of this party in only one of the numerous constituencies in the state where by means of preferential votes they accorded precedence to the party’s other candidates, not the ones the party as a whole had elected as their leaders (provided, of course, that this was in fact a democratic decision of the entire party membership, and not only a decision of the party’s functionaries). Just because someone is not sufficiently popular in his or her home constituency does not necessarily entail that other voters for the party could not elect him or her into parliament with the help of a “national list of candidates” – if such is a “transparent” element of the electoral system and if public opinion does not reject it as categorically as, e.g., is done in Slovenia. A decision regarding the constitutional admissibility of “national lists of candidates” that would have to be based on a weighing of all the mentioned conflicting elements would, nevertheless, be very difficult.

In our electoral system, which is completely non-transparent to the voter and where the public already therefore rejects the “national lists of candidates” as an intruder in the (otherwise misunderstood) system (probably also due to underdeveloped democratic practices within the parties – and due to their small number of members), the decision appears to be a great deal easier: I would deem “national lists of candidates” to also constitute a violation of the equality of the passive (and indirectly also the active) right to vote. As this (my) review depends to a large extent on the preceding review of the constitutional admissibility of our “national lists of candidates” from the perspective of the transparency or the democratic character of our electoral system and from the perspective of this element’s “systemic character” within this system, I only derived – from the primary violations of the principles of a state governed by the rule of law and of democracy – the violation of the right to equal suffrage, in the case at issue, as a secondary violation.

## II

As I have already indicated, in the second part of this dissenting opinion I will present some of the basic criteria for the constitutional review of electoral systems as I adapted them predominantly from the above-cited study of the Frankfurt-based Professor Dr Hans Meyer in the collection Isensee/Kirchhof: Handbuch des Staatsrechts – thereby also considering other sources, in particular Nohlen’s well-known political science study of electoral systems.<sup>6</sup>

*a) The criterion of “systemic character”, i.e. “loyalty to the system”, “consistency with the system”*  
As I have already applied this criterion above under Section I, I consider it at the beginning of this Section, although it is by far not the most important criterion. I would immediately like to emphasise two potential misunderstandings or two possible misconceptions regarding this criterion:

Firstly, this criterion does not entail that all possible electoral systems should be reviewed in accordance with the criterion of their “loyalty” to a pure system of proportional representation or a pure system of majority election; every mixed, combined electoral system also possesses a logic of its own, its own principles – the criterion of a “systemic character” thus (I am adding this as my opinion) entails that the specific principles of each concrete electoral system chosen or enacted by the legislature should be (as a general rule already in the law itself) clearly presented to the citizens – substantial divergences from these principles that could lead to the non-transparency of the electoral system or even “defraud” voters (who, relying on the declared principles and outward appearance, would misunderstand the actual effects of one or another kind of voting) could then, in my opinion, be deemed constitutionally inadmissible.<sup>7</sup> And secondly, as a rule, the criterion of “loyalty to the system” is only a secondary criterion for the review of the constitutionality of the individual elements of the electoral

6 Dieter Nohlen: *Wahlrecht und Parteiensystem: über die politischen Auswirkungen von Wahlsystemen*. Leske u. Budrich, Opladen 1989.

7 I have already partially indicated why the criterion of “loyalty to the system” is constitutionally acceptable precisely when reviewing electoral systems, but less so or even not all as regards other questions, above under Section I – however, in his already cited study, Meyer states that “the Federal Constitutional Court rightly rejected the idea of transforming the criterion of loyalty to the system into a constitutional postulate” and thereby refers to a position from BVerfGE 59, 36 (49). Therein, the German Constitutional Court – when reviewing the constitutionality of certain elements of the pension system – argued as follows: “The Federal Constitutional Court repeatedly held that a ‘non-systemic character’ (*Systemwidrigkeit*) – as a violation of the requirement to respect the inherent legality of a law (*Sachgesetzlichkeit*) – could entail a violation of the principle of equality before the law (Cf. BVerfGE 34, 103 (115) etc.). In addition, once certain principles have been chosen for the regulation of a field, the reasons justifying deviations from such principles would have to correspond in importance to the intensity of the deviation from the chosen principles in order to be persuasive (BVerfGE ...). **However, the *Systemwidrigkeit* as such ... is not inconsistent with the principle of equality before the law.** What system the legislature applies to regulate a certain matter is – as equally applies to the reasonableness of such regulation – a matter of its own discretion; the Constitutional Court may only find such a regulation to be unconstitutional according to the criteria under the Constitution, and not from the perspective of its “systemic character”.

system that comes to the foreground only after these individual elements as well as the electoral system as a whole have passed a review of their constitutionality from the perspective of the fundamental principles of electoral law – or when the challenged regulation is evidently not problematic from the perspective of these principles.

*b) The criterion of conformity with the principle of equal suffrage*

Nowadays (when universal, secret, and direct suffrage has long been completely self-evident), a review of the conformity of an electoral system with the principle of equal suffrage is by far the most important among such reviews.<sup>8</sup>

From this perspective, a pure system of proportional representation (without an “election threshold” and constituencies) and a pure system of majority election (in single-member constituencies) are not only different systems that are not equally admissible from a constitutional perspective, but the former constitutes the closest possible approximation to the ideal of equal suffrage (i.e. with every vote having the same weight and the same influence on the final result), while the latter basically represents the gravest possible disregard<sup>9</sup> of this principle, as, theoretically, in the event of an even distribution of the voters of the winning and losing parties over the entire territory of the state, in such a system the winning party could win 100% of the seats by gaining only 51% of the votes (or, in the event there are a greater number of parties, a relative majority entailing an even lower percentage of the votes) – in any event, in practice within such a system there occur serious violations of the principle of the equality of votes: in an individual constituency, all votes cast for minority candidates are completely lost and devoid of meaning, and it is further irrelevant whether the winning candidate won with 30, 51, or 90% of the votes (again, all “remaining” votes have no value), but above all at the state level this system can produce great disproportionalities between the distribution of votes and the distribution of seats – even up to an absurd situation whereby a party that obtained a lower share of votes wins a larger number of seats (or even an absolute majority of the seats) than another party that obtained a larger share of votes.

In Meyer’s study, the above-presented arguments are not applied to illustrate a similar constitutional law assessment of the two mentioned electoral systems (as such arguments are already well-known in countries that are parliamentary democracies and do not have to be specifically stated). Meyer merely concludes that the fact that the German Constitution contains no provisions on the electoral system – already due to the principle of equal suffrage, but also due to the position of the framers of the Constitution when it was drafted – by no means entails that the law could also introduce a system of majority election. After establishing that the German

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8 “In modern democracy, the legislature’s strongest constitutional bond derives from the requirement of equal suffrage; it is the most political of the five leading election principles as it is aimed directly at the character of the elections as a manner of distributing power (i.e. authority –[*M*]odus der Machtverteilung)”. Meyer, *op. cit.*, p. 265.

9 Out of respect for the English and French electoral systems, I refrain from applying the rougher expression “violation”.

Constitution does not deem the parliament to constitute a representative of local interests, and therefore also this (only?) possible constitutional law justification of the system of majority election is excluded, Meyer concludes: “The finding that the system of majority election is consistent with the Constitution – and therefore that less severe violations of equal suffrage in other electoral systems are admissible – is thus in any event inadmissible.”<sup>10</sup>

However, even this conclusion of the Federal Constitutional Court (adopted in the first year of its operation),<sup>11</sup> which Meyer rejects in a categorical and persuasive manner, only provided for the acceptability of a system of majority election, and as a result also of other, less severe violations of equal suffrage in mixed systems, in an entirely hypothetical manner – primarily in order to be able to emphasise the requirement of *Systemtreue* as its antithesis (in the sense that when the legislature itself determines as its starting point the principle of proportionality, then it must observe it as well). In that concrete review of the constitutionality of an element of the mixed electoral system in the federated state of Schleswig-Holstein, the Federal Constitutional Court, proceeding from the requirement of *Systemtreue*, decided that the element at issue was an (excessive) interference with equal suffrage (at that time and in the federated state in question – in light of the existing concrete political conditions and relations) and that it could no longer be deemed compatible with the Constitution. And the element at issue was merely an “election threshold” (*Sperrklausel*) that was at that time already generally accepted as an interference with equal suffrage that was in principle admissible and that has remained such until today (it does, however, undoubtedly constitute an interference, as it simply disregards the votes cast for lists of candidates that did not reach the threshold when distributing the seats) – in that case, however, it was found to be unconstitutional as it did not satisfy the conditions for the constitutional admissibility of such interferences.

At this point we encounter the following two important criteria for the constitutional review of electoral systems – that not simply any sound reason derived from the nature of the matter suffices for the admissibility of interferences with equal suffrage (or other constitutional determinants of the right to vote), in contrast to interferences with the general right to equality before the law, but that a special, necessary reason is required, and that the need to prevent excessive fragmentation of the parties in parliament (the occurrence of so-called *Splitterparteien*) as a serious danger to the democratic system may be deemed to constitute such a necessary reason, namely the crucial need for such an electoral system that enables the creation of a functional parliament and government.

*c) The criterion of a special, necessary reason for interferences with equal suffrage*

As is generally known, any sound reason deriving from the nature of the matter – even if such was not the legislature’s reason, but was, e.g., subsequently established by the Constitutional Court – suffices for interferences with the general principle

<sup>10</sup> Meyer, *op. cit.*, pp. 263–265.

<sup>11</sup> BVerfGE 1, 208 – dated 5 April 1952.

of equality before the law (*allgemeine[r] Gleichheitssatz*), i.e. for the differentiation by the legislature in any field (provided that it merely affects the general principle of equality before the law and no special constitutional right is affected thereby). That such does not suffice for the admissibility of interferences with equal suffrage actually follows already from the fact that such does not concern only the general principle of equality before the law, but the question of the admissibility of interferences with a special, independent constitutional right (equal suffrage) – such interferences, however, are only admissible in accordance with the principle of proportionality, i.e. when they are **necessary** (required) for the protection of the proportionately equally important rights of others. Since the principle of equal suffrage also constitutes application of the general principle of equality before the law in this special field, German case law and literature especially explain why the general criterion of a “sound, objective reason” does not suffice from this perspective and a “**special, necessary reason**” is required.<sup>12</sup>

Equal suffrage is fundamentally linked with the notion of democracy – as a result, an objective reason for interferences with equal suffrage cannot exist at all. From such there follows the necessity of strict (formal) application of the principle of equal suffrage (*op. cit.*, p. 281) – the cited first Decision of the Federal Constitutional Court even speaks of “absolute, mathematical equality.”<sup>13</sup> The principle of equal suffrage only allows such restrictions as are necessarily logically connected (*denknotwendig verbunden*) to the character of the elections (*op. cit.*, p. 282).

A “necessary reason” is thus required by both criteria for a review of the constitutional admissibility of interferences with equal suffrage: the “strict” criterion of finding a sufficient reason deriving from the “related nature” of the principles of equal suffrage and general equality before the law, and the criterion (principle) of proportionality with its three requirements of the appropriateness, necessity, and proportionality of the interference in order to protect the constitutional rights of others.

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12 “Differentiation with regard to equal suffrage requires a special, justifying, **necessary reason** (i.e. *eines besonderen, rechtfertigenden, zwingenden Grundes bedürfen*). Due to this bond, **the legislature’s margin of appreciation is subject to particularly tight limits**. [...] The constitutional requirement of equality extends to all rights and legal relationships that constitute the institution of elections. The voters, candidates, and the persons entitled to propose candidates stand at the core of the field of elections (i.e. *im Kernbereich der Wahl*)” (*op. cit.*, p. 283). “The principle of equal suffrage is most closely linked with both the principle of democracy and the general principle of equality before the law. The Federal Constitutional Court already expressed this link with the principle of democracy in its established case law by holding that ‘due to its connection with the egalitarian principle of democracy’ the principle of equal suffrage ‘**has to be understood in the sense of strict and formal equality**’. The equal treatment of all citizens in the exercise of their right to vote constitutes one of the essential foundations of the regulation of the state in libertarian democratic constitutional systems. This does not entail that the principle of equal suffrage is not subject to any restrictions; it rather concerns the fact that the legislature is only left with a narrow margin for differentiation. [...] A special, justifying, **objectively necessary reason** is required.” (Achterberg/Schulte in: Mangoldt/Klein: *Das Bonner Grundgesetz – Kommentar*, Band 6, Verlag F. Vahlen, München 1991, p. 51).

13 “Sometimes equal suffrage is set against the general principle of equality before the law. While the latter allows for assessment (*Wertungen*), equal suffrage concerns absolute, mathematical equality.” BVerfGE 1, 208 (247).

The criterion of “necessary reason” has to be distinguished as clearly as possible from another “criterion”, the well-known maxim that co-determines the sharpness and depth of Constitutional Courts’ interferences with challenged statutory regulations in unclear cases – i.e. the maxim that, in such and similar cases, when in doubt the Constitutional Court should decide *in favorem legis* (namely that it should not declare the challenged statutory regulation unconstitutional), or the even more general principle of judicial self-restraint. Meyer (*op. cit.*, p. 266) drew the following distinction: “When reviewing ordinary laws, there are good reasons for the Constitutional Court to restrain itself and only establish a violation of the Constitution when the legal situation is clear. There is an imminent danger that the Constitution would be applied too zealously against each respective political majority in the legislature and thus hinder it in the realisation of its programme. Accepting this position especially entails that the Constitutional Court must act more stringently when reviewing electoral legislation. Restraint towards a political programme and its statutory implementation can only be justified if the political opponent’s fair chance to win over the people, and thus the parliamentary majority, is guaranteed. A prerequisite for this, however, is that the Constitutional Court has to prevent every inadmissible attempt to retain power through the enactment of electoral legislation. **The Constitutional Court has to assume its role as a guardian of the fair political procedure for gaining and retaining power.** In interpreting the Constitution, it must therefore exhibit a particular sensibility towards all kinds of discrimination and restrictions of competition and **strictly apply the Constitution when reviewing electoral legislation.**” (Emphasis added by M.K.).

*d) The prevention of the fragmentation of the parties in parliament as a necessary reason*

In accordance with German case law, the danger of the fragmentation of the parties in parliament and thus of electing a parliament without a clear majority that would enable the formation of a strong government entails a necessary reason for interferences with equal suffrage, such as the election threshold, a minimum number of signatures required for candidacy, or similar interferences in electoral systems of proportional representation.

Meyer admits that the “protection of the parliament’s functionality” is such an important value that it can be deemed a “special, justifying” reason (pp. 284–287) – whether it is also “necessary” would have to be demonstrated by analysing the current factual situation. At this point, Meyer indicates several reservations and concludes that all these reservations do not necessarily lead to the abrogation of the election threshold, but to a relativisation of its role. Similarly, in their above-cited work Achterberg/Schulte (p. 56) raise the question of whether “nowadays this reason can still be considered a special, justifying reason for such a far-reaching interference with equal suffrage and the equal opportunities of all parties (*Chancengleichheit*),” namely in the concrete situation in Germany, and argue in favour of relativising the election threshold. (In our circumstances, thus the same logic or criterion could be applied when reviewing whether the election threshold should be changed or not –

an analysis of the current factual situation: Has the election threshold prevented the election of a functional parliament and government or could it prevent such in the future to a greater degree than it has up to now?)

The Federal Constitutional Court provided important premises for the necessity of such relativisation already in its first decision regarding electoral legislation. That decision cautions that “the degree of admissible differentiation is determined by valuations that live in the consciousness of the concrete legal community” and that, after realising the great importance of this exception to the rules of the game, some German States included the *Sperrklausel* in their State Constitutions (BVerfGE 1, 208 (249)) – such naturally entails that any reservations there regarding lose their power (if the enactment of an electoral threshold is the express will of the constitutional legislature – in contrast to the will of the Federal constitutional legislature, which in 1949 during the drafting of the *Grundgesetz* [the German Federal Constitution] explicitly rejected an electoral threshold due to its inconsistency with the principle of equal suffrage).

*Mag. Matevž Krivic*

Decision No. **U-I-283/94**, dated 12 February 1998

### DECISION

At a session held on 12 February 1998 in proceedings for the review of constitutionality and legality initiated upon the petition of Danijel Starman, Koper, and others, the Constitutional Court

*decided as follows:*

1. It is not inconsistent with the Constitution that the National Assembly Elections Act (Official Gazette RS, No. 44/95) gives members of the Italian and Hungarian self-governing national communities the right to cast two votes in the election of the deputies to the National Assembly.
2. It is not inconsistent with the Constitution that the Local Elections Act (Official Gazette RS, Nos. 72/93, 7/94, 33/94, and 70/95) gives members of the Italian and Hungarian self-governing national communities the right to cast two votes in the municipal council elections.
3. Article 22 of the Voting Rights Register Act (Official Gazette RS, No. 46/92) is not inconsistent with the Constitution.
4. It is inconsistent with the Constitution that the Voting Rights Register Act (Official Gazette RS, No. 46/92) does not determine the criteria to be applied by the commissions of the Italian and Hungarian self-governing national communities when deciding on the registration of citizens who are members of the autochthonous Italian and Hungarian national communities in a special electoral register. The National Assembly must remedy this inconsistency with the Constitution prior to calling the next regular elections to the National Assembly.
5. The fourth paragraph of Article 53, Article 134, and the second paragraph of Article 140 of the Charter of the Koper Municipality are not inconsistent with the Constitution and laws.
6. The petition has been dismissed in the part that refers to the Deputies Act (Official Gazette RS, No. 48/92) and the Rules of Procedure of the National Assembly (Official Gazette RS, Nos. 40/93, 28/96, and 26/97).

**A**

1. By the Order dated 6 June 1996, the Constitutional Court partially accepted, partially dismissed, and partially rejected the petition of Danijel Starman and others (hereinafter referred to as the petitioners) by which they challenged the provisions of the following regulations:
  - the Voting Rights Register Act (Official Gazette RS, No. 46/92 – hereinafter referred to as the VRRRA);
  - the National Assembly Elections Act (Official Gazette RS, No. 44/92 – hereinafter referred to as the NAEA);
  - the Self-Governing National Communities Act (Official Gazette RS, No. 65/94 – hereinafter referred to as the SNCA);
  - the Local Elections Act (Official Gazette RS, Nos. 72/93, 7/94, 33/94 and 70/95 – hereinafter referred to as the LEA); and
  - the Charter of the Koper Municipality (Official Publications Koper/Capodistria, No. 9/95 – hereinafter referred to as the Charter)
2. The petition was accepted in the part referring to:
  - the alleged unconstitutionality of the right of the members of the Italian and Hungarian national communities (hereinafter referred to as the national communities) to cast two votes in the elections to the National Assembly and in the elections to municipal councils – one vote to elect the representative of the national community to the National Assembly or municipal council, and the other vote to elect other deputies or members to the municipal council; they are granted those rights by the NAEA and the LEA,
  - Article 22 of the VRRRA,
  - the fourth paragraph of Article 53, Article 134, and the second paragraph of Article 140 of the Charter.
3. The petitioners believe that this double voting right, which is how they refer to the right of the members of the national communities to cast two votes in elections to the National Assembly and municipal councils, is inconsistent with the constitutional principle of equality before the law. In their opinion, the double voting right is an inadmissible form of discrimination and in no way contributes to the protection of the national communities.
4. In their initial petition, the petitioners took the position that the Rules of Procedure of the National Assembly (Official Gazette RS, Nos. 40/93, 28/96, and 26/97 – hereinafter referred to as the Rules of Procedure) should limit the rights stemming from the office of the representatives of the national communities. In their opinion, it is unconstitutional for the representatives of the national communities to participate in the decision-making process on any matter that falls under the jurisdiction of the National Assembly.
5. In the opinion of the petitioners, the provision of Article 22 of the VRRRA, which also allows members of the Italian and Hungarian nationalities who do not have

permanent residence in nationally mixed settlements to be registered at their request in the electoral register, is unconstitutional as it entails an extension of rights to non-autochthonous members of the national communities and thus exceeds the constitutional protection of nationalities.

6. In the petitioners' opinion, the following provisions of the Charter are also inconsistent with the Constitution:
  - the provision of Article 134, which affords localities the status of legal entities (the petitioners believe that by establishing legal entities of public law the Charter interferes with the powers of the legislature);
  - the provision of the second paragraph of Article 140, as it provides that the national communities must be directly represented in the councils of localities (the petitioners believe that special provisions on the rights of national communities do not apply to localities as they are not self-governing local communities); and
  - the provision of the fourth paragraph of Article 53, which determines that a deputy mayor must be of Italian nationality if the mayor is not (the petitioners believe that this discriminates against the passive right to vote of persons who are not of Italian nationality).
7. On 14 November 1996, the petitioners submitted "a motion for the temporary suspension of the NAEA, insofar as it grants members of the national communities a double voting right, the temporary suspension of the provisions of the Rules of Procedure, insofar as these do not limit the rights stemming from the office of the representatives of the national communities (especially the second paragraph of Article 119 and the second paragraph of Article 128), and the temporary suspension of the Deputies Act (Official Gazette RS, No. 48/92 – hereinafter referred to as the DepA) in its entirety with regard to the representatives of the national communities." In their motion they reiterate their view that it is unconstitutional that the deputies who are the representatives of the national communities participate in the decision-making process on any matter in the National Assembly, for example, also in electing the president of the government and appointing the ministers. The Constitutional Court considered that, by this motion, the petitioners had also extended the petition to include the Rules of Procedure and the DepA. The Constitutional Court held a public hearing regarding the motion for the temporary suspension before rejecting the motion by way of an order.
8. The Secretariat of the National Assembly for Legislation and Legal Affairs (hereinafter referred to as the Secretariat) replied to the entire petition (before it was partially accepted). In its opinion the petition is unfounded, as "the laws that the petitioners claim violate the Constitution merely implement constitutional provisions on the special rights of the autochthonous national communities." In the opinion of the Secretariat, the special protection of the national communities entails the implementation of the principle of equality in a form that takes into account the special position of these two communities and the conditions in which they live. Even if the laws had determined other or more extensive rights than are determined by the Constitution, such would, in the Secretariat's opinion, not be contrary to the Constitution.

9. In the Secretariat's opinion, the double voting right derives from the third paragraph of Article 64 of the Constitution and, with regard to the composition of the National Assembly and the position of its deputies, also from the third paragraph of Article 80 and the first paragraph of Article 82 of the Constitution. Regarding the rights of members of national communities who live outside nationally mixed areas, the Secretariat draws attention to the provision of the fourth paragraph of Article 64 of the Constitution, according to which the legislature must determine the rights exercised by the members of the national communities outside the areas in which these communities live. In the Secretariat's opinion, determining the status of the members of national communities by law is "highly questionable because of the constitutional provisions that guarantee human rights and freedoms, including the provision of Article 61 of the Constitution." The Secretariat also deems that the petitioners failed to demonstrate legal interest for lodging the petition under consideration.
10. After the Order on the partial acceptance of the petition was issued and the public hearing was held, the Secretariat once again replied (exhaustively) to the accepted part of the petition. In its reply, it states that the so-called double voting right is required by constitutional provisions; the double voting right entails the implementation of the special constitutional right referred to in the third paragraph of Article 64 of the Constitution in addition to the general right to vote. The Secretariat emphasises that the Constitution is committed to protecting the rights of the national communities and proceeds from the so-called positive concept of regulating the position of these communities. The Constitution guarantees special rights to the national communities, which manifest themselves in the form of "positive discrimination". The Secretariat emphasises the protection of minorities as an important criterion by which to assess whether an ethnically pluralistic society is democratic. It draws attention to Article 4 of the Framework Convention of the Council of Europe for the Protection of National Minorities, which was also signed by Slovenia; this article determines that measures adopted as a consequence of the specific conditions of persons belonging to national minorities shall not be deemed an act of discrimination of the persons belonging to the national majority.
11. The Secretariat states that the regulation of the position of the national communities in the Constitution entails continuity in this field, as the positive concept of the protection of minorities was already introduced in Slovenia by the Constitution of 1974 and subsequent constitutional amendments. It also refers to the provisions of the Declaration of Independence and the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (Official Gazette RS, No. 1/91-I – hereinafter referred to as the BCC), which determine that the Italian and Hungarian national communities in the Republic of Slovenia and their members are guaranteed all rights from the then applicable Constitution and treaties. It also refers to the provision of Article 338 of the Constitution from 1974 (the amendment from 1989), according to which the national communities shall each have at least one deputy in each of the assemblies of the then Assembly of the Socialist Republic

of Slovenia. It notes that the national communities had special voting rights under these provisions and that deprivation of this right would entail a violation of the principle of trust in the law.

12. The Secretariat draws attention to Slovenia's obligations under international law arising from the Agreement on Friendship and Cooperation between the Republic of Slovenia and the Republic of Hungary, the Agreement on Ensuring the Special Rights of the Slovene National Minority in the Republic of Hungary and of the Hungarian National Community in the Republic of Slovenia (Official Gazette RS, MP, No. 6/93), and the Treaty of Osimo from 1975. It also emphasises that the Framework Convention of the Council of Europe for the Protection of National Minorities requires the signatories, which include Slovenia, to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political, and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. The Secretariat states that the requirement for minorities to participate in public affairs, and especially in affairs concerning minorities, follows from the cited convention.
13. Regarding Article 22 of the VRRRA, the Secretariat states that, in accordance with the Constitution, the special voting right of the members of the national communities is not territorially limited and that the rights of the members of the national communities are guaranteed by the Constitution, irrespective of their number and distribution. The Secretariat also refers to the provision of the fourth paragraph of Article 64 of the Constitution, according to which the position of the Italian and Hungarian national communities and the manner in which their rights are exercised in the geographic areas where they live, the obligations of the self-governing local communities for the exercise of these rights, and those rights which the members of these national communities exercise also outside these areas, shall all be regulated by law.
14. Regarding the petitioners' statements that the Rules of Procedure and the DepA should limit the rights of deputies, who are the representatives of the national communities, the Secretariat states that all the provisions of the Constitution regarding deputies determine that they are all equal irrespective of their electoral base or any other circumstances. In the opinion of the Secretariat, such applies to all the rights of the deputies of the national communities in accordance with Article 19 of the DepA, as well as to the rights that arise from the Rules of Procedure (e.g. the right to form a special deputy group and the right to select the working bodies in which they participate). The Secretariat further believes that the procedural requirements for a review of the constitutionality of the Rules of Procedure and the DepA have not been met. The petitioners allegedly failed to demonstrate legal interest, as the Rules of Procedure and the DepA regulate relations that concern deputies and the rules of their work in the National Assembly. The Secretariat further draws attention to the fact that, at the public hearing, the representative of the petitioners took the position that the DepA does not apply to the elected representatives of the national communities. In this regard, the Secretariat deems that this part of the petition must be dismissed as allegedly the petitioners themselves had already withdrawn the petition.

15. The Municipal Council of the Koper Municipality (hereinafter referred to as the Council) replied to the part of the petition referring to the Charter. Regarding the representation of the Italian community in the councils of individual localities, the Council states that it “respected *mutatis mutandis* the provisions regulating the number of the members of the Italian national community in the municipal council.” In the opinion of the Council, Article 39 of the LSA [i. e. the Local Self-Government Act] serves as the basis for the provision that a deputy mayor must be of Italian nationality if the mayor is not.
16. The Italian and Hungarian self-governing national communities also communicated their position on the petition. Both believe that the challenged provisions are not inconsistent with the Constitution, but that they in fact entail the implementation of the constitutional requirements regarding the protection of the autochthonous Italian and Hungarian national communities.

### B – I

17. The petition raises constitutional law issues that concern the protection of the autochthonous Italian and Hungarian national communities. The level of respect or protection afforded to ethnic, religious, linguistic, and other minorities is an important indicator of a democratic society. Democratic states devote special attention to the protection of minorities. The protection of minorities is guaranteed in two forms: through the prohibition of discrimination on the basis of nationality, language, religion, or race and through special rights that appertain only to the minority or its members. The latter form of protection is referred to as the positive protection of minorities. Positive protection results in co-called positive discrimination as members of minorities are guaranteed rights that are not available to members of the majority. Measures of this kind entail a high level of protection of national minorities, afforded by the majority group of the population, and are therefore indicative of a democratic society.
18. The rights of national minorities in international law are regulated by multilateral conventions and bilateral agreements between states. The position of the Italian minority, i.e. the Italian national community, in Slovenia, after the Second World War was regulated by the Special Statute of the Free Territory of Trieste, which was annexed to the London Memorandum of Understanding between the FLRY [the Federal People’s Republic of Yugoslavia], the Italian Republic, and Great Britain. The Special Statute ceased to apply when the Agreement between the SFRY [the Socialist Federal Republic of Yugoslavia] and the Italian Republic concluded in Osimo (Official Gazette SFRY, MP, No. 1/77; hereinafter referred to as the Treaty of Osimo) entered into force. In the preamble to the Treaty of Osimo, both states confirmed “their loyalty to the principle of the broadest protection of citizens belonging to ethnic groups (minorities) which derives from their Constitutions and their domestic law and which each Party applies independently and drawing also upon the principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Convention on the Elimination

of All Forms of Racial Discrimination and the International Covenants on Human Rights.” Article 8 of the Treaty of Osimo provides: “Each Party declares that, when the Special Statute annexed to the Memorandum of Understanding signed in London on 5 October 1954 ceases to have effect, it shall maintain in force the internal measures already taken in application of the aforesaid Statute and shall ensure under its domestic law that the level of protection stipulated for members of the respective ethnic groups (of the respective minorities) in the expired Special Statute is maintained.” The Special Statute ceased to be in force on the day the Treaty of Osimo entered into force, but continued to be applied as a criterion for ensuring the rights of national minorities in Slovenia’s neighbouring states. The Treaty contains no provision that would guarantee members of the minorities the right to direct representation in representative bodies.

19. The position of the Hungarian national community in Slovenia is governed by the Agreement on Ensuring the Special Rights of the Slovene National Minority in the Republic of Hungary and of the Hungarian National Community in the Republic of Slovenia, signed on 6 November 1992 and ratified by law on 26 March 1993 (Official Gazette RS, MP, No. 6/93). Article 8 of this Agreement provides that the signatories shall guarantee, in accordance with domestic legislation, the adequate participation of the minorities in decision-making at the local, regional, and state levels on matters concerning the rights and position of the minorities and their members.
20. One of the measures for the protection of minorities also includes ensuring their participation in decision-making on public affairs. However, international law as it is currently in force does not guarantee the representation of minorities in representative bodies (Ohlinger/Pernthaler, *Projekt eines Volksgruppenmandats im Kaernter Landtag*, p. 8; the authors also refer to the work of Oeter, *Minderheiten im institutionellen Staatsaufbau*. See also Turk, *Mednarodnopravni vidiki sedanjega položaja slovenske narodnosti skupnosti v Italiji* [International Law Aspects of the Current Position of the Slovene National Community in Italy], p. 6; the author states that exceptions can be found in only very few treaties, e.g. the Treaty of Sèvres and the Cyprus Memorandum). Even the Framework Convention of the Council of Europe for the Protection of National Minorities, which Slovenia has also signed but not yet ratified (the Convention has not yet entered into force), does not explicitly require that the signatories ensure the representation of minorities in representative bodies. It merely provides that the Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political, and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. The measures adopted in accordance with this commitment shall not be considered an act of discrimination (the third paragraph of Article 4).
21. Although such is not required by international law, the constitutions and laws of some states guarantee the participation of minorities in decision-making on general matters in representative bodies. The following models for guaranteeing this right

(which may also be combined with each other) are particularly well-known:<sup>1</sup>

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1 A more detailed overview of the regulation in different legal systems:

- In the Danish parliament (*Folketing*), two minorities (from the Faroe Islands and Greenland) are each guaranteed two seats.
- Germany: at the federal level and in some federal states (Schleswig-Holstein, Saxony), the electoral threshold does not apply to political parties of national minorities. By voting for national parties, members of minorities may achieve representation for the minority in parliament. When voting, they are required to choose whether to vote for a minority party or for one of the parties from the traditional political spectrum.
- Finland: The inhabitants of the Åland Islands are guaranteed a seat in the parliament as the islands constitute an independent constituency in which one member of parliament is elected. This deputy has the same rights and duties as all other deputies. This deputy normally joins the deputy group of the Swedish People's Party, although he is not a member of this party.
- Croatia: The Constitutional Act on Human Rights and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (Narodne novine [Official Gazette], No. 34/92 – consolidated text) provides that the members of minorities that represent more than 8% of the total population – i.e. the Serbian minority – have the right to elect five representatives to the house of representatives of the Sabor [Parliament] and the members of all the other minorities have the right to elect five representatives in total. The third paragraph of Article 18 provides that the deputies of these minorities (representing less than 8% of the total population) are “the representatives of all the ethnic and national communities or minorities who have elected them and must protect their interests.”

The Electoral Act from 1992 (Zakon o izborima zastupnika u Sabor RH, Narodne novine, No. 22/92) contains identical provisions regarding the election of the representatives of the minorities. Four of the five representatives of the minorities “representing less than 8%” are elected in four special constituencies according to the majority system. They are elected by the members of the minorities. The nationality of the voters is entered in the electoral register (Zakon o popisima birača [the Electoral Register Act], Narodne novine, No. 19/92). The nationality of the candidates is also indicated in the nomination procedure (Article 15 of the Electoral Act).

The initial wording of the Act provided that the number of members of parliament is to be increased if the guaranteed representation of the minorities is not achieved in the elections; candidates on the national lists (according to this Act 60 deputies were elected in proportional elections on the basis of national lists) who had not been elected were to be deemed elected, provided they were of the appropriate nationality and depending on the share of votes in favour of a specific national list. If the required number of deputies of appropriate nationalities could not be ensured through this method, supplementary elections were to be carried out. According to the Act, an electoral threshold (3%) applied to all national lists, but the Constitutional Court (U-VII-233/92, Narodne novine, No. 50/92) decided that this threshold shall not be applied to national minority parties.

The amended Electoral Act (Narodne novine, No. 68/93) brought changes to the electoral system. A total of 80 deputies are elected according to the proportional system and 32 according to the majority system. Of these 32, a total of 28 are elected in “ordinary” constituencies on the basis of the principle that one deputy is elected for approximately the same number of inhabitants. 12 deputies are elected by the diaspora (Croatian citizens throughout the world) from special lists. Three deputies are elected by the citizens of Serbian nationality according to the majority system in a single constituency at the state level. Four deputies (as according to the previous regulation) are elected by the members of minorities in four special constituencies (Italians elect a deputy in the first constituency, Hungarians in the second constituency, Czechs and Slovaks in the third constituency, and Russians, Ukrainians, Germans, and Austrians in the fourth constituency).

- a) the determination of constituencies is adapted to the territorial distribution of minorities (this measure has been enacted, *inter alia*, by the following states: Hungary, Croatia, Finland, Belgium, Italy, and Switzerland),
  - b) the omission of the electoral threshold with regard to national minority parties (this measure has been enacted, *inter alia*, by the following states: Hungary, Germany, Poland, and Romania), and
  - c) minorities are guaranteed a seat in representative bodies (this right has been enacted, *inter alia*, by the following states: Croatia, Romania, Hungary, Denmark, and Finland).
22. The Slovene Constitution of 1974 did not include provisions on the mandatory representation of the national communities in municipal assemblies and the Assembly of the Republic. Article 252 provided that members of [other] nationalities may establish self-governing communities for education and culture purposes in the municipalities in which they live. Together with specific councils of the municipal assembly or with corresponding self-managing interest communities, these commu-

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In elections in small constituencies where seats are distributed according to the majority system, the members of the minorities have the option to cast a vote. The Mandatory Instructions of the National Electoral Commission (Obavezne upute broj XII, Narodne novine, No. 82/95) state that the right of the minorities to elect their own representatives is only a right and not an obligation. It is stipulated that the members of the minorities may not vote twice for a candidate in constituencies in which one or three deputies are elected, respectively. Those members of minorities who wish to vote for a “general” deputy must first obtain an attestation from the polling station that they have not voted in the special elections for the representative of the minorities. On the basis of this attestation, they may cast a vote for a candidate in the “ordinary” single-member constituency.

The term of office of “minority” deputies is not restricted (see the Rules of Procedure of the Sabor of the Republic of Croatia, Narodne novine, Nos. 59/92 and 89/92). The concept of minority consent (or veto) is not integrated into Croatian law.

- Romania: the second paragraph of Article 59 of the Romanian Constitution determines that minority organisations have a guaranteed seat in the representative body even if they do not obtain the sufficient number of votes. A minority may only be represented by one organisation. Article 4 of the Electoral Act provides that all minority organisations of a single minority together have the right to one representative if, at the state level, they obtain at least 5% of the average number of votes required for the election of one deputy. The number of members of the representative body is increased accordingly because of the direct representation of minorities.
- Hungary: the representation of minorities in parliament is guaranteed by a reduction of the number of votes required for the election of the deputy representing a minority (Articles 49 and 50 of the Electoral Act).
- Italy: in South Tyrol (the Region of Trentino – Alto Adige), the Ladin language group is guaranteed a representative in the regional council. If no member of the Ladin language group is elected from the lists in the constituencies (the region is divided into two constituencies – Bolzano and South Tyrol – and elections are held according to the proportional system with the possibility to cast a preferential vote) in accordance with the general rules, the candidate who has obtained the largest number of preferential votes is elected. The representative of the minority elected in such manner replaces the last of the candidates from his or her list who was elected according to the general rules (depending on the number of preferential votes).

nities co-decided on specific educational and cultural matters. The representation of the members of the national communities in the councils of the assemblies was only ensured through the internal nomination rules of the then Socialist League of Working People, which had monopolised the candidate selection process.

23. With the Constitutional Amendments of 1989 (Official Gazette SRS [Socialist Republic of Slovenia], No. 32/89), the provisions on the protection of the nationalities were amended. Article 250 defined the two nationalities as being autochthonous. A provision was added after Article 163 that provided that the Italian and Hungarian nationalities must be adequately represented in the assemblies of municipalities in which members of these two nationalities live together with the members of the Slovene nationality. The third paragraph of Article 338 of the Constitution provided that the Italian and Hungarian nationalities shall each have at least one delegate in each of the councils of the Assembly of the Socialist Republic of Slovenia. In accordance with this constitutional provision, the Elections to the Assemblies Act (Official Gazette SRS, Nos. 42/89 and 5/90, Official Gazette RS, Nos. 10/90 and 45/90) provided that special constituencies shall be formed for the election of the delegates of the members of the Italian or Hungarian nationalities to the councils of the Assembly of the Socialist Republic of Slovenia in nationally mixed areas, and that special constituencies could also be formed for the election of delegates of the members of the Italian or Hungarian nationalities to the councils of municipal assemblies (Article 37). Article 10 of the Act provided that voters in special constituencies and other members of the Italian or Hungarian nationalities in municipalities with areas in which members of those nationalities also live autochthonously with Slovenes (i.e. nationally mixed areas) have the active right to vote in the election of the delegates of the Italian or Hungarian nationalities to the councils of the Assembly of the Socialist Republic of Slovenia; in the election of the delegates to the councils of municipal assemblies such right shall only be granted to the voters in special constituencies, while other members of the nationalities in a municipality that includes nationally mixed areas only enjoy such right if it is determined by the Charter of the municipality. The law only granted the passive right to vote [i.e. the right to stand for election] to the members of the Italian and Hungarian nationalities.
24. The second paragraph of the third point of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (Official Gazette RS, No. 1/91-I) provided that “the Italian and Hungarian national communities in the Republic of Slovenia, and their members, are guaranteed all the rights in accordance by the Constitution of the Republic of Slovenia and valid treaties.” Here, the term Constitution of the Republic of Slovenia refers to the Constitution in force at the time, i.e. the Constitution of 1974, as amended.
25. The first paragraph of Article 5 of the Constitution currently in force provides that the state shall protect and guarantee the rights of the autochthonous Italian and Hungarian national communities in its own territory. The special rights of the autochthonous Italian and Hungarian national communities in Slovenia are

regulated by Article 64 of the Constitution and the third paragraph of Article 83 of the Constitution, which provides that one deputy of the Italian and one deputy of the Hungarian national communities shall always be elected to the National Assembly.

26. Article 64 of the Constitution is entitled “Special Rights of the Autochthonous Italian and Hungarian National Communities in Slovenia.” The fourth paragraph of Article 64 provides that the two national communities shall be directly represented in representative bodies of local self-government and in the National Assembly. The sixth paragraph of this Article provides that laws, regulations, and other general acts that concern the exercise of the constitutionally provided rights and the position of the national communities exclusively, may not be adopted without the consent of the representatives of these national communities.
27. The Constitution guarantees two inextricably linked rights to the members of the national communities: the right to direct representation in representative bodies of local communities and the National Assembly, and the right to one deputy each in the National Assembly. The latter is a logical extension of the right to direct representation in the National Assembly. The mentioned rights are special rights afforded to the national communities that guarantee these communities the opportunity to participate in the decision-making process of the National Assembly and representative bodies of local communities, regardless of the number of their members or the electoral system.
28. In matters that relate solely to the constitutional rights and position of the national communities, the representatives of the national communities in the National Assembly and municipal councils have the right of a “minority veto” (the sixth paragraph of Article 64 of the Constitution). In such manner it is ensured that the representatives of the national majority cannot outvote the representatives of the two national communities on matters that relate solely to the constitutional rights or position of the national communities.

## B – II

29. The petitioners believe that the Rules of Procedure and the DepA or a special statute should limit the rights of the deputies, who are the representatives of the national communities, to deciding on those issues that relate solely to the national communities themselves. In the initial petition, this position was referred to briefly; however, in the motion for temporary suspension, the petitioners also extended the petition to the above-mentioned acts. When deciding on the motion for temporary suspension, the Constitutional Court had not yet reviewed the existence of the procedural requirements for initiating proceedings to review the constitutionality of the DepA and the Rules of Procedure. When deciding on the accepted part of the petition, it assessed separately whether the procedural requirements to initiate those proceedings had been met. It found that the statutory regulation of the scope of the rights of deputies did not interfere directly with the rights, legal interests, or legal position of the petitioners. It therefore dismissed the petition in this part.

## B – III

30. The NAEA provides that:

- every citizen of the Republic of Slovenia who has reached the age of 18 and has not been deprived of his or her legal capacity by election day shall have the right to vote and to stand for election as a deputy (the first paragraph of Article 7),
- every member of the Italian or Hungarian national communities who has the right to vote shall have the right to vote and to stand for election as a deputy of the national communities (Article 8).

None of the provisions of the Act provide that the exercise of the special voting right (the right to vote and to stand for election as a deputy of the Italian or Hungarian national community) excludes the exercise of the general right to vote.

31. The NAEA determines a special procedure for the election of the deputies of the national communities. The deputy of a national community is elected in a constituency that shall be established in those areas in which the members of the communities live (the sixth paragraph of Article 20).
32. The VRRA regulates the voting rights register in such manner that the register of citizens who have the right to vote and to stand for election as a deputy of the Italian or Hungarian national communities are kept separately. The special electoral register for each election is compiled by the commission of the self-governing national community. The electoral registers have to be published and they are confirmed by the competent administrative authority (an administrative unit).
33. Members of the national communities who are registered in the general and special electoral registers may cast two votes in the elections to the National Assembly – one for the election of the deputy of the national community and the second for the election of other deputies. These persons therefore have a double voting right – general and special.
34. The special voting right entails a departure from the principle of equal suffrage. The principle of equal suffrage requires that each voter must have the same number of votes and that these votes have the same value. Voters who have a special voting right in addition to a general right to vote have two votes; their will is taken into account twice: firstly, when electing the deputy of the national community and, secondly, when electing other deputies. The right of the members of the national communities to elect their own deputy, irrespective of their number, already entails a departure from the principle of equal suffrage. Furthermore, double voting entails an additional departure from this principle.
35. The special voting right of the members of the national communities is an expression of the constitutionally guaranteed protection of these communities and their members. Although it entails a departure from the principle of equal suffrage, such “positive discrimination” is not constitutionally inadmissible; on the contrary, the Constitution requires that the legislature implement such measures into the legislation. As the Constitution itself provides for or, in fact, requires a departure from the principle of equal suffrage (“positive discrimination”), the Constitutional Court did not have to assess the gravity of the interference with equal suffrage and the importance of the constitutional value achieved by such interference.

36. The Constitutional Court reviewed the question of whether the legislature could have implemented the constitutional provisions on the direct representation of the national communities and the election of one deputy for the Italian and Hungarian national communities to the National Assembly in a different manner, i.e. in a way that would not have given a double voting right to the members of the national communities. If the law gave only one vote to the members of the national communities and provided them with the option to exercise either their general right to vote or their special voting right (i.e. to choose between voting in elections for a deputy of the national community and voting in elections for other deputies), these persons would have been deprived of one of these two constitutional rights. As the Constitution does not limit the general right to vote of the members of the national communities and that, at the same time, it gives them the right to elect a deputy of the national community, the enactment of the right to only one vote with the possibility to choose (option) would result in the members of the national communities being forced to choose between two constitutional rights: the general right to vote and the right to direct representation. By opting for one of these two rights, they would automatically renounce the other. Such regulation would be inconsistent with the Constitution, as the members of the national communities would be deprived of one or the other right – depending on their choice.
37. The right of the members of both autochthonous national communities to vote in elections of the deputy of the national community and in elections of other deputies derives from the Constitution itself, and thus the legislature acted in accordance with the Constitution when it incorporated this right into the electoral system. It is true that the high level of protection of autochthonous national communities guaranteed by the Constitution entails a dual departure from the principle of equal suffrage, however this departure is provided for and required by the Constitution itself as a form of so-called positive discrimination.

#### B – IV

38. The third paragraph of Article 64 of the Constitution provides that the national communities shall also be directly represented in the representative bodies of the local self-government. As is the case with the analogous regulation in accordance with the NAEA, the right of the members of the national communities to cast two votes in the elections of municipal council members is also not inconsistent with the Constitution. The grounds on which this finding is based are the same as those regarding the regulation in accordance with the NAEA – only this statutory mechanism enables the implementation of the constitutional precept that the national communities shall be directly represented in the representative bodies of local communities.

#### B – V

39. The special voting right of the members of the national communities is registered in a special electoral register that is compiled by the self-governing national community and confirmed by the competent authority (the fourth paragraph of Article 2 of the

VRRA). The electoral register of citizens who are members of the national communities in the areas in which these communities live is compiled by a commission of the respective self-governing national community. A special electoral register is prepared for each polling station (Article 19). The electoral register is then confirmed by the competent authority (an administrative unit). The challenged Article 22 determines that citizens who are members of the Italian or Hungarian national communities and have no permanent residence in the areas in which these communities live are to be entered in this special electoral register based on their request in writing submitted to the respective self-governing national community.

40. Special constitutional rights (including the special voting right) are guaranteed only to the members of the autochthonous Italian and Hungarian national communities. Neither the Constitution nor the law define the concept “autochthonous” in more detail. More detailed criteria for establishing which voters have a special voting right cannot be found in the VRRA or in any other law. In practice, in the elections of the deputies to the National Assembly in 1992 and 1996, the commissions of the self-governing national communities carried out the registration process in the special electoral registers without any statutory criteria.
41. The second paragraph of Article 121 of the Constitution provides that self-governing communities may be vested by law with the public authority to perform certain duties of the state administration. The second paragraph of Article 64 of the Constitution provides specifically that the state may authorise self-governing national communities to perform certain functions under national jurisdiction.
42. The principles of a state governed by the rule of law (Article 2 of the Constitution), the principle of the separation of powers (the second paragraph of Article 3 of the Constitution), and the principle of the legality of the administration’s operations (second paragraph of Article 120 of the Constitution) establish the requirement that, when exercising these powers, bearers of public authority must, in terms of the principle of equality, be put on an equal footing with state administration authorities. When exercising public authority in specific cases, they must have a legal basis in the law. Such also applies to self-governing national communities when they perform functions pursuant to the public authority vested in them – especially if they decide on the rights of individuals.
43. As the special voting right is recorded by entry in the special electoral registers of the members of the autochthonous Italian and Hungarian national communities, and as, at polling stations before the vote, this voting right is demonstrated by such entry in the electoral register, the criteria to be applied by the commissions of the self-governing national communities when compiling these electoral registers or deciding on the registration of individual voters in these electoral registers should have been defined. Affiliation with the autochthonous Italian or Hungarian national communities is a status to which the Constitution (and in accordance with it the law) ascribes specific rights (particularly the special voting right). Therefore, the criteria determining whether a citizen belongs to the autochthonous Italian or Hungarian national community should have been determined by statute. By determining these criteria,

the law would not interfere with the constitutional right referred to in Article 61, according to which everyone has the right to freely express affiliation with their nation or national community. Each person has the right to freely express their affiliation with any nation or national community. As regards the decision as to who should enjoy these special rights, which the Constitution only grants to the members of the autochthonous Italian and Hungarian national communities, not only the will of the individual is decisive, but statutory criteria must be determined for such decision.

44. The Constitution recognises the Italian and Hungarian national communities as autochthonous. All the special rights through which the Constitution protects the national communities refer only to the members of the autochthonous Italian and Hungarian national communities, and not to all persons who define themselves as Italians or Hungarians. In this regard, it is therefore not sufficient for a person to define him- or herself as Italian or Hungarian in order to be able to exercise the special rights (particularly the special voting right). A regulation requiring the commission of a self-governing national community to enter in the special electoral register any citizen who has reached the age of majority, has the legal capacity and has declared that he considers himself a member of the autochthonous Italian or Hungarian national community would be constitutionally inadmissible. Actual affiliation with the autochthonous Italian or Hungarian national communities is not in fact simply dependent on the individual's will, but is also a matter for the national community, which in accordance with the statutory criteria also considers such an individual to be its member and enters him or her in the special electoral register. A regulation guaranteeing anyone who defined themselves as a member of the autochthonous Italian or Hungarian national communities the right to be entered in the special electoral register would not expand the protection of the national community, but would instead enable unrestricted abuse, either solely for election purposes or with the intention of distorting the true will of the national community regarding its operations, elections to its own bodies, etc. Such regulation would negate the special rights of the members of the autochthonous Italian and Hungarian national communities.
45. The legislature should have determined the criteria for establishing affiliation with the autochthonous Italian and Hungarian national communities. The absence of such criteria allows for completely arbitrary decision-making, which is contrary to the principles of a state governed by the rule of law, the principle of the separation of powers, and the principle of the legality of the administration's operations. The Constitutional Court established that this legal gap exists in the regulation of entries in the special electoral register pursuant to the VRR. It required the legislature to fill this unconstitutional legal gap prior to calling the next elections to the National Assembly. The Constitutional Court set a relatively long time limit due to the complexity of the subject matter from academic and political perspectives and its sensitivity; more specifically, the legislature must take special care to ensure that it fills this legal gap so as not to jeopardise the constitutional rights of the national communities and other constitutional rights or freedoms.

46. In its assessment as to whether it is consistent with the Constitution that the special voting right can also be exercised by persons who have permanent residence outside the areas in which the autochthonous Italian and Hungarian national communities live, the Constitutional Court was required to interpret the concept “autochthonous”. It considered that it is not constitutionally inadmissible for a person who lives outside the nationally mixed areas to be considered a member of the autochthonous Italian or Hungarian national communities. In this respect, it took particular note of the provision of the fourth paragraph of Article 64 of the Constitution, according to which “the rights that the members of these national communities exercise also outside the areas where these national communities live shall be regulated by law.” It did not, however, decide on the question of whether it would be unconstitutional if, when filling the established unconstitutional legal gap (i.e. when defining the criteria for affiliation with the autochthonous Italian or Hungarian national communities), the legislature were also to include the criterion of permanent residence in an area in which the autochthonous national communities live.

#### **B – VI**

47. The petitioners challenge the provisions of Article 134 of the Charter, according to which local communities are granted the status of legal entities. By Decision No. U-I-274/95 (OdlUS V, 119), the Constitutional Court held that the mandatory interpretation of Article 19 of the LSA in force at the time enabled municipalities to grant legal personality to their constituent parts was not inconsistent with the Constitution. However, it established an unconstitutional legal gap in the LSA and required the legislature to regulate the fundamental characteristics of the legal status of the constituent parts of municipalities that have legal personality. The National Assembly adopted the Act amending the Local Self-Government Act (Official Gazette RS, No. 70/97) on 30 October 1997. The first paragraph of Article 19 of the amended LSA provides that the constituent parts of a municipality may have the status of legal entities. The provision of the Charter that grants local communities the status of legal entities is thus not inconsistent with the Constitution and the laws.
48. The challenged provision of the second paragraph of Article 140 of the Charter determines the direct representation of the national communities in the localities’ councils. The petitioners believe that the special provisions on the rights of national communities should not apply to a locality as it is not a self-governing local community. It is true that a locality is not a self-governing local community; nevertheless, part of the decision-making on public affairs can take place therein if a municipality transfers by Charter the implementation of specific tasks to the locality. These are matters that refer to the most basic public amenities linked to the local area – i.e. local roads, premises for cultural activities, public services in the local area, local events, maintaining the appearance of the local area, etc. The Constitution demands the direct representation of the autochthonous Italian and Hungarian communities in the National Assembly and representative bodies of local communities (municipalities), however, it does not prohibit their direct rep-

resentation in the representative bodies of constituent parts of a municipality. As the Constitution demands so-called positive discrimination in the form of a special voting right in the elections to the National Assembly and to municipal councils, a regulation in the Charter that also guarantees such special right to the members of the autochthonous Italian national community in elections to the localities' councils is not inconsistent with the Constitution and the laws, although it entails a departure from the principle of the equal suffrage.

49. The fourth paragraph of Article 53 of the Charter provides that a deputy mayor must be of Italian nationality if the mayor is not. The petitioners believe that such entails a discriminatory restriction of the passive right to vote. The deputy mayor is not elected in direct elections but is appointed by the municipal council. The challenged provision therefore cannot entail an interference with the equal suffrage. However, it could entail an interference with equality before the law (the second paragraph of Article 14) – discrimination against persons who are not of Italian nationality but wish to stand as a candidate for deputy mayor. The principle of equality before the law prohibits the legislature or representative bodies of local communities from determining different legal consequences for factual situation that share the same essential elements without an objective justification. The restriction on who may be elected to the office of deputy mayor, which puts those persons who are not of Italian nationality at a disadvantage, is objectively justified and thus not constitutionally inadmissible. It is justified on the basis of the above-described aims of the so-called positive discrimination and the special protection of the national communities. The challenged provision of the Charter, which gives specific priority to members of the autochthonous Italian national community, was also adopted by the municipal council by the required two-thirds majority. Such entails that this right of the members of this national community has been recognised by the national majority through its representatives in the municipal council; for this reason, too, it is not possible to deem it inadmissible discrimination.

### C

50. The Constitutional Court adopted this Decision on the basis of Articles 21, 25, and 48 of the Constitutional Court Act (Official Gazette RS, No. 15/94), composed of: Dr Lovro Šturm, President, and Judges Dr Miroslava Geč-Korošec, Dr Peter Jambrek, Dr Tone Jerovšek, Mag. Matevž Krivic, Mag. Janez Snoj, Franc Testen, and Dr Lojze Ude. Points 1, 2, 3, and 5 of the operative provisions were adopted unanimously. Points 4 and 6 of the operative provisions were adopted by seven votes to one. Judge Ude voted against. Judge Ude submitted a dissenting opinion, and Judges Jerovšek and Krivic submitted concurring opinions.

*Dr Lovro Šturm*  
*President*

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**DISSENTING OPINION OF JUDGE DR UDE**  
**REGARDING POINTS 4 AND 6 OF THE OPERATIVE PROVISIONS**

1. I voted for Points 1, 2, 3, and 5 of the operative provisions of the Decision, in which it was essentially decided that the regulation set out in the National Assembly Elections Act, the Local Elections Act, the Voting Rights Register Act, and the Charter of the Koper Municipality, according to which members of the Italian and Hungarian self-governing national communities have the right to cast two votes in the elections of deputies to the National Assembly, is consistent with the Constitution of the Republic of Slovenia.
2. I do not agree, however, with Point 4 of the operative provisions, according to which it is inconsistent with the Constitution that the Voting Rights Register Act does not determine the criteria applied by the commissions of the Italian and Hungarian self-governing national communities when deciding on the entry of voters in the special electoral register of the citizens who are members of the autochthonous Italian and Hungarian national communities, and the National Assembly must remedy this inconsistency with the Constitution prior to calling the next regular elections to the National Assembly.

The concept of an autochthonous national community is not sufficiently defined from a legal, political, and academic perspective. Already in the discussions held during the adoption of the Constitution, some legal theorists, especially those who study the legal position of minorities or ethnic communities in the context of international law, expressed the opinion that the Constitution should not use this concept and associate it with an extremely high level of rights. Even after the Constitution was adopted, the concept of an autochthonous national community was never sufficiently clarified and no elements have yet been determined that are decisive for the establishment of whether or not a specific national community is autochthonous. For this reason, I doubt that the legislature could satisfactorily fulfil the obligation to define by law the criteria for entering voters in the special electoral register of the members of the autochthonous Italian and Hungarian national communities. The Constitutional Court has set a relatively long time limit for the National Assembly, since new elections to the National Assembly will be held in less than three years. Nevertheless, I believe that the legislature will not have sufficient time to study this issue or, more importantly, to prepare reasoned positions of sufficient quality. In addition, such discussion may raise further questions that are crucial for Slovene society, such as, for example, the question of whether it is right that the two autochthonous national communities are granted an extremely high level of rights, especially political rights, while some other national communities, which have more members, are not even guaranteed a much lower level of rights in the spheres of culture and the economy. It is to be expected that some other countries and the international community will exert pressure on Slovenia in relation to these issues. It is therefore, in my opinion, unwise to further exacerbate these issues through positions of the Constitutional Court that could be used as an argument in discussions on the regulation of the rights of national communities in our country.

It is true that the definition of the criteria that are decisive for registering voters in the special electoral register of citizens who are members of the autochthonous Italian and

Hungarian national communities is not identical to a definition of the content of the concept of an “autochthonous national community”. However, by defining the criteria that are decisive for the affiliation with an autochthonous national community, the content of the concept of autochthony is also defined. These two issues simply cannot be separated. In my opinion it is necessary to refrain from defining the content of the concept of an autochthonous national community by law until it becomes clear from an academic perspective as to what this concept entails and what consequences a definition of this concept would have for the protection of the rights of the national communities (autochthonous and non-autochthonous). In my opinion, it is too early, and at this time even legally and politically irrational, to impose on the legislature the obligation to define this concept by law.

3. I also do not agree with Point 6 of the operative provisions, by which the Constitutional Court dismissed the petition in the part that refers to the Deputies Act and the Rules of Procedure of the National Assembly. As a result, the Constitutional Court refused to decide whether the provision that the two deputies – who are representatives of the Italian and Hungarian national communities – have the same rights as the rest of the deputies in the National Assembly, and that they may therefore vote on all matters, is consistent with the Constitution.

The allegation that the petitioners do not have legal interest to challenge the regulation of the scope of rights of the deputies as such regulation does not directly interfere with their rights is extremely unpersuasive. The Constitutional Court recognised that the same petitioners have legal interest to challenge the regulation of the “double” voting right of the members of the Italian and Hungarian national communities in the elections to the National Assembly and municipality councils. The Constitutional Court, however, failed to state the reasons for its position that these petitioners do not have legal interest to challenge the regulation of the scope of rights of the two deputies to the National Assembly, and only held, in very abstract and general terms, that the regulation did not directly interfere with the petitioners’ rights, legal interests, or legal position. It is understandable that the Constitutional Court was unable to find reasons for such a position, as this differentiation between the regulation of elections and the regulation of the scope of rights of the deputies is entirely unconvincing.

The Constitutional Court therefore should have substantively considered the scope of rights of the two deputies of the autochthonous national communities. With its formal decision on dismissal, the Constitutional Court avoided substantive consideration and thus providing an answer, even though the answer to this question is very straightforward from a constitutional perspective. In accordance with the first paragraph of Article 80 of the Constitution, the National Assembly is composed of deputies of the citizens of Slovenia, and comprises 90 deputies in total. In accordance with the third paragraph of the same Article of the Constitution, one deputy of the Italian and one deputy of the Hungarian national communities shall always be elected to the National Assembly. These two deputies therefore number among the ninety deputies, each of whom, in principle, have the same rights.

The same conclusion is inevitably reached on the basis of an interpretation of the fifth paragraph of Article 64 of the Constitution, which provides that laws, regula-

tions, and other general acts that concern the exercise of the constitutionally provided rights and the position of the national communities exclusively may not be adopted without the consent of the representatives of these national communities. The deputies of the national communities to the National Assembly therefore hold a constitutionally defined special position regarding the adoption of laws that concern the rights and position of the national communities, while otherwise their rights are identical in terms of content to those of other deputies.

The reasoning of the petitioners could therefore be relevant only in the procedure for amending the Constitution, and not in proceedings to review the constitutionality of laws or other general acts implementing the current constitutional order.

*Dr Lojze Ude*

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#### **CONCURRING OPINION OF JUDGE DR JEROVŠEK**

I voted for all the Points of the operative provisions and for the entire Decision; nevertheless, I was of the opinion that the decision reached in Point 4 of the operative provisions, according to which the Voting Rights Register Act is unconstitutional merely because it does not determine the criteria according to which the commissions of the Italian and Hungarian self-governing national communities to decide on the entry of the voters in the special electoral register of citizens who are members of the autochthonous Italian and Hungarian national communities, was too narrow. More specifically, I believe that, apart from the finding that the mentioned act does not entail sufficient regulation, the Constitutional Court should have held that it is unconstitutional to provide that the national community itself may decide on the entry of voters in the special electoral register. Such would need to be entrusted to the authorities responsible for registering voters in the electoral registers. By such authorisation as is currently provided by the law, the national community (even though to a somewhat lesser extent after the criteria will be defined) has the possibility to generate the number of persons who are entitled to vote, thereby creating certain special relationships to the remaining electorate with regard to the elections to the National Assembly. Even registration in the general electoral registers is not entrusted to special commissions of the electorate but to the competent state authorities who perform such in the manner and in the procedure determined by law. As a result, the current regulation results in an unequal position with regard to the manner in which electoral registers are prepared, which are in addition prepared without the appropriate control of the competent state authorities. In such situation, it is even more reasonable to expect that the required criteria will at least additionally provide for an adequate control mechanism for these registrations and determine appropriate legal remedies in the event of irregularities in the decision-making process regarding the registration of voters on the electoral register.

*Dr Tone Jerovšek*

**I**

I agree with all the points of the operative provisions as well as with the entire reasoning, except for one or two formulations in Section B – V; nevertheless, in this concurring opinion, I wish to further elaborate upon the reasoning in Section B – V and, at the same time, also state my position on the differing views on the issues at hand that are also partially evident from some separate opinions.

**II**

I would like to draw attention to the importance of the constitutional premise referred to at the beginning of Paragraph 40 of the reasoning in Section B – V, which is formulated as follows: “Special constitutional rights (including the special voting right) are guaranteed only to members of the autochthonous Italian and Hungarian national communities.” Members of other “nations or national communities” (wording of Article 61 of the Constitution),<sup>1</sup> i.e. including the members of any other autochthonous national communities, are guaranteed other constitutional rights, especially those determined by Articles 61 and 62 of the Constitution: the right to express their national affiliation and the right to express their culture and use their language and script.

I believe the concerns that Point 4 of the operative provisions and its reasoning in Section B – V could prompt needless discussion on the content of the concept of autochthony and on a possible extension of the special constitutional rights of the Italian and Hungarian autochthonous national communities to others to be with-

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- 1 It is not entirely clear from the wording of Article 61 of the Constitution, which refers to the affiliation with “his or her nation or national community”, what the difference between a “nation” and a “national community” is supposed to be, as it is likely that members of every nation also form some kind of “national community” (referred to, of course, in sociological terms as an unorganised group of people that does not have any authorities and legal norms, but that is held together by different ties). With regard to its origins, this wording could probably be attributed to the term “nations and nationalities of the SFRY” that was used in the previous regime; the term “nations” designated the constitutive nations of Yugoslavia (i.e. the nations that founded Yugoslavia), whereas the disputable term “nationalities”, which is problematic from various perspectives, referred to what is clearly and simply known throughout the world as national minorities. I therefore assume that today’s wording “nations and national communities” is some kind of (transformed) remnant of the previous syntagm “nations and nationalities”. In this context, Article 61 of the Constitution should be interpreted in the sense that it guarantees everyone the right to freely express affiliation with any nationality living outside Slovenia, or indeed with any nationality whose members have already lived in Slovenia for a long time and enjoy the status of “national community” or minority. Or, to be more specific, this distinction actually makes it possible for persons who deem themselves to be Italian to freely define themselves either as members of the Italian minority in Slovenia (“national community”) or simply as members of the Italian nation as a whole. However, it is likely that this nuanced distinction lacks any significant practical importance. If an Italian person also has a sense of belonging to the Italian minority in Slovenia, he will probably display this in practical terms (e.g. by participating in the life and activities of the Italian minority or by registering on the special electoral register) and not by some abstract declaration.

out foundation. On the one hand, it is neither possible nor necessary to prevent or fear such discussions because the gradual increase in sensitivity towards these issues on a global level is also inevitably reflected here, in Slovenia; on the other hand, in accordance with Articles 61 and 62 of the Constitution, the members of all the national communities in Slovenia are guaranteed such a high level of constitutional protection (which either does not exist or is not achieved in many traditional democratic states) that it is entirely an internal matter of Slovenia and its constitutional order for what reasons – constitutional, traditional, historical, cultural, and political – it provided the Italian and Hungarian national communities with an even higher level of protection or additional special rights in the Constitution. It is also entirely an internal matter of Slovenia as to whether it will deem it necessary to provide any other national community, apart from these two, with an equally high level of protection and rights in the future, given that the regulation of the rights of the members of all the national communities is more than satisfactory when compared to international law and other legal systems. It is my personal view that there is a probability that this issue will arise – albeit not immediately – only in relation to the Roma community, which in principle already enjoys a special position and special rights in accordance with Article 65 of the Constitution, but not to the same extent as the Italian and Hungarian national communities.

Above all, it is clear that this point of the operative provisions and its reasoning do not require a statutory definition of an autochthonous national community, but merely a statutory definition of the “criteria to be applied by the commissions of the Italian and Hungarian self-governing national communities when deciding on the registration of citizens in a special electoral register”. These are, however, two related but nevertheless independent and different issues. I will explain hereinafter why this is the case.

The issue at hand does not concern an individual not being allowed to express his or her affiliation with one of the two national communities (i.e. to subjectively define him- or herself as its member), as this is his or her constitutional right in accordance with Article 61 of the Constitution. However, it is not possible to impose on this national community, which is organised as a special self-governing community in accordance with Article 64 of the Constitution, the obligation to accept as its member anyone who has declared him or herself as its member or to enter him or her in the special electoral register, especially not when a person (or even a larger organised group of people) seeks to abuse, either solely for election purposes or with the intention of distorting the true will of the national community regarding its operations, the elections to its own bodies, etc.

This idea has already been expressed in Paragraph 44 of the reasoning and I would merely like to further support it with additional arguments. In my opinion, emphasis should not be devoted to the concept of autochthony, but instead solely to the necessary statutory definition of the criteria for the preparation of the special electoral register in order to protect the Italian and Hungarian national communities from any electoral and other abuses. The purpose of these criteria is there-

fore to protect the two national communities from potential abuses, but not from the possibility that another Italian or Hungarian, who immigrated subsequently, would “pretend” to be one of the “autochthonous” Italians and Hungarians (who have been living here for a long time).

Paragraph 46 of the reasoning also partially addresses this issue, but, in my opinion, not in an entirely adequate manner. In my opinion, the question of whether Italians and Hungarians who live, for example, in Ljubljana or Maribor may also obtain a special voting right does not interfere with the “interpretation of the concept of the autochthony” as is stated in Paragraph 46. The Italian and Hungarian national communities are undoubtedly autochthonous in Slovenia and it is known where they traditionally live, and the issue as to whether or not they deem specific compatriots who live or originate from elsewhere to also be their members is entirely a matter for them to decide. Even if such compatriot has moved to Slovenia from the south of Italy or from eastern Hungary and has actually started to participate in the cultural and other life of the Italian or Hungarian minorities, or wishes to do so, I see no reason why this minority should refuse to accept him or her into its ranks – of course, however, only if it so wishes and not under any duress. In this sense, both minorities could thus attempt to draft a proposal for the statutory criteria required by Point 4 of the operative provisions; however, a simple negative criterion might suffice: anyone who so wishes can be entered in the special electoral register, and registration may only be denied to those for whom it is not possible to ascertain that they are truly connected with the national community based either on their origin, name, language proficiency, and similar objective criteria, or on their previous subjective expression of affiliation with the minority and active involvement in the community, or if specific circumstances point to an attempt to abuse the special voting right for purposes that are foreign to this national community or even contrary thereto.

It is clear from the above statements as to what my answer would be to the unanswered question, which is indicated at the end of Paragraph 46: if the law also included permanent residence in the “autochthonous” area as one of the above-mentioned criteria, this would not be unconstitutional, if such was the will of the Italian and Hungarian national communities (i.e. if they proposed such statutory regulation); moreover it would not be unconstitutional if the law did not determine such criterion, and would thus be much broader and more liberal in this regard. It should be a matter for these two national communities to decide on which compatriots they include as their members through registration in the special electoral register; the statutory criteria for such must be determined exclusively for the protection of the minority against potential abuses or, more specifically, in order to ensure that when the competent commissions started to deny such registrations in the electoral register due to attempts “of hostile takeover of the minority deputy mandates by the groups foreign to the minority”, these commissions, and subsequently, in the event of disputes, also the courts, would have statutory criteria on which they could base their decision. Until no such organised attempts are made, registration will probably not be denied and there will thus be no disputes in this regard.

### III

Regarding the petitioners' legal interest (Point 6 of the operative provisions and Paragraph 29 of the reasoning), the fundamental criterion for recognising legal interest (in accordance with Article 24 of the CCA) is that the challenged provisions directly legally affect the petitioner. It is of course true that the legal regulation of the voting right of the "minorities" and the legal regulation of the scope of rights of the minority deputies are issues that are inextricably linked; however, it is also true that the double voting right of the members of the minorities directly interferes with equal suffrage in regard to all the other voters (even though this interference is, as has been established by this Decision, constitutionally admissible and even required), whereas the different scope of rights of minority deputies interferes, at most, indirectly with the rights of the voters who have voted for other deputies. *Quod erat demonstrandum*. This was (the only) point to be proved. Once this was demonstrated (that, pursuant to the law, the petitioner cannot be deemed to have legal interest), the petition had to be dismissed, regardless of what we may think of the content of the petition and regardless of the fact that, in my opinion, also the answer to this substantive question would probably not be questionable or uncertain.

*Matevž Krivic*

Decision No. **U-I-336/96**, dated 4 March 1999

### DECISION

At a session held on 4 March 1999 in proceedings to review constitutionality initiated upon the petition of the political parties Stranka Enakopravnih Dežel, Ljubljana, represented by its president, Jožef Jarh, Krščansko-Socialna Unija, Ljubljana, represented by its president, Franc Miklavčič, Republikanci Slovenije, Velenje, represented by its president, Adolf Štorman, and Komunistična Partija Slovenije, Ljubljana, represented by its secretary general, Marek Lenardič, the Constitutional Court

*decided as follows:*

**Article 43 of the National Assembly Elections Act (Official Gazette RS, Nos. 44/92 and 60/95) is not inconsistent with the Constitution.**

### *Reasoning*

#### **A**

1. The petitioners challenge Article 43 of the National Assembly Elections Act (hereinafter referred to as the NAEA), which regulates the submission of nominations for election to the National Assembly. They assert that the provisions of Article 43 discriminate against political parties that do not have deputies in the National Assembly (hereinafter referred to as extra-parliamentary parties). They do not agree with the fact that extra-parliamentary parties must “persuade voters” to sign a nomination proposal and thus reveal their political beliefs. They further state that, through the requirement to collect signatures, the time for their election campaign is shortened. They claim that the challenged regulation is contrary to Article 14 of the Constitution. Krščansko-Socialna Unija also claims that the challenged regulation is contrary to Article 22 of the Constitution (equal protection of rights).
2. The Secretariat of the National Assembly for Legislation and Legal Affairs replies that the petitions are unfounded. It states that it is the purpose of the challenged regulation “to exclude from competition political parties that do not have a real intention or possibility of standing for election.” It further states that according to

the challenged regulation all political parties, including extra-parliamentary parties, have the same legal opportunities to submit a nomination and it is therefore not possible to claim inequality.

### B – I

3. The Constitution guarantees universal and equal suffrage. This guarantee follows from the provisions of the Constitution regarding a democratic political system (Article 1 of the Constitution, the second paragraph of Article 3 of the Constitution), universal and equal suffrage (the first and second paragraphs of Article 43 of the Constitution), the right to participate in the management of public affairs (Article 44 of the Constitution), and the elections of deputies to the National Assembly (the second paragraph of Article 80 of the Constitution). The principles of universality and equality refer to the active right to vote (i.e. the right to cast a vote) as well as the passive right to vote (i. e. the right to stand for election).
4. The principles of universal and equal suffrage must also be taken into account in the statutory regulation of the nomination of candidates for elections. Each candidate or list of candidates must have the same legal opportunity to stand for election. In addition, all political parties must have the same legal opportunities for their candidates and lists of candidates to stand for election.
5. The principle of universal suffrage does not prohibit the legislature from determining specific conditions for the nomination of candidates. The legislature has the right to ensure, by determining the minimum support required for a nomination at elections to the National Assembly, that only those candidates and lists who have demonstrated that they have at least a minimal chance of being elected may compete in the election, and at the same time prevent the participation of those candidates and lists for whom it becomes clear already during the nomination procedure that they enjoy so little support from the electorate that they have no chance of being elected. In such manner, difficulties that could arise if too many candidates participated in an election are prevented. This ensures electoral transparency and prevents that technical and time constraints would render the presentation and confrontation of political programmes and candidates impossible. The prevention of nominations of candidates that have no chance of being elected also prevents the loss or splitting of votes (it would be certain in advance that the votes of a specific, although minimum, number of voters would not be taken into account in the distribution of seats). The prevention of all these negative phenomena has a positive effect on the democratic nature of elections.<sup>1</sup>

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1 The German Federal Constitutional Court has also taken the same position regarding the question of whether a statutory requirement for specific support of nominations is consistent with the principles of the universal and equal suffrage.

The court took the view that the requirement for specific support for a nomination (*“Unterschriftenquorum”*) does not interfere with the passive right to vote if it is determined in such manner that it only prevents unrealistic or hopeless nominations, but not nominations that have at least a small chance of success (BVerfGE 3, 19; 3, 383; 4, 375; 5, 77; 6, 84; 12, 135; 24, 260; 41, 399).

6. A statutory regulation of the support required to stand for election could entail a restriction of the right to vote (a violation of the principle of universal suffrage) if it were disproportionate, i.e. if the restrictions exceeded the extent required to achieve the above-mentioned aims. A restriction would exist if it was likely that the support required for a nomination would prevent candidates or lists of candidates who would have at least a minimal chance to be elected from standing for election – for example, if the required number of voters' signatures was excessive or if the support of a parliamentary party was prescribed as a mandatory condition.
7. An analysis of the voting system is essential in order to determine the limit which could be considered, once exceeded, to be restricting the right to vote in relation to the statutorily required support for nomination, given the fact that it depends on the realistic chance of the person seeking nomination to be elected.
8. The principle of equal suffrage is not violated if the law provides for alternative ways in which to obtain support for a nomination – for example, if nomination requires the support of a political party, a specific number of voters or deputies of the National Assembly, or a combination of these options. The fact that different weight is assigned to signatures provided by deputies and voters in support of a nomination does not entail inadmissible discrimination between those persons (Article 14 of the Constitution). Such distinction is objectively founded on the different positions held by the individual subjects within the political system. Their different positions give their signatures different weights in establishing the probability of a candidate or list being elected.

## B – II

9. The challenged Article 43 of the NAEA provides as follows:  
 “Political parties shall nominate candidates in accordance with the procedure determined by their regulations. The list of candidates shall be determined by secret ballot. A political party may submit a list of candidates in every constituency, provided its lists are supported by the signatures of at least three deputies of the National Assembly. The signatures of the deputies shall be submitted to the National Electoral Commission on the prescribed forms.  
 A political party may submit a list of candidates in a constituency if the list of candidates has been nominated by members of the political party who have the right to vote and permanent residence in the constituency and the list of candidates is supported by the signatures of at least fifty voters who have permanent residence in the constituency.  
 A political party may also submit a list of candidates in a constituency if the list of candidates has not been nominated in the manner defined in the preceding paragraph, provided the list of candidates is supported by the signatures of at least one hundred voters who have permanent residence in the constituency.  
 Two or more political parties may submit a joint list of candidates.”
10. The statutory regulation of nomination for elections to the National Assembly currently in force does not prevent candidates who have at least a minimum chance of being elected from participating in the election. Even if political parties cannot

secure for their lists the support of at least three deputies of the National Assembly, they may nominate lists of candidates with the support of 50 or 100 voters in a constituency (50 in the event that the list is nominated by members of the party from the constituency, and 100 in the event that the list or lists are nominated by the bodies of the party at the national level). According to available data on the average number of registered voters (according to the data of the Ministry of the Interior, on 30 June 1996 there were 2,039,578 citizens in total, of which 1,593,035 were adults), the average number of adult citizens in a constituency is 199,129. Therefore, in order to support a list of candidates it is on average necessary to secure the signatures of 0.052% or 0.026% of the registered voters in a constituency. Such number of required signatures of support does not prevent the lists of candidates that have at least a minimal chance of obtaining a seat in the distribution at constituency level (on the basis of an electoral quotient that amounts to one eleventh of the votes cast in a constituency) or at the national level (on the basis of an electoral threshold of three seats) from standing for election. This entails that the required support does not exceed the admissible limit and can therefore not be deemed to limit the passive right to vote. The provisions of the NAEA regarding the required support merely exclude from the election those lists that do not have even a small chance of winning a seat. Such ensures electoral transparency and facilitates debates in the election campaign between candidates on those lists that have at least a minimum chance of winning at least one seat in the election, and prevents an unnecessary splitting of votes.

11. Differentiating between the weight of the support of deputies and that of voters is objectively justified by legitimate reasons and it is therefore not possible to claim the inadmissible discrimination of legal subjects. Such different treatment is not based on personal circumstances (nationality, race, sex, language, belief, political or other conviction, etc.) but on the different positions of these subjects within the political system. Political parties are organisations in which citizens associate in order to achieve political goals (especially by nominating candidates for elections) and therefore it is justified for the legislature to assign a special role to them in the nomination procedure. Deputies to the National Assembly are elected in direct and universal elections and therefore it is possible, irrespective of the electoral system by which they are elected, to deem that they enjoy the support of a significant part of the electorate. A differentiation between the weight carried by signatures of support of deputies and signatures of support of voters (the signatures of three deputies are equal to the signatures of up to 800 voters) is objectively justified.
12. The principle of the equal protection of rights in any proceedings before courts, other state authorities, local community authorities, and bearers of public authority (Article 22 of the Constitution) does not refer to the substantive law regulation of the right to vote, the challenged Article 43 of the NAEA, however, contains substantive law provisions on nomination (i.e. conditions for nomination). Consequently, the reference made by the petitioners to Article 22 of the Constitution is irrelevant.
13. The provisions of the NAEA that determine what kind of support a list of candidates nominated by a political party must obtain in order to stand for election to the Na-

tional Assembly in an individual constituency are not inconsistent with the principle of a democratic state (Article 1 of the Constitution, the second paragraph of Article 3 of the Constitution), the principle of equality before the law (Article 14 of the Constitution), the principle of the equal protection of rights in proceedings (Article 22 of the Constitution), the principles of universal and equal suffrage (the first and second paragraphs of Article 43 of the Constitution), the right to participate in the management of public affairs (Article 44 of the Constitution), and the provisions on the elections of deputies to the National Assembly (Article 80 of the Constitution).

### C

- 14.** The Constitutional Court adopted this decision on the basis of Article 21 of the Constitutional Court Act (Official Gazette RS, No. 15/94), composed of: Franc Testen, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Dr Miroslava Geč-Korošec, Lojze Janko, Milojka Modrijan, Dr Mirjam Škrk, Dr Lojze Ude, and Dr Dragica Wedam-Lukić. The decision was adopted unanimously.

*Franc Testen*  
*President*

Decision No. **Up-2385/08**, dated 9 September 2008

### DECISION

At a session held on 9 September 2008 in proceedings to decide upon the constitutional complaint of the *Lista za čisto pitno vodo* [List for Clean Drinking Water], Ljubljana, represented by Mitja Bartenjev, attorney in Ljubljana, the Constitutional Court

*decided as follows:*

1. Supreme Court Judgment No. II Uv 3/2008, dated 15 September 2008, is abrogated, the Decision of the Electoral Commission of the 1<sup>st</sup> constituency No. 041-3/2008, dated 1 September 2008, is annulled.
2. The list of candidates, which is called the “*List for Clean Drinking Water*” and which was submitted in the 1<sup>st</sup> constituency on 20 August 2008, is confirmed.
3. The National Electoral Commission shall implement the decision referred to in the previous point by placing the list of candidates, which is called “*List for Clean Drinking Water*”, last on the list of confirmed lists of candidates in the 1<sup>st</sup> constituency.

*Reasoning*

### A

1. The Electoral Commission of the 1<sup>st</sup> constituency (hereinafter referred to as the EC) rejected the list of candidates, which is called “List for Clean Drinking Water” (hereinafter referred to as the List), because it established that three of the fifty voters who supported the List do not have a permanent residence in the constituency. With regard to the third paragraph of Article 43 of the National Assembly Elections Act (Official Gazette RS, No. 109/06 – official consolidated text and 54/07 – hereinafter referred to as the NAEA), the list of candidates was allegedly not compiled and nominated in accordance with the law. By the challenged judgment the Supreme Court rejected the appeal of the List’s representative as unfounded. It established that the person submitting the List was requested to remedy its formal deficiencies within a specifically determined deadline but failed to do so before the decision rejecting the list of candidates had been issued. Consequently, the Supreme Court ruled that the

EC's decision to reject the list of candidates under discussion in accordance with Article 56 of the NAEA was correct and lawful. Therefore, the Supreme Court rejected all the objections of the complainant that, in the given context, could not have influenced the Supreme Court to adopt a different decision.

2. The complainant alleges a violation of the right to vote determined in Article 43 of the Constitution and the right to participate in the management of public affairs determined in Article 44 of the Constitution. It states that the political party "List for Clean Drinking Water" submitted a list of candidates for the election of deputies to the National Assembly in the 1<sup>st</sup> constituency on 20 August 2008, that the list was supported by fifty confirmed forms expressing the support of the voters from the constituency, and the person submitting the list allegedly received confirmation thereof. On 28 August 2008, i.e. after the deadline to submit candidacies had expired, the president of the party was informed by telephone that three of the forms for expressing voters' support in this constituency "were not ok". It was alleged that the voters in question did not have a permanent residence in the constituency. The person submitting the candidacy relied on the accuracy of the support of the voters expressed before the competent authority – i.e. the administrative unit. It believes that it was the duty of the administrative unit to verify whether the signatory supporting the List has a permanent residence in the constituency, as it may access the voters' permanent residence records. Consequently, the complainant's reliance on the accuracy of the data provided in the form for expressing support, which was confirmed by the administrative unit, was allegedly reasonable. The complainant therefore argues that the finding of the Supreme Court that the fact that three signatories of the form for expressing support do not have a permanent residence in the constituency could not be disputed is unfounded.
3. The complainant argues that, having regard to the third paragraph of Article 56 of the NAEA, it was requested to remedy the formal deficiencies of the list of candidates in an unlawful manner. It claims that that provision of the NAEA requires a written request in order to remedy the deficiencies of a list of candidates; however, the complainant was requested to supplement the list of candidates verbally by telephone, it was given a deadline that was too short, and was not warned of the consequences if it failed to supplement the list of candidates within the specified deadline. The complainant did not invoke this allegation before the Supreme Court, but it alleges that the Supreme Court should have addressed this issue *ex officio*.
4. By Order No. Up-2385/08, dated 8 September 2008, the Constitutional Court accepted the constitutional complaint for consideration.

## B

5. The Supreme Court deemed that the rejection of the list of candidates was consistent with the second paragraph of Article 56 of the NAEA and rejected the complainant's argument that it relied in good faith that the work of the administrative unit will be carried out properly as irrelevant given that the complainant had been requested to remedy the formal deficiencies and that it had allegedly asserted that it would submit other declarations of support within the specified deadline. In the second

paragraph of Article 43, the Constitution guarantees the active and passive right to vote in the elections of deputies to the National Assembly, and the NAEA specifies the manner of implementation of those rights. The provisions governing the manner of expressing support to a list of candidates enable the exercise of the voters' active right to vote and, at the same time, the passive right to vote of the candidates standing for election to the legislative body. These rights are protected by Article 43 of the Constitution and not by Article 44 of the Constitution to which the complainant also refers in order to substantiate its constitutional complaint.

6. In accordance with the third paragraph of Article 43 of the NAEA, a political party may submit a list of candidates in an individual constituency provided the list of candidates is (*inter alia*) supported by the signatures of at least fifty voters who have permanent residence in the constituency. In accordance with the first paragraph of Article 47 of the NAEA, voters express their support by signing a prescribed form; the voter shall sign the form in person before the competent authority, which keeps a voting rights register, regardless of their place of permanent residence. On the mentioned form, the competent authority confirms that the person who signed the form before it is eligible to vote. Article 8 of the Voting Rights Register Act (Official Gazette RS, No. 1/07 – official consolidated text) determines that the right of a citizen of the Republic of Slovenia to vote is entered *ex officio* in the Permanent Population Register, in which the citizen is entered according to his permanent residence, unless provided otherwise by this Act (however, such is not relevant for the case at issue). The prescribed form for expressing support also requires that the data on the person's residence are provided, whereby, having regard to the third paragraph of Article 42 of the NAEA and the manner in which the Voting Rights Register is kept, it has to be deemed that the form requires that the data on the permanent residence are provided.
7. In Decision No. Up-304/98, dated 19 November 1998 (OdlUS VII, 240), the Constitutional Court already emphasised that elections are a process that must take place and be concluded within a specified continuous period and thus all the activities that have to be carried out in this procedure are limited by precise and very short statutory deadlines; all the authorities that have the power to decide in this procedure must take the manner in which the right to vote is exercised into account and, at the same time, such must also be taken into consideration by all the participants in this procedure. This usually entails that the person submitting the list of candidates is obliged to submit a complete list of candidates in due time; this obligation, however, does not imply that the person submitting the list is required to verify the accuracy of the data contained in the confirmations issued as authentic instruments by the competent national authorities. Therefore, the voters who expressed their support, as well as the person submitting the list of candidates, could reasonably expect that the competent administrative unit had verified the data on a voter's identity on the basis of which it was obliged to establish whether the person signing the prescribed form is eligible to vote. In view of the above, the administrative unit was obliged to verify the data regarding the permanent residence of such a person. The active right to vote, including the right to support candidates, which constitutes an element of this right, is exercised

in the constituency in which the voter has permanent residence. In addition, the competent electoral commission that is bound by short deadlines when exercising its competences must be able, as a general rule, to trust that another national authority has fulfilled its obligation lawfully, as it is impossible to imagine that, within the short deadlines that apply during the electoral procedure, and especially at the stage of the nomination procedure, it would be required to verify the entire work that the other national authorities had to perform in accordance with their competences.

8. The complainant enclosed with the list of candidates fifty forms signed by voters before the competent authority. All of the forms, i.e. including the three forms that are allegedly disputable and that were confirmed by the Jesenice Administrative Unit, included addresses that lay in the territory of the 1<sup>st</sup> constituency as residences. In view of the above, the complainant reasonably relied on the fact that the competent administrative unit had lawfully performed the work that is entrusted to it within the electoral procedure.
9. If the list of candidates fails to meet the condition determined in the third paragraph of Article 43 of the NAEA – i.e. fifty signatures of support by voters who have permanent residence in the constituency – such cannot be deemed a formal deficiency that could be remedied within the deadline and according to the procedure determined by the second paragraph of Article 56 of the NAEA. However, it would not be inconsistent with the right to vote if the electoral commission nevertheless requested that the person submitting the list of candidates supplement the list of candidates within the meaning of the second paragraph of Article 56 of the NAEA, as, if it transpired that the submitting person was already in possession of obtained additional signatures of support or that it had inadvertently failed to submit them, etc., then such would actually have the nature of a formal deficiency, which does not require new election-related activities to be performed in the nomination procedure and that could therefore be remedied.
10. The assessment of whether the complainant could reasonably rely on the fact that the competent administrative unit performed its task lawfully is therefore essential for the decision on confirming or rejecting the complainant's list of candidates. Therefore, the Supreme Court's position, according to which the complainant's argument that it was acting in good faith and therefore relied on the proper work of the national authority are irrelevant, violates the complainant's right to vote determined in Article 43 of the Constitution. Consequently, the Constitutional Court abrogated the judgment of the Supreme Court.
11. As the electoral commission is the electoral authority that is required to verify whether the list of candidates fulfils all the conditions required by law, and is therefore also responsible for the lawfulness of the work performed, the electoral commission, although it is not under any obligation to do so, may not be denied the competence to verify whether all the conditions provided by law are fulfilled, provided it acts in the same way in all cases characterised by identical circumstances, as it is also bound by the second paragraph of Article 14 of the Constitution. The Constitutional Court was not required to consider such as the complainant did not invoke the allegation of unequal treatment. If upon such verification the EC found that the competent administrative

unit had not performed its work lawfully, this does not entail that such failure can be attributed to the person submitting the list of candidates who performed his work in accordance with the law and who in view of the above could reasonably rely on the confirmation of the national authority. In such circumstances, the EC could not simply reject the candidacy upon finding that the person submitting the list was unable to remedy the established deficiency in the manner provided in the second paragraph of Article 56 of the NAEA as it transpired that the person submitting the list in fact did not possess any other forms expressing support. The Constitutional Court also considered the fact that the list of candidates was submitted on 20 August 2008 and that the person submitting it was requested to supplement the list as late as 28 August 2008, despite the provisions of the second paragraph of Article 54 of the NAEA.<sup>1</sup> This decision of the EC deprived the complainant and the candidates on the list of candidates of their right to vote. Given the circumstances of the case at issue, the EC's decision thus violated the complainant's right determined in the second paragraph of Article 43 of the Constitution and, despite the fact that the complainant had invoked it explicitly in its appeal, the Supreme Court failed to remedy this violation due to its position that is inconsistent with the Constitution. In such circumstances, the EC should have decided in favour of the right to vote and confirmed the list of candidates. Therefore, the Constitutional Court annulled the challenged decision of the EC.

12. Due to the short deadlines and, in particular, in order to enable the effective exercise of the right to vote of all persons who are eligible to vote, on the basis of the first paragraph of Article 60 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court also decided on the lawfulness of the submitted list of candidates. The complainant submitted the list of candidates within the prescribed deadline and demonstrated that the list fulfils the conditions determined by law. With regard to the above-mentioned reasons, it had to be deemed that the complainant could reasonably rely on the fact that fifty voters with permanent residence in the 1<sup>st</sup> constituency supported the list of candidates through their signatures, and the unlawful work of the competent administrative unit cannot outweigh the importance that the confirmation of the candidacy has for the complainant. Therefore, the Constitutional Court confirmed the list of candidates and, on the basis of the second paragraph of Article 60 of the CCA and given the current stage of the electoral procedure, ordered the National Electoral Commission to enforce this Decision. The EC already carried out a draw in order to determine the order of the confirmed lists of candidates [on the ballot papers] on 3 September 2008; therefore, to ensure the effective implementation of the election-related activities that still have to be performed before election day, the Constitutional Court decided that the list of candidates, confirmed by this Decision, was to be placed last on the list of confirmed lists of candidates in the 1<sup>st</sup> constituency.

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1 The second paragraph of Article 54 of the NAEA reads as follows: "Upon receipt of a list of candidates, the constituency electoral commission shall immediately ascertain whether the list of candidates was submitted in due time and whether it was nominated in accordance with this Act."

**C**

- 13.** The Constitutional Court adopted this Decision in accordance with the first paragraph of Article 59 and Article 60 of the CCA and the first indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of: Jože Tratnik, President, and Judges Mag. Marta Klampfer, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, and Jan Zobec. The decision was reached unanimously.

*Jože Tratnik*  
*President*

**DECISION**

At a session held on 24 March 2011 in proceedings to decide upon the constitutional complaint and in proceedings to review constitutionality, initiated upon the petition of Dnevnik, časopisna družba, d.d., Ljubljana, and others, all represented by Mag. Emil Zakonjšek and Jasna Zakonjšek, attorneys in Ljubljana, the Constitutional Court

*decided as follows:*

1. The second paragraph of Article 5 of the Elections and Referendum Campaign Act (Official Gazette RS, No. 41/07 and 11/11) is inconsistent with the Constitution.
2. The National Assembly of the Republic of Slovenia must remedy the established unconstitutionality within six months after the publication of this Decision in the Official Gazette of the Republic of Slovenia.
3. Until the unconstitutionality has been remedied, the publication of opinion polls on the candidates, the lists of candidates, political parties, and referendum questions is prohibited during the twenty-four hours before voting day.
4. Ljubljana Local Court Judgment No. ZSV-304/2008-2455, dated 13 January 2009, is abrogated and the case is remanded to that court for new adjudication.

*Reasoning*

**A**

1. The petitioners challenge the second paragraph of Article 5 of the Elections and Referendum Campaign Act (hereinafter referred to as the ERCA), which prohibits the publication [Translator's note: the Slovene noun objava used in the original text can mean both publication as well as broadcast. Similarly, the verb objaviti can mean to publish or to broadcast. For reasons of brevity the translation therefore uses the terms publication and to publish to refer also to broadcast.] of public opinion polls on candidates, the lists of candidates, political parties, and referendum questions in the period of seven days before voting day. They claim that such is inconsistent with the second paragraph of Article 14, Article 39, and the

first paragraph of Article 74 of the Constitution. They state that the prohibition of public opinion polls does not serve any of the legitimate aims specified in the second paragraph of Article 10 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). In addition, they believe that the restriction is not sufficiently precise and that it is not necessary in a democratic society; these are the two conditions under which a restriction of freedom of expression is permitted in accordance with Article 10 of the ECHR. The regulation is allegedly also inappropriate because it does not prevent the polls from being made public. Furthermore, the challenged provision allegedly entails an excessive interference with the right to free economic initiative, particularly in relation to the general principle of equality before the law. It allegedly only restricts the publication of opinion polls by the mass media, but not by other legal and natural persons not categorised as such. The regulation allegedly also gives foreign mass media an unfair advantage over domestic mass media. It is claimed that foreign mass media can publish opinion polls even though they can be accessed via the Internet in the same way as domestic mass media.

2. The petitioners lodged a constitutional complaint along with the petition. In the constitutional complaint they challenge the judgment by which the Ljubljana Local Court rejected their application for judicial protection against the minor offence decision finding them guilty of minor offences, which constitute a violation of the prohibition determined in the second paragraph of Article 5 of the ERCA. In the judgment, the court found that the petitioners or complainants in principle admitted that they had committed the minor offences; however, they justified their actions on grounds that are legally not acceptable and did not absolve them of their responsibility for committing the minor offences with regard to the legislation currently in force. The petitioners believe that the challenged judgment violated their rights determined in the second paragraph of Article 14, Article 39, and the first paragraph of Article 74 of the Constitution, as well as the right determined in Article 22 of the Constitution. In order to substantiate the constitutional complaint, the petitioners invoke the arguments put forward in the petition. They only additionally substantiated the violation of the right determined in Article 22 of the Constitution, to be precise they claim that the court did not consider their allegations regarding the unconstitutionality of the second paragraph of Article 5 of the ERCA.
3. The National Assembly of the Republic of Slovenia did not reply to the petition; an opinion was, however, submitted by the Government of the Republic of Slovenia. It states that it does not wish to express an opinion on the constitutionality of the challenged provision; however, it believes that the challenged provision is inappropriate and unnecessary. It further states that the challenged provision was intended to prevent the misuse and manipulation of the results of public opinion, but that this purpose had lost its meaning due to the ubiquity of the Internet. The petitioners did not comment on the Government's opinion, as they believe that it clearly demonstrates that the Government agrees with their arguments in the petition and constitutional complaint.

## B – I

4. The second paragraph of Article 5 of the ERCA provides: “It is prohibited to publish public opinion polls on candidates, lists of candidates, political parties, and referendum questions in the period of seven days before voting day.” A grammatical interpretation of this provision leads to the conclusion that it prohibits everyone, not just the mass media, from publishing opinion polls during the seven days before voting day; however, the fact that the provision is included in the chapter entitled “Election and referendum campaigns in the mass media” indicates that this legal prohibition is directed only at the mass media. Other provisions in this chapter also make reference only to the duties of the mass media – Article 6 determines how the mass media’s airtime is allocated, and Article 7 regulates the publication of political campaign broadcasts in the mass media. The legislature’s intention for the second paragraph of Article 5 of the ERCA to apply only to publications in the mass media is also evident from the second indent of Article 34, the first indent of the first paragraph of Article 35, and the second paragraph of Article 35 of the ERCA as, in accordance with these provisions, the editor-in-chief, the publisher, and the person in charge of the legal entity are punished for a minor offence if the mass media outlet in question publishes an opinion poll contrary to the second paragraph of Article 5 of the ERCA. As the minor offence can only be committed by way of a publication in the mass media and as it is not evident from the legislative materials that the second paragraph of Article 5 of the ERCA should be a *lex imperfecta* in relation to other entities, it was clearly the intention of the legislature for the second paragraph of Article 5 of the ERCA to only prohibit the publication of opinion polls in the mass media.<sup>1</sup> The publication of opinion polls is prohibited, regardless of the form in which the mass media are published, meaning that this also applies to Internet mass media. At the same time, it follows from the challenged provision that it is only the publication of opinion polls that is prohibited, not the conducting of such polls. Moreover, during the period of prohibition, anyone (the mass media, candidates, political parties, etc.) may conduct public opinion polls, but they may not publish the results in the mass media.
5. The second question that arises with regard to the second paragraph of Article 5 of the ERCA concerns the actual content of the prohibition. It is manifestly clear that the provision prohibits the mass media from publishing opinion polls ordered by the organisers of the election or referendum campaign during the seven days before voting day. It is clear from the title of Chapter II of the ERCA “Election and Referendum Campaign in the Mass Media” that it determines the rules that the mass media have to respect during the election or referendum campaign while carrying out their activities in relation thereto. Strictly speaking, the mass media do not lead the campaigns by themselves, but merely provide a space for the campaigns to be conducted

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1 The ERCA does not define the term “mass media”. According to the first paragraph of Article 1 of the Mass Media Act (Official Gazette RS, No. 110/06 – official consolidated text), the term “mass media” includes newspapers and magazines, radio and television programme services, electronic publications, teletext, and other forms of editorially formulated programmes published daily or periodically through the transmission of written material, vocal material, audio, or images in a manner that is accessible to the public.

by the campaign organisers. Election and referendum campaigns comprise the entire advertising content and other forms of political campaign material the purpose of which is to influence the choice of the voters in elections and referenda (the second and third paragraphs of Article 1 of the ERCA); however, it is primarily carried out through political campaign material disseminated in the mass media (first indent of the fifth paragraph of Article 1 of the ERCA). The election campaign may be organised by the candidates themselves, the candidates' backers, lists of candidates, political parties, or other organisers, and, in the event of a referendum, it may be organised by the proposer of the referendum or others that have an interest in its result (the first paragraph of Article 3 of the ERCA). The mass media thus do not normally conduct their own campaign but instead provide airtime or space in their newspapers to conduct the campaign. The mass media are also not obliged to facilitate the election or referendum campaign (the exception is Radiotelevizija Slovenija [i.e. the national radio and television broadcasting network], which, in accordance with the second paragraph of Article 6 of the ERCA, is required to provide airtime during the campaign for the presentation of the candidates or opinions on the referendum question); however, if they decide to do so, they are required to respect the rules determined in Chapter II of the ERCA.

6. During the seven days before voting day, the mass media is therefore prohibited from publishing opinion polls conducted in the context of an election or referendum campaign *sensu stricto*, i.e. opinion polls that are ordered by the campaign organisers. The question as to whether the second paragraph of Article 5 of the ERCA also prohibits the mass media from publishing polls that were conducted upon the initiative of the mass media with the intention of informing the public, or polls that were not ordered by campaign organisers, however, is a special question. A grammatical interpretation of the second paragraph of Article 5 of the ERCA reinforces the interpretation that the mass media must not publish their own polls or polls that were not commissioned during a formal election or referendum campaign. The wording of the statutory provision is clear: it does not draw a distinction between public opinion polls in terms of who commissioned them, who conducted them, or their purpose. It follows therefore from the usual meaning of the words used that the challenged provision prohibits the mass media from publishing any opinion polls, including those that have been conducted in the context of typical mass media activity, which is to inform the public, and not in the context of campaigns that are run by campaign organisers.<sup>2</sup> This interpretation is also corroborated by the intention of the legislature and the aim that the legislature wished to achieve through this prohibition. With regard to the Government's statements, the purpose of the challenged provision is to prevent the misuse or manipulation of public opinion polls. It is clear that it would not be possible to achieve this aim if the mass media were prohibited only from publishing

<sup>2</sup> The title of Chapter II of the ERCA ("Election and Referendum Campaign in the Mass Media") could be construed differently, i.e. it could be understood to mean that the second paragraph of Article 5 of the ERCA prohibits only the publication of those polls that represent a formal campaign in the mass media.

opinion polls commissioned and conducted in the context of a formal campaign during the seven days before voting day, but were freely permitted to publish their own opinion polls and other opinion polls, unrelated to the campaign organisers, until the last day before the elections or referendum (i.e. until the election silence). Unless this prohibition covers all public opinion polls, the second paragraph of Article 5 of the ERCA loses its meaning. An interpretation that would completely hollow out the purpose of the statutory provision is unacceptable. Therefore, the second paragraph of Article 5 of the ERCA is to be understood in such a way that the mass media are prohibited from publishing any public opinion polls on candidates, political parties, or a referendum question during the seven days before voting day.

7. In the case at issue, the petitioners (the newspaper and its persons in charge) are publishers of mass media. The performance of this activity is protected in the context of the freedom of the press and other forms of informing the public, which is guaranteed by the first paragraph of Article 39 of the Constitution, as well as in the context of free economic initiative, which is guaranteed by the first paragraph of Article 74 of the Constitution. The challenged second paragraph of Article 5 of the ERCA prohibits the mass media from publishing any public opinion polls during the seven days before voting day. Insofar as this prohibition refers to the mass media publishing their own opinion polls, which they publish on their own initiative in order to inform the public, this entails an interference with the first paragraph of Article 39 of the Constitution. Insofar as this prohibition also refers to the publication of polls that are ordered and paid for by others, this could also entail an interference with the first paragraph of Article 74 of the Constitution. In the case at issue, the publisher of the mass media, the editor in chief, and the person in charge of the legal entity were punished for the minor offence of publishing their own public opinion poll. As a result, the Constitutional Court reviewed the constitutionality of the second paragraph of Article 5 of the ERCA from the viewpoint of the first paragraph of Article 39 of the Constitution.
8. In the first paragraph of Article 39, the Constitution guarantees the freedom of expression of thought, speech, and public appearance, protecting in particular the freedom of the press and other forms of informing the public or the freedom of expression in this framework. The significance of the right to freedom of expression is multi-faceted: its purpose is to protect the freedom to impart information and opinions (i.e. the active aspect) and the freedom to receive such, meaning the right to be informed (i.e. the passive aspect).<sup>3</sup> Freedom of the press and other forms of informing the public has a particularly important role in the framework of freedom of expression. In its Decision No. U-I-172/94, dated 9 November 1994 (Official Gazette RS, No. 73/94, and OdlUS III, 123), the Constitutional Court has already emphasised

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3 In Decision No. Up-20/93, dated 19 June 1997 (OdlUS VI, 181), the Constitutional Court explicitly linked the right of the mass media to function freely with the constitutional right of citizens to be informed: "The right to freedom of expression guarantees to natural persons and legal entities that are involved in informing the public the right to freely collect, receive, and disseminate information, thoughts, ideas, and opinions. Public mass media perform an activity through which all citizens are able to exercise their right to be informed; its activities are focused on the people and the community."

that the freedom of the press is one of the key institutional conditions for the effectiveness of the democratic process.<sup>4</sup> The positions taken by the Constitutional Court in that Decision are relevant not only for the press but also for other forms of informing the public. Free, i.e. independent from the government, mass media are the *conditio sine qua non* for creating pluralism and ensuring that the public is provided information that is free from bias.<sup>5</sup> The freedom to inform the public is required in order for the public to be able to supervise the authorities, and provides for the effective functioning of the political opposition to the government. Only free mass media can ensure the balanced exercise of political power within the state and continuous supervision of the state (governmental) authorities. The vital role played by the mass media in supervising the authorities entails that it is crucial that they are permitted to function freely, including when monitoring the processes through which people establish state power (i.e. through elections) or directly exercise such power (i.e. by referendum). Elections or referenda can only be deemed fair when the true will of the people has been expressed and when the public has been extensively and comprehensively informed throughout the process.

9. In light of the above, it is necessary to establish that the freedom of the press and other forms of informing the public and freedom of expression enjoy special constitutional protection. Statutory limitations of this human right are admissible only in accordance with the third paragraph of Article 15 of the Constitution, i.e. only in instances determined by the Constitution or to protect the rights of others. A statutory interference with the freedom of expression may only be based on an objectively justified and constitutionally admissible aim. If such aim is demonstrated, it is further necessary to review whether the challenged regulation is consistent with the general principle of proportionality (Article 2 of the Constitution). The Constitutional Court assesses whether an interference is excessive on the basis of the so-called strict test of proportionality in accordance with the settled case law of the Constitutional Court.<sup>6</sup>
10. The aim pursued by the second paragraph of Article 5 of the ERCA is not evident from the legislative materials. The National Assembly did not respond to the petition and

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4 In that Decision, the Constitutional Court referred to Article 1 of the Constitution, which determines that Slovenia is a democratic state. It emphasised that the effectiveness of the democratic process depends, in particular, on:

- (a) fair election(s) at all levels that enable the formation of representative bodies of the state and local self-government in accordance with the will of the people;
- (b) public supervision of the legislative, judicial, and executive branches of power; and
- (c) recognition of the right to political opposition to the government.

5 In Decision No. U-I-106/01, dated 5 February 2004 (Official Gazette RS, No. 16/04, and OdlUS XIII, 7), the Constitutional Court emphasised that the state is not the only one who can jeopardise freedom of expression, but individual social groups may influence it to an even greater extent. Therefore, it is not sufficient to understand freedom of expression merely in terms of being a negative or defensive right that only limits the state. The first paragraph of Article 39 of the Constitution requires the state to adopt legislation to ensure the independence of public mass media with regard to their programme, organisation, and financing.

6 See Constitutional Court Decision No. U-I-18/02, dated 24 October 2003 (Official Gazette RS, No. 108/03, and OdlUS XII, 86).

the Government stated in its opinion that the aim of this provision was to prevent misuse and manipulation of the results of opinion polls. The Government did not explain in more detail how such misuse or manipulation could occur, but it considers that, due to the ubiquity of the Internet, this purpose can no longer be achieved by the challenged provision. Therefore, the statutory prohibition determined in the second paragraph of Article 5 of the ERCA is inappropriate and unnecessary. In addition, the Government explained that a draft law amending the ERCA is in the process of being adopted and that according to this draft the period during which the publishing of public opinion polls is prohibited is reduced from seven days to twenty-four hours before voting day. In this respect, the Constitutional Court notes that the Act amending the Election and Referendum Campaign Act (Official Gazette RS, No. 11/11) was adopted on 9 February 2011, but did not amend the second paragraph of Article 5 of the ERCA.

11. Insofar as the aim of preventing misuse and manipulation of the results of opinion polls allegedly entails that the purpose of the challenged provision is to ensure conditions in which the voters can freely and without interference form and express their true will at the elections, then the Constitutional Court deems that this entails a constitutionally admissible aim for limiting the free functioning of the mass media before and during the elections. The requirement of fair and free elections where the voters have the opportunity to form their true will before voting, without any inappropriate (manipulative, misleading, etc.) external influences, interferences, or pressure, originates from the principle of democracy in the Constitution (Article 1 of the Constitution), which was emphasised by the Constitutional Court in Decision No. U-I-172/94.
12. Moreover, the European Court of Human Rights (hereinafter referred to as the ECtHR) ruled on the right to freedom of expression and whether it was admissible to limit that right during or before elections. The position of this court, in principle, is that during elections the right to freedom of expression enshrined in Article 10 of the ECHR has to be considered in light of the right to free elections protected by Article 3 of Protocol No. 1 to the ECHR.<sup>7</sup> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other. In the ECtHR's opinion, freedom of expression is one of the conditions necessary to ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. Nonetheless, the ECtHR deems that, in certain circumstances, the right to freedom of expression and the right to free elections may come into conflict. The ECtHR therefore allows for the possibility that it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the free expression of the opinion

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7 Article 3 of Protocol No. 1 to the ECHR reads as follows: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot and under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

of the people in the choice of the legislature. The ECtHR recognises that, in striking a balance between these two rights, the Contracting States have a wider margin of appreciation, as they do generally with regard to the restriction of freedom of expression pursuant to the second paragraph of Article 10 of the ECHR.<sup>8</sup> Therefore, also with regard to the ECtHR case law, ensuring the conditions required for voters to freely form and express their true political will in the elections may constitute a reason for restricting the time period during which the mass media may report on opinion polls.

13. Without considering the question of whether the statutory prohibition determined in the second paragraph of Article 5 of the ERCA is an appropriate and necessary measure to achieve the pursued aim, the Constitutional Court found that the severity of the consequences of an interference with freedom of expression cannot be justified by the pursued aim or the advantages that would result from the interference. When considering whether the challenged provision entails an excessive interference with the right to freedom of expression, the Constitutional Court took into account several constitutionally relevant circumstances (Paragraphs 14 through 19 of the reasoning).
14. The prohibition to publish specific information with the intention of preventing the mass media from influencing how public opinion is formed or changed entails an interference with the very essence of the role and significance of the mass media in a democratic society. It is in the nature of the mass media to influence public opinion; the principle function of the mass media (leaving economic interests aside) is to inform the public and thereby inevitably influence public opinion. Especially before the elections, when the direct expression of the voters' political will is concerned, the free functioning of the mass media is even more important.
15. In accordance with the first paragraph of Article 2 of the ERCA, an election campaign may not commence sooner than thirty days before voting day. The seven-day prohibition therefore entails that the mass media cannot perform their function of informing the public through the publication of opinion polls for almost one quarter of the duration of the election campaign. It is, however, just before the elections that the electoral activities of the candidates and political parties are performed in a most concentrated and intensive way and therefore undoubtedly significantly influence the voters' decisions.
16. The free functioning of the mass media also goes hand in hand with the right of voters to be informed. Therefore, the prohibition to publish opinion polls may also be considered from the perspective of a voter who may therefore be deprived of essential information. Free and democratic elections presuppose that the voter has the opportunity to be informed of all the relevant issues based on a wide range of true and complete information, as only comprehensively informed voters can in fact express their own true political will on voting day. In addition, information on the state or dynamics

<sup>8</sup> See the Judgment in *Bowman v. UK*, dated 19 February 1998, in which the ECtHR invoked, in particular, the judgment in *Mathieu-Mohin and Clerfayt v. Belgium*, dated 2 March 1987. In referring to the mentioned judgments, the ECtHR also took the same positions in *TV Vest As & Rogaland Pensjonistparti v. Norway*, dated 11 March 2009.

of public opinion may also be important, or even crucial, for the voters. Therefore, it is important that the flow of information regarding this question, which may have a decisive influence on the voter's final choice, is interrupted as late as possible.

17. It is not possible to ignore the fact that the prohibition to publish opinion polls is not binding on natural persons and legal entities that are not mass media publishers (or on the foreign mass media), which entails that, given the present-day ubiquity of the Internet, it is almost impossible to prevent such polls from being made available to the wider public.
18. On the other hand, the alleged benefits of the prohibition to publish opinion polls (i.e. guaranteeing to voters the right to freely form their own true will without interference) are relative because they depend on each individual voter and because other methods through which mass media can influence voters (critical or favourable articles, comments, interviews, etc.) are allowed for the entire duration of that prohibition, up until the election silence. Unlike published opinion polls, the electoral campaign and all public campaigning must end one day before the day of the vote, which is when the so-called election silence begins.<sup>9</sup>
19. Even if, by seeking to prevent an unacceptable influence of the mass media on voters before the elections, the legislature pursued a constitutionally admissible aim, it was first required to consider adopting a regulation to limit such conduct by the mass media in a manner that takes into account the interest of the mass media to publish opinion polls as well as the interest of the voters to have access to such information before prohibiting their publication. A more precise regulation of the manner in which opinion polls are conducted during the pre-election period (e.g. by requiring the poll to contain information regarding the date on which it was conducted, who ordered and paid for the poll, who conducted the poll, the methodology used, the sample, and the margin of error, etc.) could reduce the possibility of an unacceptable influence on voters and thereby contribute to the purpose for which such polls are intended – the professional and objective presentation of information regarding changes in public opinion. It must namely be taken into account that opinion polls conducted by the mass media on their own initiative appear objective, impartial, and neutral. The fact (or at least the appearance) that a scientific methodological approach was applied in such polls clearly entails that some voters rely on the published opinion polls to a lesser or greater extent when forming their opinions. Naturally, expertise and objectivity do not imply that there are no differences between the polls or that the mass media are completely unbiased when conducting and publishing such polls (especially if the

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9 The first paragraph of Article 2 of the ERCA determines that the election campaign must end no later than twenty-four hours before voting day. Article 5 of the National Assembly Elections Act (Official Gazette RS, No. 109/06 – official consolidated text – hereinafter referred to as the NAEA) provides that public election campaigning must end no later than twenty-four hours before voting day. The NAEA applies *mutatis mutandis* also to other elections and to referenda (Article 9 of the Election of the President of the Republic Act, Official Gazette RS, No. 39/92; Article 4 of the Local Elections Act, Official Gazette RS, No. 94/07 – official consolidated text, and 45/08; and Article 55 and the fifth paragraph of Article 56 of the Referendum and Popular Initiative Act, Official Gazette RS, No. 26/07 – official consolidated text).

poll is accompanied by a commentary). However, in a democratic society, it is crucial that there is plurality in the mass media and that voters have the opportunity to form their own opinions on the basis of different public opinion polls.

20. On the basis of the above, the Constitutional Court held that the seven-day prohibition was a limitation that excessively interferes with the free functioning of the mass media. Therefore, the challenged second paragraph of Article 5 of the ERCA is inconsistent with the first paragraph of Article 39 of the Constitution. The Constitutional Court did not abrogate the provision but merely established its inconsistency with the Constitution (Point 1 of the operative provisions) and required the legislature to remedy the established unconstitutionality within six months (Point 2 of the operative provisions). The Constitutional Court adopted a declaratory decision as the abrogation of the provision would have jeopardised the effectiveness of the institution of election silence. Although the election silence is a special statutory institution that pursues other aims and, as such, it is not directly related to the prohibition of publishing opinion polls, it would lose its meaning to a great extent if the mass media were allowed to publish opinion polls without any restrictions during this time (and even on the day of voting). The publication of public opinion polls conducted by the mass media on their own initiative does not entail the conduct of a campaign and, therefore, the first paragraph of Article 2 of the ERCA, which determines that campaigning must cease no later than twenty-four hours before voting day, does not apply to such conduct of the mass media. Similarly, it is not possible to qualify the publication of opinion polls as an example of public propaganda, which is prohibited by Article 5 of the NAEA during the twenty-four hours before voting day. The Constitutional Court thus adopted a declaratory decision as it would have interfered with the effectiveness of another statutory institution if it had abrogated the challenged provision.
21. In order to protect the effectiveness of the institution of election silence, the Constitutional Court, on the basis of the second paragraph of Article 40 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text - hereinafter referred to as the CCA), also determined the manner in which its decision was to be implemented. It determined that, until the established unconstitutionality has been remedied, the publication of public opinion polls is not permitted during the twenty-four hours before voting day (Point 3 of the operative provisions).
22. Since the Constitutional Court established that the second paragraph of Article 5 of the ERCA is inconsistent with the first paragraph of Article 39 of the Constitution, it did not consider the other allegations made by the petitioners. By determining the manner of implementation, the provisions of Articles 34 and 35 of the ERCA, which define that the conduct in violation of the second paragraph of Article 5 of the ERCA constitutes a minor offence, became irrelevant.

## B – II

23. The complainants were found guilty of minor offences under the first indent of the first paragraph of Article 35 of the ERCA, the second paragraph of Article 35 of the ERCA in conjunction with the first indent of the first paragraph of Article 35 of the

ERCA, and the second indent of Article 34 of the ERCA. These minor offences entail a violation of the prohibition determined in the second paragraph of Article 5 of the ERCA, which the Constitutional Court found to be unconstitutional. Therefore, as the challenged judgment was based on an unconstitutional statutory provision, the Constitutional Court abrogated it and remanded the case to the court of first instance for new adjudication (Point 4 of the operative provisions). In such context, the Constitutional Court was not required to review the allegations regarding violations of other human rights and fundamental freedoms.

24. In addition, the Constitutional Court specifically draws attention to the unconstitutionality of the position taken by the court in the challenged judgment that a court is not required to take a position on alleged violations of the Constitution for lack of jurisdiction. It is true that the regular courts do not have jurisdiction to decide on the constitutionality of laws; however, this does not entail that they are not obliged to take a position on alleged violations of the Constitution. The position that, when deciding, a court is only bound by the law, but not by the Constitution, is inconsistent with the Constitution. Article 125 of the Constitution clearly determines that judges are bound by the Constitution and laws. When human rights – in the case at issue, freedom of expression – are subject to judicial protection, such obligation of the judges (i.e. that they are bound by the Constitution and laws) also arises from the fourth paragraph of Article 15 of the Constitution. In accordance with this provision, the judicial protection of human rights and fundamental freedoms and the right to obtain redress for the violation of such rights and freedoms are guaranteed. Such judicial protection is not judicial protection in constitutional complaint proceedings, but judicial protection in judicial proceedings at all levels of decision-making before the regular courts, as it is generally guaranteed by the first paragraph of Article 23 of the Constitution. The courts are therefore required to take a position on relevant constitutional objections of the parties (such as the objection regarding the unconstitutionality of the second paragraph of Article 5 of the ERCA); otherwise, they are in violation of the constitutional procedural guarantee determined in Article 22 of the Constitution from which there proceeds, *inter alia*, the duty of the courts to take a position on the allegations of parties to proceedings that are essential for a decision from a human rights perspective. If as a result they are faced with a statutory provision that they deem unconstitutional, they must, on the basis of Article 156 of the Constitution, initiate proceedings before the Constitutional Court. If, however, they deem that the objections regarding unconstitutionality are unsubstantiated, they must present arguments to reject them. In light of the above, the position of the court, according to which it was not obliged to take a position on the alleged unconstitutionality of the statutory regulation which constituted the legal basis of the challenged decision, violated the right to the equal protection of rights determined in Article 22 of the Constitution. In the case at issue, the court also violated the right determined in the fourth paragraph of Article 15 of the Constitution.

**C**

25. The Constitutional Court adopted this Decision in accordance with Article 48, the second paragraph of Article 40, and the first paragraph of Article 59 of the CCA, composed of: Dr Ernest Petrič, President, and Judges Dr Etelka Korpič-Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, Jože Tratnik, and Jan Zobec. The Decision was reached by six votes against one. Judge Pogačar voted against.

*Dr Ernest Petrič*  
*President*

**DECISION**

At a session held on 21 February 2013 in proceedings to decide upon the appeal of Franc Kangler, Maribor, represented by law firm Odvetniška družba Čeferin, o. p., d. o. o., Grosuplje, the Constitutional Court

*decided as follows:*

1. The Order of the National Council of the Republic of Slovenia, dated 12 December 2012, stating that the office of Franc Kangler, elected member of the National Council, is not confirmed, is abrogated.
2. The office of Franc Kangler, member of the National Council, elected on 21 November 2012 in the elections to the National Council – representatives of local interests, in Maribor constituency No. 3, is confirmed.

*Reasoning***A**

1. On 21 November 2012, the appellant was elected a member of the National Council. On 27 November 2012, he received a certificate from the State Election Commission regarding his election. At the constitutive session held on 12 December 2012, the National Council voted separately on the confirmation of his office as a member of the National Council and did not confirm it. The appellant alleges that such decision of the National Council was adopted without a legal basis and arbitrarily, therefore it allegedly violated his passive right to vote and the right to participate in the management of public affairs, as protected by Articles 43 and 44 of the Constitution, and the right to the equal protection of rights determined by Article 22 of the Constitution.
2. Allegedly, neither the National Council Act (Official Gazette RS, No. 100/05 – official consolidated text – hereinafter referred to as the NCA) nor the National Assembly Elections Act (Official Gazette RS, No. 109/06 – official consolidated text – hereinafter referred to as the NAEA), whose provisions apply *mutatis mutandis* with regard to questions that are not specifically regulated by the NCA, expressly

determine the grounds or criteria on the basis of which the National Council can refuse to confirm the office of an elected member. In the opinion of the appellant, the refusal to confirm such office would only be possible on the basis of an appeal against a decision of the Election Commission submitted to the National Council on the basis of Article 49 of the NCA, which could have an influence on the confirmation of the appellant's office. From the materials for the constitutive session of the National Council and the minutes of the meeting, it is evident that such an appeal was not submitted to the National Council.

3. Although the law does not determine the grounds or the criteria on the basis of which the National Council could refuse to confirm the office of an elected member, the National Council should, in the opinion of the appellant, also act in conformity with Article 22 of the Constitution when confirming the offices of elected members. The decision not to confirm the office should have been substantiated by legal arguments; the decision should not have been taken on grounds that should not be taken into consideration. Due to the fact that allegedly neither the procedural nor the substantive prerequisites for deciding that the appellant's office was not confirmed were fulfilled, the decision of the National Council was allegedly completely arbitrary. Such decision was allegedly inconsistent with the highest constitutional values determined by Article 2 of the Constitution and it allegedly inadmissibly interfered with the already mentioned human rights and fundamental freedoms of the appellant.
4. In its reply to the appeal, the National Council explained that at its constitutive session after the elections were held, firstly, in conformity with Article 49 of the NCA and the Rules of Procedure of the National Council (Official Gazette RS, Nos. 70/08, 73/09, and 101/10), the Mandate and Immunity Commission (hereinafter referred to as the MIC) was elected, in which each interest group of the National Council has one member, in order to prepare everything necessary for the confirmation of the offices of the elected members. During the debate at the first session of the MIC, held on 12 December 2012, reservations were expressed with regard to the confirmation of the office of Franc Kangler. The non-economic activities interest group adopted a written standpoint that it felt obliged to act in conformity with moral and ethical standards and that by drawing attention to them it raises the credibility of the National Council; in light of the above it assessed that the office of Franc Kangler is morally and ethically disputable and proposed that a secret vote on the confirmation of such be carried out. In addition to the representative of this interest group, similar reservations were also expressed by the representatives of the interest group of employers and the interest group of employees at the first session of the MIC. With regard to the above, the MIC decided to propose that the National Council decide on all 38 undisputed offices together, and separately on each of the two disputed offices, including that of Franc Kangler. After the undisputed offices were confirmed, the interest group of local interests decided to convene an extraordinary session at which it decided to propose that the National Council decide on the two disputed offices by a secret vote. It also proposed that explanations should be presented to the National Council.

cil with regard to why these offices are disputable. The representative of the State Election Commission and Head of the Legal and Analytical Affairs Department of the National Council informed the National Council that no appeal had been filed against the election of Franc Kangler. At the secret vote, the National Council did not confirm the office of Franc Kangler, because 18 members of the National Council voted for confirmation of his office, whereas 19 voted against.

## B

5. By not confirming the office of an elected member,<sup>1</sup> the National Council adopted a decision that would result in a new election being held.<sup>2</sup> [After] a decision that an office is not confirmed [is adopted] the affected person can invoke, before the Constitutional Court and on the basis of the third paragraph of Article 50 of the NCA, the protection of his or her rights. What is at issue is the protection of the right to vote, which is intended to protect the individual rights of voters and also to protect the legality of the elections, all of which should ensure that the representative authority is legally elected. Due to the specificities with regard to exercising the right to vote in comparison with other rights, the procedures for its protection are specifically regulated.<sup>3</sup> Such procedure with regard to the confirmation of the offices of the members of the National Council is regulated by Articles 49 and 50 of the NCA. With regard to the questions that are not specifically regulated by this Act, Article 10 of the NCA prescribes the *mutatis mutandis* application of the provisions of the NAEA. This entails that also in a dispute regulated by Articles 49 and 50 of the NCA, the principle to be applied is that only such established irregularities are taken into consideration with regard to elections that affected or could have affected the election result, which under the NAEA is applied with regard to the protection of the right to vote after elections have been carried out.<sup>4</sup> Therefore, also in the event an appeal is submitted to the National Council, by which, in conformity with the second paragraph of Article 49 of the NCA, it is admissible to challenge the decisions of election commissions that can affect the confirmation of an office, only such irregularities at the elections can be at issue that affected or could have affected the election result, which of course consequently also affect the confirmation of an office.

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1 See Report of the State Election Commission on the Election Results Regarding the Elections of the Members of the National Council, Official Gazette RS, No. 90/12.

2 The second paragraph of Article 8 of the NCA determines that new elections are also carried out if, in the event of an appeal, the National Council or the Constitutional Court do not confirm the office of a member of the National Council and the State Election Commission establishes that new elections must be held.

3 The procedure for the constitution of the National Council envisages the examination of and deciding on possible appeals of candidates, interest organisations, or local communities against the decisions of the Voting Commission that can affect the confirmation of the respective offices (the second paragraph of Article 49 of the NCA); the affected person has the right to file an appeal with the Constitutional Court against the decision of the National Council to not confirm an office, which can abrogate the decision of the National Council and confirm the office or dismiss the appeal (the third paragraph of Article 50 of the NCA).

4 See Articles 106 through 109 of the NAEA.

6. The refusal to confirm the office of an elected member of the National Council in fact entails a rejection of the officially established election result. Such a decision can be, with regard to the NCA, only a result of the examination of an appeal submitted to the National Council that leads to the finding that during the elections such irregularities occurred that it is not possible to recognise the election result otherwise established. Therefore, in deciding on such an appeal before an office is confirmed, the National Council must assess whether the alleged irregularities at the elections are substantiated. It must assess whether they are of such nature as to affect or to be able to affect the legality of the election result in a constituency. The National Council does not have the competence to assess in a discretionary manner whether an office is disputable, as is determined by the second paragraph of Article 50 of the NCA. An office can only be disputable on the basis of an appeal submitted by the entitled subjects and the submitted evidence on the essential irregularities in the election procedure or in the determination of the election result. Only if the National Council establishes the existence of the circumstances that the NCA and the NAEA determine to be [grounds] for an office to be disputable can the National Council adopt an order by which it decides not to confirm the office of a member that was otherwise elected.
7. The appellant was elected a member of the National Council, and the State Election Commission issued a certificate thereon. The appellant alleges that the challenged order of the National Council violates Articles 43 (the right to vote) and 44 of the Constitution (the right to participation in the management of public affairs). From older constitutional case law it namely follows that the right to vote regarding elections to the National Council is protected, due to the special right to vote of the members of interest groups, in the framework of the right determined by Article 44 of the Constitution.<sup>5</sup> However, in the electoral dispute in the framework of the elections to the National Council in 2007, the Constitutional Court allowed the possibility that the right to vote with regard to the elections to the National Council should be protected in accordance with the second paragraph of Article 43 of the Constitution.<sup>6</sup> However, in the Order by which the Constitutional Court rejected the petition for the initiation of proceedings for the review of the constitutionality of the regulation of the elections of the deputies of national communities<sup>7</sup> the Constitutional Court expressly adopted the position that the principles of the general and

5 Such standpoint followed from the fact that the members of the National Council are elected on the basis of a special (active and passive) right to vote, as determined by Article 2 of the NCA. See Order of the Constitutional Court No.Up-681/02, dated 24 November 2002, Official Gazette RS, No. 105/02, and OdlUS XI, 298, Para. 5 of the reasoning.

6 In Decision No. Up-3486/07, Up-3503/07, Up-3768/07, dated 17 January 2008 (Official Gazette RS, No. 19/08, and OdlUS XVII, 23), the Constitutional Court stated: "From the hitherto constitutional case law, it follows that the right to vote with regard to elections to the National Council is protected within the framework of Article 44 of the Constitution. However, due to the fact that the allegations of the complainant are manifestly unfounded, the Constitutional Court did not have to adopt a position on whether the alleged violation, were it committed, would also entail a violation of the right to vote determined by Article 43 of the Constitution." (Para. 13 of the reasoning).

7 See Order of the Constitutional Court No. U-I-225/08, dated 15 January 2009.

equal right to vote must be respected within a group of voters that has a special right to vote with regard to the election of such deputies. Such position logically requires that the Constitutional Court also adopt a new position with regard to the constitutional protection of the special right to vote with regard to elections to the National Council. It is true that what is at issue with regard to such elections is a special right to vote and an indirect type of elections, which are established in order to ensure the election of the representatives of the individual interests that comprise the National Council in conformity with Article 96 of the Constitution. However, the National Council is one of the constitutionally defined state authorities with competences as regards the legislative procedure, therefore it is clear that the protection of this right to vote must be based on the same principles as are otherwise envisaged by the Constitution with regard to the right to vote. Such entails that also its protection must be ensured within the framework of Article 43 of the Constitution. Consequently, the right to vote with regard to the election of members of the National Council is a right to vote ensured by the second paragraph of Article 43 of the Constitution.<sup>8</sup>

8. With regard to the information in the minutes of the meeting of the first session of the National Council, the National Council adopted the challenged order in the procedure for the confirmation of offices on the basis of the assessment that the office of the elected member at issue was morally and ethically disputable and without an appeal being filed on the basis of the second paragraph of Article 49 of the NCA. The regulation in force regarding the procedure for the confirmation of the offices of the members of the National Council does not envisage a dispute without an appeal being submitted to the National Council and it also does not state that the grounds on which the challenged order of the National Council was based can entail a circumstance that could affect the confirmation of such. Therefore, it is evident that the decision-making of the National Council on the confirmation of the appellant's office was not based on law. Such decision is arbitrary and entails a constitutionally inadmissible interference with the appellant's passive right to vote.<sup>9</sup> It also entails a constitutionally inadmissible interference with the active right to vote of the eligible voters who elected him.
9. With regard to the above, the appellant's appeal is well founded. By the challenged order, the National Council did not act in conformity with the second paragraph of Article 50 of the NCA. By rejecting the confirmation of the office of the appellant, it violated his passive right to vote determined by the second paragraph of Article 43 of the Constitution and the active right to vote of voters, which is also guaranteed by the same provision of the Constitution.

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8 This is also stated by J. Sovdat in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia: Supplement to the Commentary – A], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2011, pp. 712–713.

9 "The passive right to vote includes the right of an individual to compete with others for election under the same conditions (i.e. the right to be elected or the right to be a candidate at elections). It also includes the right to be elected, which in fact entails the right of an individual to acquire office on the basis of the election results. In addition to the acquired office there also arises the third aspect of the passive right to vote, which includes the right of an individual to perform office acquired in such manner." This is stated by J. Sovdat, *op. cit.*, pp. 711–712.

10. In light of the above, the Constitutional Court granted the appeal and abrogated the Order of the first session of the National Council, dated 12 December 2012, determining that the office of the appellant is not confirmed (point 1 of the operative provisions). With regard to the above, the Constitutional Court confirmed the office of appellant Franc Kangler (point 2 of the operative provisions).

### C

11. The Constitutional Court adopted this Decision on the basis of the third paragraph of Article 50 of the NCA, composed of: Mag. Miroslav Mozetič, Vice President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. Judge Dr Ernest Petrič was disqualified from deciding in the case. The decision was reached unanimously. Judge Sovdat submitted a concurring opinion.

*Mag. Miroslav Mozetič*  
*Vice President*

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### CONCURRING OPINION OF JUDGE DR JADRANKA SOVDAT

#### I

1. The non-confirmation of the office of a councillor [i.e. a member of the National Council] without the elections of councillors being challenged by legal remedies regulated by law entails political arbitrariness. It is illegal and leads to a violation of the elected candidate's passive right to vote and the active right to vote of voters. This is the principal message of this Decision and I concur with it completely. The National Council should have confirmed the office. Because it did not do so, the Constitutional Court is called on to adopt a decision on the basis of an appeal against the decision of the National Council. The final say regarding the validity of elections must be reserved for an independent and impartial judge, not only in order for the judicial protection of the right to vote to be ensured (although mainly for this reason), but also in order to prevent such type of political arbitrariness of the representative body or some other collective state authority formed in elections (in the case at issue, the National Council). In conformity with the statutory regulation in force, the only legal decision that can be adopted was that adopted by the Constitutional Court.
2. I also concur with the interpretation by which the Constitutional Court clearly stated that the passive (and, of course, also the active) right to vote with regard to the elections to the National Council is constitutionally protected by the second paragraph of Article 43 of the Constitution. In such manner, the position that was clearly expressed by Judge Dr Franc Grad in his dissenting opinion to Decision Up-3486/07, Up-3503/07, Up-3768/07, dated 17 January 2008 (Official Gazette RS, No. 19/08, and OdlUS XVII, 23), also became the "official" position of the Constitutional Court. Due to the fact that I have already expressed my opinion on the constitutional rea-

sons why I find this position to be correct in the commentary to Article 43 of the Constitution,<sup>1</sup> I hereby refer thereto in this aspect and will not repeat it here.

3. Although I agree with all of the above, in this concurring opinion I also wish to present to some degree the reasons that guided me during the decision-making – and that do not allow me to have doubt as regards the constitutionality of the fundamental standpoint that is expressed in the Decision – i.e. that “there is no judge without a plaintiff” and that this also applies in an electoral dispute, although its first part takes place before a political authority. This fact cannot be changed even by my otherwise firm position, which I have already stated several times,<sup>2</sup> regarding the numerous unconstitutionality of the statutory regulation of the electoral dispute with regard to all types of national elections, European elections, and local elections; and also not by my equally firm position (which I also substantiated in a book on electoral disputes that is about to be published) on the fact that also Slovenia should have regulated ineligibility as is also done by foreign regulations and for which in the second paragraph of Article 82 of the Constitution there exists the constitutional basis, while the legislature has thus far not considered it to be necessary to also regulate by law the individual limitations of the passive right to vote. In a certain way, the constitutional background of the electoral dispute and the absence of the regulation of ineligibility nicely illustrate the case at issue.

## II

4. In continental Europe, for a long time the position prevailed that only the parliament can be its own “electoral judge”.<sup>3</sup> The changes in this area happened mainly in the period after the Second World War, when certain Western Europe states introduced judicial supervision over the elections. However, also at that time, most of them entrusted this task to constitutional courts, modelling themselves on the Austrian constitutional regulation of 1920. If we look at the regulation in European states, we can find that certain states retained supervision over the validity of elections to the parliament,<sup>4</sup> whereas others decided primarily in favour of two possible regulations regarding national elections: they either gave the role of the electoral judge directly to the constitutional court (e.g. France, and such regulation also exists in Austria),

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1 See J. Sovdat in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia: Supplement to the Commentary – A], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2011, pp. 712–713.

2 Partly also in the commentary on the third paragraph of Article 82 of the Constitution; see J. Sovdat, *ibidem*, pp. 1122–1124, and J. Sovdat 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, pp. 783–787.

3 Whereas in the United Kingdom the decision-making on electoral disputes was already in 1868 transferred from parliamentary committees to courts. See J. Harvey and L. Bather, *The British Constitution*, 3<sup>rd</sup> Edition, MacMillan St Martin's Press, London 1972, p. 60.

4 However, in doing so, they regulated in a very detailed manner the procedure for decision-making on a legal remedy by which elections are challenged before the parliament; see, e.g. the Norwegian and Swedish regulation.

or maintained the parliament as the primary supervisor of elections, but reserved the last say for the constitutional court (e.g. the Federal Republic of Germany). With regard to the regulation of the electoral judge regarding the election of deputies (the third paragraph of Article 82 of the Constitution), the Slovene constitution-framers modelled themselves on the German regulation, which entrusted primary supervision over elections to the parliament, and allowed an appeal to the Constitutional Court against its decisions. Such regulation also applies with regard to the National Council, however not due to the will of the Slovene constitution-framers, because the Constitution does not regulate this matter, but due to the legislature's will. The legislature namely determined by Article 10 of the National Council Act (Official Gazette RS, No. 100/05 – official consolidated text – hereinafter referred to as the NCA) *mutatis mutandis* application of the provisions of the National Assembly Elections Act (Official Gazette RS, No. 109/06 – official consolidated text – hereinafter referred to as the NAEA), i.e. also of the provisions of Articles 106 through 109 of the NAEA, which regulate the protection of the right to vote after election day, and by the third paragraph of Article 50 of the NCA it regulated the appeal to the Constitutional Court.

5. A regulation in which the primary supervisor of elections is a political body conceals in itself special pitfalls; for such reason, I am distinctly not in favour of such.<sup>5</sup> The nature of the work of the representative body is above all political and is not adapted to decision-making in individual legal procedures. Consequently, there exists a danger that political aspects will prevail over the legal aspects also when deciding in the procedure ensuring supervision over elections. Moreover, the political authority thereby assumes the role of the “judge” in matters in which it is involved, whereby it is at the same time required to impartially decide on election irregularities that refer to the election of its own members. This, however, is not an appropriate guarantee that shadows of doubt will not remain over the election procedure. The election results must namely authentically reflect the expressed will of the voters in the electoral procedure in which the candidates campaigned under equal conditions for their votes in accordance with the electoral rules determined in advance. These votes are in the end reflected in the acquired political offices, which are distributed in accordance with the chosen electoral system and in conformity with the expressed will of the voters. The same is also true in the event of indirect elections, except that in such case the electors who elect the candidates assume the role of voters, such as is the situation with regard to the National Council. Therefore, from the viewpoint of the protection of the right to vote, indirect elections by electors do not of themselves require different requirements than those that apply to direct elections.
6. If a regulation leaves the primary supervision over elections to a political body and only allows [appellate] judicial protection before the Constitutional Court, which at the same time is the appellate authority and the electoral judge, it is necessary to en-

5 On this matter, see J. Sovdat, *Ustavno varstvo volilne pravice* [Constitutional Protection of the Right to Vote], in: I. Kaučič (Ed.), *Dvajset let Ustave Republike Slovenije, pomen ustavnosti in ustavna demokracija* [Twenty Years of the Constitution of the Republic of Slovenia, The Significance of Constitutionality and Constitutional Democracy], Constitutional Court of the Republic of Slovenia, Ljubljana 2012, pp. 188–192.

sure that already in the procedure before the political body there exists a meticulously regulated legal procedure for the verification of the validity of the elections and the authenticity of the election results. If such procedure is not clearly regulated, if the details regarding the legal remedy by which elections can be challenged are not regulated, if the authorisations (to annul elections or to establish a different result of elections) of such political body or its working bodies with regard to the verification of alleged election irregularities are not known, if the procedure does not respect the fundamental constitutional procedural guarantees of a fair legal procedure, and if a decision on such legal remedy is not substantiated, this can even have an influence on the role of the electoral judge. It can influence the role of the electoral judge so as to significantly reduce such role, because the electoral judge, who concurrently performs the role of appellate authority and electoral judge in the first and the last judicial instance, cannot avoid a decision that it must examine as the appellate authority. In such manner, the question can be raised whether we really have ensured judicial protection of the right to vote in conformity with the generally internationally established standards regarding electoral disputes today. Whereas in the German regulation, which Slovenia took as a model on the constitutional level, the decision-making procedure of the parliament for appeals with regard to the election of deputies is precisely regulated by law,<sup>6</sup> our legislature inadmissibly abandoned such regulation (in fact, it simplified it to the extreme by a brief regulation in its Rules of Procedure<sup>7</sup>) with regard to deputies. It then copied such completely inadmissible regulation such that it also applies to elections to the National Council<sup>8</sup> (and also to local and European elections).

7. If the decision-making procedure regarding appeals before the National Council was regulated by law, as it should be, it would be clearly evident already from the statutory regulation that interferences with elections are only possible on the basis of the fact that elections can be challenged by a legal remedy that is determined by law that at the same time also regulates all that must be regulated in connection therewith and with deciding on this legal remedy. Once the election day is behind us and the election results are determined, the will of the voters has been expressed – thereby they exercise their active right to vote, which is a human right. On the basis of the established election results, the political office in question is awarded, in conformity with the election formula determined in advance, to the candidate who won such office in the election. On the basis of such voting results, i.e. the votes of voters, the candidate's passive right to vote, which after the confirmation of the candidacy entailed that the candidate has the right to partake in the political struggle for power as a candidate, assumes a new quality – the acquired

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6 With regard to the election of the deputies of the Bundestag, these questions are regulated by the Law on the Scrutiny of Elections, accessible in English at: [http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/wahlpruefungsgesetz\\_engl.pdf](http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/wahlpruefungsgesetz_engl.pdf).

7 See the second and the fifth paragraphs of Article 13 of the Rules of Procedure of the National Assembly (Official Gazette RS, No. 97/07 – official consolidated text).

8 See the second through fourth paragraphs of Article 6 of the Rules of Procedure of the National Council (Official Gazette RS, No. 70/08 etc.).

office. Therefore, in such case the candidate's passive right to vote, which is as well a human right ensured by the second paragraph of Article 43 of the Constitution, also includes the right to perform the office acquired in such manner.<sup>9</sup> If election irregularities occur due to which the candidate should not have acquired this right, it must be allowed to challenge the elections. For such reason, a legal remedy must be ensured by which it will be possible to claim these election irregularities. In the decision-making procedure for this legal remedy, all constitutional procedural guarantees must be respected, including the right of the candidate to make a statement regarding the alleged irregularities.

8. Due to the fact that the right to vote has a special legal nature and a voter can only exercise it simultaneously with all the other voters, although it is a personal right, and in an electoral procedure organised in advance<sup>10</sup> – this entails the collective manner of exercising the right to vote – and because the trust of voters in the fairness of the election procedure is of exceptional importance for the legitimacy of political power, protection of the right to vote after election day must be ensured in the public interest. For such reason, the legal remedy by means of which the elections may be challenged must be granted to both voters and all the candidates<sup>11</sup> who participated in the election. Therefore, elections can only be successfully challenged (meaning that they are either abrogated or the determined election results are different if the election irregularities can be remedied already in such manner) if what is at issue are such electoral irregularities that have or could have affected the election results, which is also emphasised by the Decision in the fifth paragraph of the reasoning.
9. If no one challenges an election, it must be deemed that the electoral procedure was carried out in conformity with the electoral rules and that the elected candidates acquired their offices, which are constitutionally protected as the passive right to vote; for such reason they also have the right to perform such office. Therefore, in the procedure for the confirmation of office they must be confirmed. Their confirmation also represents respect for the will of the voters, who by exercising this human right expressed it in the most democratic manner possible – in secret, free, and fair elections. A regulation that allows a political decision on the fact whether outside the Constitution and the law there exist reasons due to which it would perhaps nevertheless be substantiated to refuse the confirmation of an office although no one participating in the elections, i.e. voters or candidates, challenged the election would thus entail an inadmissible interference with the passive right to vote that the individual acquired in the elections in conformity with all the electoral rules, and with the active right to vote of voters. Both rights are protected by the second paragraph of Article 43 of the Constitution as human rights.

9 See J. Sovdat in: L. Šturm (Ed.), *op. cit.* 2011, pp. 711–712.

10 Grad wrote about this already in 1992; see F. Grad, *Novi volilni sistem z volilno zakonodajo* [The New Electoral System with Electoral Legislation], Inštitut za javno upravo pri Pravni fakulteti v Ljubljani, Ljubljana 1992, pp. 39–40. See also Decision of the Constitutional Court No. Up-304/98, dated 19 November 1998 (OdlUS VII, 240).

11 At this time I am leaving aside my serious doubts regarding the constitutionality of the statutory regulation in this respect, because they are not decisive for deciding in the case at issue.

10. If today we were to allow the substantiation offered by the National Council – that due to moral and ethical reasons, although no one has challenged the election, it is necessary to refuse to confirm the office of the appellant, a special political exclusion of competitors after the election is over. This would mean that in the procedure intended to perform legal supervision of the constitutionality and legality of elections we abandon the law entirely and allow decision-making based only on how those who find themselves in the position to decide on the confirmation of the office assess the morality of the person elected, although, in fact, from the aspect of the ethical perspective of the situation, they may perhaps even really be entitled to provide such assessment. The doors of arbitrary, political decision-making thus would open fully, in a procedure that must be a legal procedure and that must, as such, be carried out in conformity with the legal rules, in a procedure that entails legal decision-making on the validity of elections at the first instance, and the constitutionality and legality of which will be assessed by the Constitutional Court, as the electoral judge, on the basis of an appeal. Such would entail that instead of a legal procedure, there exists complete political discretion in the decision-making at the first instance. And what is then the electoral judge to supervise – if the politicians have exercised such political discretion correctly? In such manner, also the electoral judge would be transformed into an exclusively political authority. It is not necessary to explain the inadmissibility of such a situation.
11. Therefore, it is, of course, not a coincidence that also the Code of Good Practice in Electoral Matters,<sup>12</sup> which allows primary supervision over elections to a political body as a fact, if such regulation has existed for a longer period of time in the state, simultaneously warns of the possibility of a political decision, due to which it qualifies such possibility as admissible only as a measure at the first instance against which judicial protection must be ensured,<sup>13</sup> i.e. judicial protection before the electoral judge, which in such case simultaneously performs the role of the appellate authority and the role of the judge deciding in the first and the last instance regarding protection of the right to vote. This role imposes the requirement that there exists comprehensive judicial protection to which all the participants in the elections must have access, i.e. both the voters as well as all the candidates in the election. In this judicial procedure the right to vote is protected, especially its already mentioned collective aspect, as is the fairness of elections; therefore, the access of participants in the elections to the electoral judge cannot be conditioned by their possible personal interests and benefits. Consequently, both the voters as well as all the candidates can request an assessment of all possible election irregularities. This refers to the existence of the

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12 The Code of Good Practice in Electoral Matters was adopted by the so-called Venice Commission on 5 and 6 July 2002 at its 51<sup>st</sup> session. The European Court of Human Rights refers regularly thereto when interpreting Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette, RS No. 33/94, MP, No. 7/94), whereby its formally non-binding recommendations are changed into relevant requirements when what is at issue is the protection of the right to vote. See, e.g., the Grand Chamber Judgment in *Scoppola v. Italy*, dated 22 May 2012.

13 See Procedural Safeguards, an effective system of appeal, Section II.3.3.a. of the Code and paragraph 94 of the Explanatory Report to the Code of Good Practice in Electoral Matters.

right to vote and the electoral registers connected therewith, the validity of candidacies, compliance with the rules on and financing of electoral campaigns, as well as to compliance with the rules on voting at polling stations and on the determination of election results.<sup>14</sup> However, if no one invokes these electoral irregularities, the election results are final and those confirming the offices must respect the will of the voters expressed in the elections, which is a reflection of their active right to vote – the human right that developed through the centuries, due to its role and importance for a democratic state, into a fundamental political right of free citizens.

12. As I have already emphasised, for the significance of democratic elections it is especially important that voters have faith in the fairness of the electoral procedure, because it is the foundation of their legitimacy and thus the legitimacy of power. For such reason, also the selection of the system for resolving electoral disputes that is effective and powerful enough to ensure the peaceful consolidation of democracy is one of the most important decisions that a state must adopt when regulating the electoral system.<sup>15</sup> Since the legislature decided, modelling itself on the regulation governing the election of deputies, to keep the primary supervision over elections in the hands of a political body, it is even more important that such supervision be carried out in conformity with the legal rules envisaged in advance and not on the basis of political decisions of one kind or another. This is also why it is so important that the decision (at least the final one) is at all times subject to supervision by an independent and impartial judge – the guardian of the fairness of elections. If in the case at issue the Constitutional Court had not abrogated the decision of the National Council and had not confirmed the office [at issue], it would not have performed this role of the electoral judge.

### III

13. It is characteristic of Slovene statutory regulation that it determines the least possible limitations of the passive right to vote. If we examine foreign regulations, as well as numerous decisions of the ECtHR, in which it assessed the admissibility of limitations of the passive right to vote, we can see that elsewhere the situation is significantly different. One of the most known limitations of the passive right to vote is ineligibility. This was also envisaged by the Slovene constitution-framers, except that the legislature has left it unregulated to this day. The second paragraph of Article 82 of the Constitution determines that the law is to establish who may not be elected a deputy. Thus, it gives the legislature the authorisation to enact limitations of the passive right to vote in order to achieve the aim of this constitutional provision. In reality, this aim is intended to ensure the integrity of the electoral procedure and the elected representatives of the people. Due to the fact that the Constitution itself re-

14 All this is also emphasised in paragraph 92 of the Explanatory Report on the Code of Good Practice in Electoral Matters.

15 A. Ayoub, Electoral Dispute Resolution Mechanisms, 4<sup>th</sup> European Conference of Electoral Management Bodies, “Fighting against electoral fraud – Complaints and appeals procedures”, Strasbourg, 20 to 21 September 2007, publication of the European Commission for Democracy through Law, CLD-EL (2008)005, pp. 119–127, accessible at: [http://www.venice.coe.int/docs/2000/CDL-INF\(2000\)013-e.html](http://www.venice.coe.int/docs/2000/CDL-INF(2000)013-e.html), p. 127.

quires such limitations of the right to vote, the constitutionally admissible aim of ineligibility is fulfilled (the third paragraph of Article 15 of the Constitution), and what remains for the legislature to do is to determine the limitations by law and to respect, in doing so, the general principle of proportionality (Article 2 of the Constitution). Without statutory regulation of the passive right to vote it is thus not admissible to limit the passive right to vote, and the statutorily determined limitations must pass the so-called strict test of proportionality, on the basis of which the admissibility of a limitation with a human right is assessed.

14. Even if instances of ineligibility are determined by law, such does not already entail that on such basis there can occur political arbitration with regard to which candidate has his or her office confirmed after the elections have been carried out and which not. Ineligibility entails that a person who otherwise fulfils the general conditions (citizenship, age, legal capacity), on the basis of which he or she has the active right to vote (except when what is at issue are persons whose right to vote – both active and passive – is denied due to a lack of legal capacity), does not have the right to vote due to specific limitations that are connected with the profession, activities, or positions that the person carries out or occupies.<sup>16</sup> Such entails that such person must be eliminated already from running for office. From the start, the Election Commission may not confirm the candidacy of an ineligible person. During the confirmation of candidacies, it is not yet possible to successfully challenge its decision, which is based on law, by legal remedies before the competent court (not even by a constitutional complaint). If the Election Commission confirms the candidacy of an ineligible person, voters and candidates can successfully challenge the elections after they have been carried out, if the fact that an ineligible person participated in the election could have affected the election result. If an appeal has been filed, this can thus be the subject of a dispute before [a specific] office is confirmed; however, also in such case the Constitutional Court would not be able to decide politically, but would have to decide legally in conformity with the legal rules determined in advance by law.
15. Due to the fact that our legislature did not in any manner determine the instances of ineligibility, I would like to briefly draw attention to the French regulation, which extended ineligibility also to instances that are not included in the presented definition of this term. The *Code électoral*,<sup>17</sup> which regulates elections in France, determines different examples of ineligibility for different offices; sufficiently illustrative is the ineligibility of a deputy of the French National Assembly, which is the general representative chamber. According to such, for instance, persons ineligible to be deputy in any district include persons who are currently or who were in the previous six months in such area judges, high officials of the state, bearers of individual public offices at the regional and departmental level, and the human rights ombudsman in all

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16 Cf. J.-C. Masclet, *Droit électoral* [Election Law], Presses universitaires de France, Paris 1989, p. 71. Cf. also F. Grad, *Volitve in volilni sistem* [Elections and Election System], 2<sup>nd</sup> revised edition, Uradni list Republike Slovenije, Ljubljana 2004, p. 41.

17 Accessible at: <http://legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070239>.

districts. Persons for whom a (criminal) conviction (final, of course) prevents them from being entered into the electoral register for a determined limited period of time are ineligible (meaning that due to a conviction they also do not have the active right to vote). [Furthermore,] the special examples of ineligibility are actually special sanctions for not complying with electoral rules and the rules connected therewith, especially those that refer to the declaration of the assets of elected officials and the financing of election campaigns. In such manner, a deputy who in the statutorily determined time limit does not submit to the special Commission for Financial Transparency of Political Life a declaration of their assets becomes ineligible for a period of one year. Persons who in the statutorily determined period of time do not submit their campaign accounts to the special National Commission for Campaign Accounts and Political Financing, persons whose campaign accounts have not been approved, and persons who exceed the upper statutorily determined amount for the election campaign become ineligible as well. It is the French Constitutional Court (the *Conseil constitutionnel*) that decides thereon; the one-year time limit is calculated from [the date of] the judicial decision on ineligibility. The French Constitutional Court decides on ineligibility with regard to the financing of the election campaign either simultaneously in an electoral dispute in which either the annulment of the elections due to irregularities (also) in the financing of the election campaign is required or upon the special request of the mentioned Commission if the elections are not challenged. What is essential with regard to both ineligibility caused by a final criminal conviction and ineligibility caused by a decision of the Constitutional Court is that the person is removed from office.<sup>18</sup>

16. In a state as small as Slovenia, it is even more necessary than in larger states to determine ineligibility in order for the integrity of the elected representatives of the people to be ensured, as well as the integrity of the electoral procedure. It would be preferable for the legislature to finally address the regulation of this field. However, let me repeat this one more time: Even if it does determine the cases in which ineligibility applies, this can only entail that these cases would be decided on in legal procedures and in a legal manner.

#### IV

17. Legal supervision of elections in which the electoral judge has the last say and the legally regulated instances of ineligibility are not a substitute for political responsibility and a culture of [proper] political behaviour. The latter two coexist with the former two. It is known from which perspective political responsibility is a constitutional category, by whom it may be invoked, and when. When what is at issue is

<sup>18</sup> A known case that also the Court of Justice of the European Union dealt with (see the Judgment in *J.-M. Le Pen v. European Parliament*, C-208/03, dated 7 July 2005) is, for instance, the conviction of a known French politician who was convicted by the final judgment of a French criminal court of having committed the criminal offence of assault and public insult and on whom also a one-year prohibition of the exercise of the passive right to vote was imposed, the consequence of which was the termination of the office of a deputy of the European Parliament.

the electoral procedure, those who insist on political responsibility in a democratic state during each election again are the voters (i.e. adult citizens of the state) – either directly or through electors (who are elected by them), who with regard to indirect elections are, as I have already mentioned, voters themselves. Of course, also each office holder can demonstrate his or her political responsibility by respecting the political culture in such a manner that he or she resigns from his or her office. However, neither political responsibility nor [proper] political culture entail the negation of law. On the contrary, they adhere to it. After the electoral procedure is complete, an integral part of this law is also the electoral dispute, which entails legal proceedings in which legal supervision of compliance with the electoral rules in the election procedure is carried out. This also applies, as I have already emphasised, when on the request of the entitled initiators of such proceedings this supervision is first carried out before a political body and only then before the electoral judge. Therefore, there is no space therein for politically arbitrary conduct; conduct in conformity with the Constitution and the law is required in an electoral dispute.

*Dr Jadranka Sovdat*

**DECISION**

At a session held on 9 November 2006 in proceedings to review constitutionality initiated upon the petition of Elizabeta Dolenc, Radovljica, and others, and the petition of Marija Petan, Ljubljana, the Constitutional Court

decided as follows:

1. The Victims of War Violence Act (Official Gazette RS, Nos. 63/95, 8/96, 44/96, 70/97, 43/99, 28/2000, 64/01, 110/02, 3/03, and 18/03 – official consolidated text) is inconsistent with the Constitution.
2. The National Assembly must remedy the established inconsistency within a time limit of one year from the publication of the Decision in the Official Gazette of the Republic of Slovenia.
3. The petitions for the initiation of proceedings to review the constitutionality of the Redress of Injustices Act (Official Gazette RS, Nos. 59/96, 11/01, 87/01, 34/03, 47/03 – official consolidated text, 53/05, and 70/05 – official consolidated text) are rejected.

*Reasoning***A**

1. The petitioners filed two petitions for the review of the constitutionality of the Victims of War Violence Act (hereinafter referred to as the VWVA) and the Redress of Injustices Act (hereinafter referred to as the RIA). The petitioners are close relatives of persons who died violently during the Second World War (i.e. from May 1942 until May 1945 inclusive). The petitioners allege that those persons were civilian victims who had died during the war due to violence perpetrated by members of the Partisan movement.
2. The petitioners are of the opinion that the third paragraph of Article 50 of the Constitution guarantees them, as the closest relatives of persons who were victims of war violence, special protection in conformity with the law. They emphasise that due to the violent death of their relatives they suffered severe consequences both

during and after the war. As children they were forcibly deprived of the possibility and right to live in community with their parents. They emphasise that due to the loss of their parents they experienced severe suffering and psychological damage, which continued also in the post-war period, and which are still present particularly in those cases in which the children have not yet succeeded in finding the graves of their parents and to thereby find proper expression of their grief. In the opinion of the petitioners, due to the fact that the remains of their relatives are located in unknown and unmarked places, which are not graves, their right to personal dignity is still being violated.

3. The petitioners allege that due to the confiscation of property they also incurred material damage. Their social position was allegedly worsened. Furthermore, they allegedly did not have equal opportunities as others to enjoy education, employment, and a professional career. Already in their childhood, they were allegedly mocked, injured regarding their personal development, and socially marginalised. Their mental integrity was allegedly injured, and their personal development and the formation of their personal identity were hampered. Furthermore, the honour and good reputation of their families were damaged. The petitioners are convinced that they were ostracised for the entire post-war period as their honour and good reputation were stained. By the establishment of the inconsistency of the RIA and the VWVA with the Constitution they would allegedly receive concrete material and non-material legal benefits and rights.
4. In the opinion of the petitioners, the state of the facts that is characteristic of the killing of their relatives is in essential elements equal to the state of the facts that apply to the cases of the persons referred to by the third paragraph of Article 4 of the RIA, i.e. “persons who were killed without court sentences.” Also the relatives of the petitioners were allegedly killed without being convicted by a court, i.e. without any legal proceedings. The only difference between the two categories of persons is, according to the petitioners, in the period of time in which they were killed. While the relatives of the persons that were killed after the war enjoy the right to compensation determined by the first paragraph of Article 5 of the RIA and the right to be issued death certificates and to mark the graves [of those killed], the petitioners, who are relatives of persons killed during the war, are not entitled to the mentioned rights.
5. The petitioners allege that their position is also not regulated in the VWVA, which in terms of time refers to the period from 6 April 1941 to 15 May 1945, i.e. to the period in which their relatives were killed. The petitioners emphasise that with respect to the provision of Article 1 of the VWVA, which only covers the violent acts or forcible measures of the occupier, they cannot acquire the rights guaranteed to the victims of war violence by Articles 7 and 8 of the VWVA. They emphasise that their relatives do not fall within the circle of persons who voluntarily or professionally collaborated with the aggressor (Article 6 of the VWVA), but that their relatives were civilians or even members of the Partisan movement. In their opinion, the legislature did not have reasonable grounds to exclude the category of persons to which the petitioners and their relatives belong. According to the petitioners, by failing to regulate

the legal status of the mentioned persons the legislature violated the principle of a state governed by the rule of law and of a social state determined by Article 2 of the Constitution, the principle of equality before the law determined by the second paragraph of Article 14 of the Constitution, the right to personal dignity and safety determined by Article 34 of the Constitution, the rights to privacy and personality rights determined by Article 35 of the Constitution, and the right to social security determined by Article 50 of the Constitution.

6. The petitioners are convinced that the matter concerns an unconstitutional legal gap for which the legislature did not have reasonable and objectively justifiable grounds. Therefore, they propose that the Constitutional Court establish that “the Victims of War Violence Act and the Redress of Injustices Act are not in conformity with the Constitution insofar as they do not regulate the legal position of persons killed during the war and the rights of the relatives of persons killed during the war.”
7. The petition of Elizabeta Dolenc and others was sent to the National Assembly, which did not respond thereto. The petition was also sent to the Government, which also did not submit an opinion thereon.

#### **B – I**

8. The petitioners substantiate their legal interest by alleging that they are close relatives of persons who as civilian persons allegedly died violently during the Second World War (i.e. between May 1942 and May 1945 inclusive). The Constitutional Court assesses that the petitioners demonstrate the legal interest to file a petition in the part relating to the VWVA. The Constitutional Court has received a large number of submissions supporting the filed petition, due to which it did not deem the persons submitting such to be participants in the proceedings.
9. The Constitutional Court joined the two petitions for joint consideration and decision-making. As the allegations in the petition of Marija Petan and others do not deviate substantively from the allegations in the petition of Elizabeta Dolenc and others, the Constitutional Court did not send the other petition to the National Assembly.

#### **B – II**

10. The Constitutional Court accepted for consideration the two petitions for the initiation of proceedings to review the constitutionality of the VWVA. Since the conditions determined by 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, it proceeded to decide on the merits of the case.
11. The petitioners proposed the calling of a public hearing. They substantiated their proposal by claiming that the Constitutional Court would thereby gain direct insight into their tragic life stories. The Constitutional Court established, however, that the state of the facts that was the basis for the review of the constitutionality of the challenged statutory regulation was sufficiently explained already on the basis of the submitted documents. Therefore, it decided to not hold a public hearing.

## B – III

### The Review of the VWVA

12. Thus far, the Constitutional Court has decided a number of times on cases in which individuals challenged the VWVA and alleged that they had been unjustifiably excluded from the circle of persons entitled to be granted the status of a victim of war violence.<sup>1</sup> The petitions at issue, however, open a new aspect, i.e. the question of the exclusion of an entire group of persons who in accordance with the criteria determined by the VWVA could well fall within the circle of civilian victims of war, but to whom the VWVA does not grant the status of a victim of war violence merely due to the fact that the circumstances which the VWVA determines as a criterion for granting the status of a victim of war violence were not caused by the occupying forces or their collaborators.
13. The starting point for the review of the constitutionality of the challenged statutory regulation is the third paragraph of Article 50 of the Constitution, on the basis of which war veterans and victims of war are guaranteed special protection in accordance with the law. In a number of decisions (e.g. Decision No. U-I-86/94, dated 14 November 1996, Official Gazette RS, No. 68/96, and OdlUS V, 153; and Order No. U-I-327/96, dated 6 May 1999, Official Gazette RS, No. 51/99, and OdlUS IX, 19), the Constitutional Court has already explained the nature of this constitutional right. The mentioned constitutional provision obliges the state to regulate special protection for victims of war violence in a manner that exceeds the rights arising from mandatory social insurance. The content of the right to social security is, however, not determined by the Constitution. Furthermore, the Constitution does not guarantee specifically determined social rights. What follows from this constitutional provision is merely the obligation of the state to create conditions and possibilities for the realisation of social security. Special protection signifies ensuring special rights or a broader scope of rights. The Constitution does not determine the measures that the state must opt for in order to achieve such an aim. Special human rights in the field of social security (social rights) are exercised “under conditions provided by law” – i.e. on the basis of a law that determines the circle of entitled persons, the type and scope of entitlements, the conditions for their acquisition, and the manner of the exercise of these rights.
14. When assessing the challenged statutory regulation, the Constitutional Court must also take into consideration the generally accepted principles of international law (Article 8 and the second indent of the first paragraph of Article 160 of the Constitution). This term encompasses, in particular, the rules of customary international law and the general principles of law recognised by civilised nations. These two sources of international law are enumerated in points b and c of Article 38 of the Statute of the International Court of Justice.<sup>2</sup> Within the framework of the constitutional category of ‘generally accepted principles of international law’, the Constitutional Court has applied the ‘general principles of law recognised by civilised nations’ as the criterion

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1 See, e.g., Order No. U-I-403/02, dated 12 December 2002 (OdlUS XI, 259).

2 A. Graseli 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, p. 141.

for deciding a number of times.<sup>3</sup> In Decision No. U-I-23/93,<sup>4</sup> it proceeded from the fact that after the Second World War the international legal order was established on the basis of condemnation of the Nazi and Fascist regimes and the persecution of the perpetrators responsible for the crimes committed, which was confirmed by the entire international community of that time.<sup>5</sup> In the mentioned Decision, the Constitutional Court adopted the position that certain activities of an individual during the [Second World] War can entail a reason for such person to not be entitled to Yugoslav citizenship. It is also necessary to emphasise the significance of the Preamble to the Constitution, which in this respect states the following: “Proceeding from [...] the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood [...]” From both the materials of the Commission for Constitutional Affairs and constitutional theory, it follows that what is meant by the struggle for national liberation is, in particular, the periods of the national liberation struggle and the struggle for independence.<sup>6</sup> In connection with such, Dr Peter Jambrek wrote: “The Slovene constitutional doctrine of the right of the nation to self-determination was explicitly formed, practically tested, and constitutionally implemented in two key periods of the previous century relating to Slovene statehood – in the years between 1941 and 1945 and between 1987 and 1991.”<sup>7</sup>

15. By Article 1 of the VWVA the legislature determined that a citizen of the Republic of Slovenia who during a war or military aggression against the Republic of Slovenia was subject to violent acts or the forcible measures of an occupier, aggressor, or their collaborators, is entitled to the status of a victim of war violence. By such definition the legislature determined that who caused the person to be subject to violent acts or forcible measures is to be the basic criterion for granting the status of a victim of war violence. On the basis of this criterion, the legislature introduced a differential

3 See the following Decisions of the Constitutional Court: Decision No. U-I-6/93, dated 1 April 1994, Official Gazette RS, No. 23/94, and OdlUS III, 33; Decision No. U-I-67/94, dated 21 March 1996, Official Gazette RS, No. 24/96, and OdlUS V, 31; Decision No. U-I-249/96, dated 12 March 1998, Official Gazette RS, No. 29/98, and OdlUS VII, 47; Decision No. U-I-248/96, dated 30 September 1998, Official Gazette RS, No. 76/98, and OdlUS VII, 176; Decision No. U-I-247/96, dated 22 October 1998, Official Gazette RS, No. 76/98, and OdlUS VII, 195; and Decision No. U-I-23/93, dated 20 March 1997, Official Gazette RS, No. 23/97, and OdlUS VI, 43.

4 In Case No. U-I-23/93, the Constitutional Court assessed the statutory regulation by which the post-war Yugoslav authorities had denied persons of German nationality who during the occupation had been loyal to the German Reich the possibility to acquire Yugoslav citizenship. It established that such regulation was not inconsistent with the general principles of law that already at that time were recognised by civilised nations.

5 See United Nations General Assembly Resolution No. 3(I) of 13 February 1946 on the Extradition and Punishment of War Criminals and Resolution No. 95(I) of 11 December 1946 on the Affirmation of the Principles of International Law Recognised by the Charter of the International Military Tribunal in Nuremberg. The Constitutional Court referred to them already in Decision No. U-I-6/93.

6 Cf. the treatise of Dr France Bučar, President of the Commission for Constitutional Affairs, entitled *Nastajanje slovenske ustavnosti* [The Formation of Slovene Constitutionality], in M. Cerar and G. Perenič (Eds.), *A Selection of the Materials of the Commission for Constitutional Affairs (1990–1991)*, Vol. 1, Ljubljana, 2001, p. 236.

7 P. Jambrek, *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], p. 35.

regulation of the position of [various] victims of war violence who in fact had experienced the period of the Second World War in comparable circumstances.

16. The basic text of the VWVA was adopted in 1995 as one of the so-called war acts (together with the War Disabled Act, Official Gazette RS, Nos. 63/95, etc. – hereinafter referred to as the WDA, and the War Veterans Act, Official Gazette RS, Nos. 63/95, etc.). As follows from the legislative file (Gazette of the National Assembly, No. 72/02), the VWVA was adopted in order to ensure special protection of those citizens of the Republic of Slovenia who during the war (from 1941 until 1945) had been subject to certain typical and generic forms of war violence, which resulted in consequences for the war generation that society is only able to remedy or mitigate by special material and organisational efforts. Initially, the VWVA only applied to certain categories of such persons; however, the circle of entitled persons was subsequently expanded by several amendments to the VWVA.
17. In the original text of the VWVA, the legislature included individual typical categories of civilian persons who had been subject to war violence; however, it did not define the concept of a civilian person itself (neither did it do so in subsequent amendments).<sup>8</sup> The following categories of victims of war violence were defined in Article 2 of the VWVA: exiles, camp prisoners, prisoners, labour deportees, internees, refugees, and stolen children. By the provision of Article 4 of the VWVA, the legislature enabled the status of a victim of war violence to also be granted to persons who had been forcibly mobilised into regular military units of the occupier. These persons can also be listed among the particularly exposed victims of war, as they are civilian persons who, contrary to the then valid rules of international law,<sup>9</sup> had been

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8 The concept of a civilian is defined in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 (Official Gazette SFRY, MP, No. 16/78, and Official Gazette RS, No. 14/92 – hereinafter referred to as Protocol I). In conformity with the first paragraph of Article 50 of Protocol I, a civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3), and (6) of the Third Geneva Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. This is an exclusionary approach in defining the concept of a civilian. Members of the armed forces, the wounded, the sick, and prisoners of war are excluded from the circle of civilians. By interpreting the mentioned definition of the term a civilian from the viewpoint of the rules of the international military law in force during the Second World War, one can establish that also in accordance with the war regulations in force at the time, the wounded and sick in the framework of the armed forces and prisoners of war were specially protected categories that could not be included among civilian victims of war (*cf.* the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and the Convention relative to the Treatment of Prisoners of War, adopted in Geneva on 27 July 1929; on 20 May 1931, the Kingdom of Yugoslavia submitted the instruments of ratification regarding both of them to the Swiss Federal Council. These two Conventions were superseded by the First and Third Geneva Conventions for the Protection of War Victims of 12 August 1949.

9 The prohibition against [forcibly] recruiting inhabitants in an occupied territory can be extracted by interpreting the Hague Regulations of 1907, which in Article 45 determined that it is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power. This prohibition was included in the Fourth Geneva Convention, i.e. the Geneva Convention Relative to the Protection of Civilian Persons in

forced to join the military units of the occupier. Only by the 2002 amendment to the VWVA (i.e. the VWVA-G) did the legislature enable the status of a victim of war violence to be granted to the only category [of persons] who cannot be considered to be civilian victims of war, i.e. members of the former Yugoslav army at the time of the capitulation of the Kingdom of Yugoslavia; however, this category is not relevant to the assessment of the case at issue.<sup>10</sup>

18. Depending on the status granted, the VWVA recognises different categories [of victims of war violence] different scopes of statutory rights (health care, spa and climatic treatment, the reimbursement of travel expenses, recognition of the pension qualifying period, the right to a pension under more favourable conditions, the right to military compensation in accordance with a special law, a monthly allowance for life, and priority in the allocation of subsidised housing). Under certain conditions, also family members of a person who lost his or her life or went missing in the circumstances enabling the granting of the status of a victim of war violence in conformity with this Act (Article 7 of the VWVA) are entitled to such protection.<sup>11</sup>
19. In the framework of the authorisation granted by the third paragraph of Article 50 of the Constitution, the legislature namely adopted a regulation by which it limited

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Time of War of 12 August 1949 (Official Gazette of the Presidium of the People's Assembly of the FPRY, Nos. 6/50 and 24/50, and Official Gazette RS, No. 14/92), which in the first paragraph of Article 51 determines the following: "The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted."

- 10 The petitioners do not mention this category in the framework of their allegations.
- 11 In conformity with the first paragraph of Article 7 of the VWVA, protection under this Act is extended to a citizen of the Republic of Slovenia, a family member of a person who lost his or her life or went missing in action in circumstances enabling the granting of the status of a victim of war violence in accordance with this Act. Such protection is ensured to the same circle of family members and under equal conditions as in accordance with the regulations on war-disabled persons. Articles 8 through 10 of the WDA determine which family members fall within the circle of entitled persons in accordance with this Act. In conformity with Article 9 of the WDA, the following family members are entitled to protection under this Act:
  1. A spouse whom a war-disabled person, fallen combatant, or other person maintained during at least the last year prior to his or her death, and a spouse whose marriage was dissolved by divorce, if he or she has or had the right to maintenance on the basis of a court decision or an agreement, and enjoyed such right until the death of the war-disabled person, fallen combatant, or other person (i.e. the divorced spouse);
  2. Children and adoptees, as well as stepchildren, however the latter only under the condition that the war-disabled person, fallen combatant, or other person maintained such during at least the last year prior to his or her death, or from the stepchild's birth onwards, if he or she is less than one year old and does not have a parent who is maintaining him or her;
  3. A parent, adoptive parent, stepfather, or stepmother whom the war-disabled person, fallen combatant, or other person maintained during at least the last year prior to his or her death, provided that the stepfather or stepmother maintained the war-disabled person, fallen combatant, or other person for at least three years and cared for him or her.

On the basis of Article 10 of the WDA, a partnership [of two persons] lasting at least three years that in accordance with the regulations on marriage and family relations is equated with marriage has, under this Act, the same legal consequences as a marriage.

granting the status of a victim of war violence to different categories of civilian persons. However, granting the status of a victim of war violence was only made possible regarding those civilian persons who had been subject to the violent acts or forcible measures of an occupier or its collaborators. The legislature entirely excluded from the circle of entitled persons civilian persons who had been subject to violent acts or forcible measures carried out by the armed forces fighting on the opposing side in the armed conflict. In order to define the term civilian victims, it is decisive that these are persons who were subject to violence due to war events without being actively involved on the either side of the armed conflict.<sup>12</sup>

20. In the assessment of the Constitutional Court, by entirely excluding from special protection the mentioned circle of civilian victims of war who had experienced the period of the Second World War in circumstances comparable to those determined by Article 1 of the VWVA, the legislature acted inconsistently with the authorisation determined by the third paragraph of Article 50 of the Constitution. The authorisation given to the legislature by the mentioned constitutional provision is not unlimited. The legislature may only exercise this authorisation within the framework of constitutional principles and by respecting constitutionally guaranteed human rights and fundamental freedoms. By determining in Article 6 of the VWVA that persons who voluntarily or professionally collaborated with the occupier are excluded from the circle of victims of war violence, the National Assembly acted within the framework of such authorisation. A regulation that allowed persons who collaborated with the occupier to be granted the status of a victim of war violence could be inconsistent with generally accepted principles of international law and thus also with the Constitution.<sup>13</sup> However, it does not follow from the Constitution that the term victim of war violence should be restricted to only those civilian persons who had been subject to violent acts or forcible measures carried out by the armed forces of the occupier. Therefore, it is inconsistent with the Constitution that the legislature excluded from the circle of civilian victims of war violence all those persons who had been subject to violent acts or forcible measures carried out by the armed forces fighting on the other side in the armed conflict. Establishing whether potential victims of war violence collaborated with the occupier can be the subject of concrete procedures and thus also the subject of a possible constitutional review of the acts adopted in such procedures, but not the subject of a constitutional review of a regulation.
21. Due to the reasons stated above, the Constitutional Court assesses that the challenged regulation determined by the VWVA is inconsistent with the Constitution. As the matter concerns a situation referred to in Article 48 of the CCA, the Constitutional Court established that the challenged statutory regulation was unconstitutional (point 1 of the operative provisions). The Constitutional Court determined a time limit of one year within which the legislature is obliged to remedy the established inconsistency (point 2 of the operative provisions). By regulating the position and the rights of civil-

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12 See note No. 8.

13 Cf. Decision No. U-I-23/93.

ian victims of war in conformity with the above-mentioned, the legislature will also enable the family members of the persons killed to acquire, under the conditions determined by Article 7 of the VWVA, certain rights on the basis of this Act.

22. As the Constitutional Court established an unconstitutionality of the challenged regulation determined by the VWVA already due to the inconsistency with the third paragraph of Article 50 of the Constitution, it did not assess the other alleged inconsistencies.
23. Considering the fact that the two petitions substantively refer to the regulation determined by the VWVA, the petitioners do not have a legal interest to challenge the RIA. Therefore, the Constitutional Court rejected the petitions in this part (point 3 of the operative provisions). With respect to the petitioners' allegations concerning their inability to build graves and to obtain death certificates, the Constitutional Court explains that these issues are not a subject of the challenged Acts.

### C

24. The Constitutional Court adopted this Decision on the basis of Articles 25 and 48 of the CCA, composed of: Dr Janez Čebulj, President, and Judges Dr Zvonko Fišer, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr Ciril Ribičič, Dr Mirjam Škrk, Jože Tratnik, and Dr Dragica Wedam Lukić. The decision was reached unanimously.

*Dr Janez Čebulj*  
*President*

**DECISION**

At a session held on 2 October 2008 in proceedings to decide upon the constitutional complaint of Velislav Todorović, Ljubljana, represented by Nevenka Šorli, attorney, Ljubljana, the Constitutional Court

*decided as follows:*

1. Supreme Court Judgment No. VIII Ips 213/2004, dated 1 February 2005, Higher Labour and Social Court Judgment No. Psp 136/2003, dated 9 April 2004, and Ljubljana Labour and Social Court Judgment No. Ps 1459/2000, dated 22 January 2003, are annulled.
2. The case has been remanded to the Ljubljana Labour and Social Court for new adjudication.

*Reasoning***A**

1. The court of first instance found that the complainant is a citizen of the Republic of Slovenia and that he had claimed his right to an old-age pension from the pension insurance institution in the Republic of Serbia where he was last employed. As a result, the court decided that he had exhausted the right to choose his insurance institution in accordance with the applicable regulation. For this reason, he did not meet the conditions for recognition of the right to the oldage pension in the Republic of Slovenia pursuant to Article 177 of the Pension and Disability Insurance Act (Official Gazette RS, No. 106/99 etc. – hereinafter referred to as the PDIA-1). The first paragraph of this Article provides that an insured person who meets the conditions for entitlement to two or more pensions that are based on compulsory insurance in the Republic of Slovenia may enjoy only one pension of their choice. In the second paragraph it provides, however, that the preceding paragraph shall also apply if an insured person meets the conditions for obtaining pensions in other states, provided they acquire rights on the basis of the same periods

of pensionable service. In the opinion of the court of first instance, the possibility of choice relates to the insured person, i.e. to the economically active person who has not yet obtained the right to choose. Once the right is exercised, it is no longer possible to choose which institution has the jurisdiction to recognise the right and subsequently disburse the benefit. Therefore the court of first instance rejected the complainant's claim to annul the final decision of the Pension and Disability Insurance Institute (hereinafter referred to as the Institute), by which the latter recognised the right for the oldage pension to be supplemented pursuant to the Provision of Social Security to Slovene Citizens Entitled to Pensions from the Former Republics of the SFRY [Socialist Federal Republic of Yugoslavia] Act (Official Gazette RS, No. 18/01 etc. – hereinafter referred to as the PSSA). According to the court of second instance, the complainant's position that, pursuant to the general regulations, he is entitled to an independent oldage pension – instead of the recognised supplement to the pension – is erroneous on the grounds that were convincingly established in the challenged judgment and final decision of the respondent party to the proceedings. The court of second instance argued that, in order to solve the case at the appeal stage, the actual finding of the court of first instance alone that the right of the complainant to an old-age pension had been recognised by the Serbian pension insurance institution since 1992, which is where he was last insured, also taking into account the years completed in Slovenia was essential. As a result, the right to choose between the state pensions in the Republic of Slovenia and Republic of Serbia had been exhausted. The court of first instance ruled that the plaintiff had exhausted the right to choose, i.e. by claiming his right from the Serbian insurance institution, he had waived the possibility of claiming the same pension benefit from the Slovene insurance institution. Moreover, the Supreme Court upheld the ruling of both courts that the complainant is only entitled to the supplement to the pension. It argued that an insured person who claims the right to a pension in any of the republics of the former SFRY does not have the right to choose and cannot successfully claim the same right in the Republic of Slovenia.

2. The complainant asserts that the position of the courts pursuant to which he exhausted the right to choose the insurance institution in accordance with the applicable regulations by claiming the right to the old-age pension from the Serbian insurance institution is unconstitutional. The complainant believes that the purpose of the second paragraph of Article 177 of the PDIA-1 is not for the insured person to lose the right to a pension as soon as he obtains the right to pension on the basis of the same period of pensionable service in another country. In his opinion, the aforementioned provision is intended to prevent a person from receiving two pensions simultaneously on the basis of the same period of pensionable service, but is not intended to prevent recognition of two rights to a pension. The complainant emphasises that the insured person has the right to a pension on the basis that he meets the conditions for a particular pension. He argues that it is possible to limit the extent to which this right is exercised, but it is not possible to interfere with the right itself, since the individual would be deprived of what he had secured for himself by

paying the contributions and by the period of pensionable service in the Republic of Slovenia. In his opinion, the courts would have to recognise his right to a pension and only then decide on whether it was going to be disbursed. It is alleged that the courts decided that because he exercised his right to choose in another country he ultimately lost the possibility to claim the pension on the basis of the period of pensionable service completed in the Republic of Slovenia. The complainant claims that the second paragraph of Article 177 of the PDIA-1 does not provide such and that the courts went beyond what is admissible according to the Constitution. It is alleged that the adopted position results in excessive interference with the right to social security determined in Article 50 of the Constitution. The complainant alleges that the courts also violated the right to make statements (Article 22 of the Constitution), since they did not consider his claims that he is entitled to the right to a pension pursuant to Article 36 of the PDIA-1. It is also alleged that they violated the right to private property pursuant to Article 33 of the Constitution by the contentious interpretation of the second paragraph of Article 177 of the PDIA1, since the protection of property also includes the right to be a beneficiary of the pension scheme to which he contributed. He argues that his right to freedom of conduct (Article 35 of the Constitution) was violated indirectly, because the adopted position of the courts represented an exaggerated sanction for the conduct of the insured person who has the possibility to simultaneously receive pension in two states. He also alleged that the challenged interpretation of the courts is also inconsistent with the principle of equality before the law (second paragraph of Article 14 of the Constitution). The insured persons that were paying the contributions and completed specific period of pensionable service only in Slovenia acquired the right to a pension without any difficulties, whereas the insured persons who in addition to the same period of pensionable service in Slovenia completed lesser proportion of the period of pensionable service in another state were deprived of that right.

3. By an Order No. Up-360/05, dated 7 November 2006, the panel of the Constitutional Court accepted the constitutional complaint for consideration. Pursuant to the provision of the then applicable Article 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94), the Constitutional Court sent the constitutional complaint to the Supreme Court that replied that it will not respond thereto.

## B

4. The complainant claims *inter alia* that, by the challenged decisions, the courts excessively interfered with his right to social security.
5. The first paragraph of Article 50 of the Constitution guarantees the right to a pension under conditions provided by law. Therefore, this is a case for which the Constitution leaves part or all of the content and scope of the human right to be determined by the subsequent statutory regulation. In a case such as this, as pointed out by the Constitutional Court in its Decision No. U-I-86/96, dated 12 December 1996 (Official Gazette RS, No. 1/97, and OdlUS V, 176), the so-called statutory reservation is so broad that it is necessary to establish on a case-by-case basis the extent to which

the legislature is bound by the Constitution when defining the content and scope of the human right, and the extent to which this falls within its margin of appreciation, in the event of which it is bound merely by other provisions of the Constitution and no longer by the constitutionally determined content of this human right, i.e. by the constitutionally protected core or essence of this human right. If the statutory regulation interfered with the essence of the human right, this would entail an interference with the right determined in Article 50 of the Constitution, which the Constitutional Court would have to review in relation to the third paragraph of Article 15 and Article 2 of the Constitution pursuant to the so-called strict proportionality test. If this does not constitute an interference with the very essence of the human right, then the regulation thereof falls within the legislature's margin of appreciation and it is the duty of the competent courts and the Supreme Court as the highest court in the state (Article 127 of the Constitution) to correctly apply such regulation in individual proceedings when deciding on the rights.

6. In accordance with the previous paragraph, when deciding on the right to a pension, the court would be in violation of the first paragraph of Article 50 of the Constitution if the court decision was based on a position that was inconsistent with this right, i.e. if, by interpreting the PDIA1, the courts would inadmissibly interfere with the very essence of the right to a pension. The essence or the core of the right to a pension entails an individual's right to obtain and enjoy a pension that provides social security, on the basis of paid pension insurance contributions and if other reasonably determined conditions (e.g. period of pensionable service and age) are met. The pension has a dual nature: it is an economic category, since the rights from pension insurance<sup>1</sup> depend mainly on how long the contributions were being paid and in what amount and it also includes elements of intergenerational solidarity. The elements of intergenerational solidarity are relevant when determining the amount of the pension, but not for obtaining the right. The insurance aspect of this relationship is essential for obtaining the right. Conceptually the core of the right to a pension itself primarily includes the right of an individual to obtain the right once the abovementioned conditions have been met. An individual who has fulfilled the conditions required to obtain the right to a pension in accordance with the PDIA-1 on the basis of paid contributions to a Slovene insurance institution has the right to claim this right from the insurance institution.
7. The courts of all three instances established beyond a reasonable doubt that the complainant had been paying contributions into the pension insurance system in the Republic of Slovenia for almost 36 years. They took the position that the complainant who exercised his right to a pension in the Republic of Serbia had already exhausted his right to choose the insurance institution, and therefore no longer had the right to choose referred to in the second paragraph of Article 177 of PDIA-1,<sup>2</sup> and would

1 Cf. Order of the Constitutional Court No. U-I-156/92, dated 20 May 1993 (OdIUS II, 47).

2 Article 177 of the PDIA-1 is worded as follows:

“1) In the event that an insured person meets the conditions for entitlement to two or more pensions from the compulsory insurance in the Republic of Slovenia, the insured person may enjoy only one pension of his own choice.

only be entitled to the supplement to the pension pursuant to the PSSA; the right to a pension was exhausted when it was claimed from the foreign insurance institution and he therefore is unable to successfully claim a right to a proportional part of his pension from the insurance institution in the Republic of Slovenia. In view of the constitutionally defined core of the right to a pension, as evident from Paragraph 6 of the reasoning of this Decision, such position of the courts entails an interference with the complainant's right to a pension determined in the first paragraph of Article 50 of the Constitution since it does not allow the complainant to claim his right to a proportional pension from the Slovene insurance institution.

8. Interference with the constitutionally enshrined core of the right to a pension could be admissible if it were consistent with the third paragraph of Article 15 and Article 2 of the Constitution. In accordance with the third paragraph of Article 15 of the Constitution, a constitutionally admissible aim is required in order to limit the right to a pension referred to in the first paragraph of Article 50 of the Constitution. Since it is not possible to ascertain a constitutionally permissible aim from the position of the courts, this position is inconsistent with the first paragraph of Article 50 of the Constitution.
9. The Ljubljana Labour and Social Court was the first to take the position violating the complainant's right to a pension referred to in the first paragraph of Article 50 of the Constitution. The Higher Labour and Social Court and the Supreme Court confirmed this position. Therefore, the Constitutional Court annulled the judgments of all three courts and remanded the case to the Labour and Social Court for new adjudication. The Labour and Social Court will need to take into consideration the grounds stated in this decision when deciding again on this matter.
10. Since the Constitutional Court annulled the challenged judgments on account of a violation of the right to a pension having been established (first paragraph of Article 50 of the Constitution), it was not required to review the complainant's allegations of violations of other human rights.

## C

11. The Constitutional Court adopted this Decision on the basis of Article 59 of the Constitutional Court Act (Official Gazette RS; No. 64/07 – official consolidated text - CCA), composed of: Jože Tratnik, the President, and the Judges Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Dr Ciril Ribičič, and Jan Zobec. The decision was reached by six votes to two. Judges Klampfer and Zobec voted against. Judge Zobec submitted a dissenting opinion. Judge Krisper Kramberger submitted a concurring opinion.

*Jože Tratnik*  
*President*

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2) The preceding paragraph shall also apply if an insured person satisfies the criteria for obtaining pensions in other countries, provided that these rights are obtained for the same period of pensionable service. "

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**DISSENTING OPINION OF JUDGE JAN ZOBEC,  
JOINED BY JUDGE MAG. MARTA KLAMPFER**

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1. While writing this Dissenting Opinion, I am aware of the general message that is being conveyed: not only did the decision not receive unanimous support, but also the judge who remained in the minority has profound and serious reservations as to the correctness of the decision adopted. I am aware that each dissenting opinion somewhat weakens the decision that was voted through. I am also aware of the risk of diminishing the importance and authority of the constitutional decision. Lastly, I am also aware that this expression of dissent may not contribute to strengthening the integrity, authority, power, trust, consistency, and maybe even the reputation of the Court itself.<sup>1</sup> When I was appointed a Constitutional Court judge, I decided that when considering whether to vote against the majority decision after having exhausted all the persuasive legal arguments (in the discussions at the plenary session as well as in written communications with fellow judges), but nevertheless remaining in the minority with my position, and when considering whether to publish the reasoning behind my vote in the dissenting opinion, I would practice restraint, moderation, and prudence. I sought to use this method of expressing my dissent from the legal arguments of the majority only if the difference of opinion was serious and profound – not so much on account of the values that guide legal feeling (which, when dealing with nuance, is a persuasive factor as to which direction the balance should tilt), but on account of fundamentally different viewpoints regarding the essential issues of the constitutional argumentation, and even then only in matters of fundamental (precedent) importance for finding constitutional balance and establishing the content of constitutionally protected rights.<sup>2</sup>
2. Unfortunately, it appears that both of these conditions are met in the Todorović case. In this unfortunate case, it is the first time since the right to a pension was enshrined in the Constitution that we have ruled on its constitutionally protected content, and we are, at the same time, confronted with sensitive issues concerning

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1 Regarding these issues and dilemmas, see A. Mavčič, *Ločeno mnenje v ustavnem sojenju* [Separate Opinion in the Constitutional Case Law], *Pravna praksa* No. 254, 1992, p. 17 *et seq.*, C. Ribičič, *Ločena mnenja in varstvo človekovih pravic* [Separate Opinions and Protection of Human Rights], *Pravna praksa* No. 42, 2006, M. Cerar, *Ločena mnenja kot izraz modernega prava* [Separate Opinions as an Expression of Modern Law], *Pravna praksa* No. 36, 2007, p. 11 *et seq.*

2 Cf. R. B. Ginsburg, *The Role of Dissenting Opinions* (available at the website [www.supremecourtus.gov/publicinfo/speeches/sp\\_10-21-07.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_10-21-07.html)), where the author (a judge of the United States Supreme Court) puts emphasis on the significance of unanimously reached decisions and advises prior to publishing a separate opinion a thorough consideration of whether a separate (either dissenting or consenting) opinion is really necessary. She is very reserved on the subject of separate opinions: “I will continue to give voice to my dissent if, in my judgment, the Court veers in the wrong direction when important matters are at stake. I stress important matters because I try to follow Justice Brandeis’ counsel. He cautioned that in most matters it is more important that the applicable rule of law be settled than that it be settled right.” And then: “Dissents [...] need to be saved for major matters if the Court is not to appear indecisive and quarrelsome.”

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the very essence of the jurisdiction of our forum in relation to the judiciary. I am concerned that, in the event of the consistent implementation of the idea that may be attributed to the positions expressed in the reasoning of the Decision, its effects could lead to “statutory” assessment in almost every pension dispute – which may ultimately prove fatal, not only for the pension scheme itself (which may not be predominantly financial in nature or, more precisely, subject to insurance law – it is in fact a scheme of intergenerational and general social solidarity), because elements would be introduced into the scheme that would differ from those that are typical for social security, i.e. elements of property law, especially insurance law. The consequences of this would be fatal for our future constitutional reviews, the balance between the branches of power, and the self-limitation on the (exaggerated) activism of the Constitutional Court.

3. I see the central issue in this difference of opinion being not only in terms of the scope (the extent) but also, in particular, regarding the content of the constitutionally protected core of the right to a pension (the reason why this right is protected by the Constitution, what the intentions of the constitution-framers were, and what is actually being protected – social situation of retirees or a financial investment for old age). The right to a pension is a typical positive right. That is why there can probably be no doubt that, owing to its specific nature, this right necessarily depends on the active role of the state and cannot exist at all if the statute does not prescribe the manner in which it can be exercised. The right to a pension may only come into existence (or cease) through the statute. For this reason, “the so-called statutory reservation (where the Constitution leaves part or all of the content and scope of specific human rights to be determined by the subsequent statutory regulation) is very broad” for this right.<sup>3</sup> The question as “to the extent to which the legislature is bound by the Constitution when defining the content and scope of the human right and the extent to which this falls within its margin of appreciation (in the event of which it is bound merely by general constitutional principles and no longer by the constitutionally determined content of individual, specific constitutional right)” inevitably arises.<sup>4</sup>
4. It was not possible on this occasion to avoid this complex question under the pretext of the “multifaceted and non-specific nature of the right to social security”,<sup>5</sup> or that the matter relates to “a very complex set of possible contents and relations that are dictated by different circumstances”,<sup>6</sup> or quite simply that the content of this right (to a pension) is not determined by the Constitution.<sup>7</sup> This does not entail that the content of the right to a pension guaranteed by the Constitution, more specifically that part of the right that is its constitutionally protected essence, is such in quantita-

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3 See Decision No. U-I-86/96, dated 12 December 1996 (OdlUS V, 176).

4 *Ibidem*.

5 A. Bubnov-Škoberne, *Pravica do socialne varnosti* [Right to Social Security], published in *Pravo socialne varnosti*, Pravna fakulteta, Ljubljana, 1999, p. 49.

6 Decision No. U-I-135/92, dated 30 June 1994 (OdlUS III, 84).

7 This was the case in Order No. U-I-282/94, dated 18 October 1995 (OdlUS IV, 108).

tive and qualitative terms as determined by statute regulating this right – including the manner in which it is exercised (otherwise the pension legislation would have the rank of a constitutional act). The constitutionally protected content of the right to a pension is therefore still to be found (determined, evaluated) – and certainly to an extent and standard which is “less” than that what arises from the comprehensive normative body of pension legislation. What does this mean? Nothing more than what the Constitutional Court did on numerous occasions when determining what represented the minimum of a specific, constitutionally guaranteed right, below which the legislature shall not go – without legally hollowing out this right and depriving it of its constitutional minimum (thereby depriving it of its constitutional essence). The Constitutional Court merely protects the minimum standard of economic and social rights, or their core, otherwise leaving significant room for manoeuvre to the legislature (and the judiciary, when interpreting the law).<sup>8</sup>

5. Each right recognised by the Constitution comprises three layers: the first and most fundamental is its solid, constitutionally protected, existential nucleus, which is completely inaccessible to the legislature and judiciary. It is surrounded by somewhat less solid, but still impermeable, plasma, which is not entirely immune to interference from the legislature. However, this may only be achieved through statute – and only if the strict proportionality test has been passed. A court may not penetrate the constitutionally protected layer of the right solely through its interpretation of the statute unless this interference is clearly and specifically provided for therein (and unless such statutory limitation meets the conditions of the third paragraph of Article 15 of the Constitution). The outer layer represents a soft, porous, and relatively wide layer that is not, as a general rule, immune to interference from the legislature (provided the interference is reasonable, non-arbitrary and in the public interest) and cannot withstand legally incorrect conclusions, even if they are reached at the last judicial instance – unless they are manifestly erroneous or arbitrary. The boundaries and transitions between these layers are flowing, dynamic, sometimes vague, and not always easy to identify. The difficulty with delimitation is most common, indeed typical, for the rights that fall within the category of positive rights and require a statutory regulation with regard to how they are obtained, exercised, and maintained, and how they expire. Therefore, it is often impossible to ascertain whether the statute determined the manner in which a human right is exercised (the second paragraph of Article 15 of the Constitution) or whether this is a statutory regulation that has become an interference or limitation of a human right (third paragraph of Article 15 of the Constitution).<sup>9</sup>

<sup>8</sup> “The objective, the purpose, which is to provide social security, is therefore essential; the way in which this objective will be achieved is mostly left to the legislature. When determining the manner in which a constitutional right to social security is executed, the legislature has a broad margin of appreciation, but its normative freedom is not unlimited”. (B. Kresal in *Komentar Ustave Republike Slovenije* [Commentary of the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana, 2002, p. 523)

<sup>9</sup> F. Testen in *Komentar Ustave Republike Slovenije*, [Commentary of the Constitution of the Republic of Slovenia], p. 196.

6. When asking the question as to whether the court interfered with the constitutionally protected core of the right by choosing and then interpreting the second paragraph of Article 177 of the Pension and Disability Insurance Act (Official Gazette RS, No. 106/99 etc. – PDIA-1), we must first examine the inherent nature of the right – and the undisputable recognition that it is positive in nature. We must also take into account that the PDIA-1 does not have constitutional rank and so the Supreme Court, as the highest court in the state pursuant to the Constitution, has the final say in the assessment of that layer of the right to a pension which does not represent the right's constitutionally protected core. However, it is manifestly clear that the Constitutional Court has the final say in the decision as to the nature of the solid constitutional core of this right, as well as its scope and content (the task of the Constitutional Court is to state this unambiguously and as clearly as possible). At this point, it is necessary to provide an answer to three crucial questions – it appears that I disagree with the majority on the answers to these: the first issue is whether the right to choose a pension falls under the right to a pension, or whether the right to a pension is (“merely”) the right to receive a pension. Secondly, it is necessary to determine whether the constitutionally protected essence of the right to a pension pertains solely to social security or whether its financial components are also protected. Thirdly, there is the issue as to whether the constitutional guarantee of a pension also requires a Slovene insurance institution to disburse the pension.
7. In my view, the right to a pension is the right to receive a pension (to simply have a pension), and the right to choose between two or more pensions is a typical expression of the way in which this right is exercised. The right to a pension itself may be exercised with or without choosing a pension (the majority of pensioners do not have an option to choose). By applying and subsequently interpreting the second paragraph of Article 177 of the PDIA-1, the court deprived the complainant of the right to choose a pension, claiming that he had already chosen the insurance institution – with the recognition of the right to an old-age pension (initially an early retirement pension) in the Republic of Serbia, where he was last insured, from 23 December 1992 onwards.
8. The decision in this case is, in my opinion, extremely important. This is primarily because it is of principled (precedent) importance and, secondly, because it leads to a temptation for exaggerated activism.<sup>10</sup> I am concerned that we could eventually become prisoners of such activism – in the first instance because of the principle of the equal protection of rights (more precisely, equality of rights). I am also concerned that, at some point in the future, the decision voted through might be interpreted using the historical interpretation of the constitutional right to a pension. It could also be

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10 From a layman's perspective, I completely relate to his predicament because of my feelings of empathy for the complainant's tragic fate. However, as a judge, I absolutely do not. Moreover, a primordial standard of judicial assessment also applies to the Constitutional Court: The judge should always act as if he has an indefinite number of cases of the same kind before him (the third paragraph of Article 3 of the Courts Act – Official Gazette RS, No. 19/94 etc.). I would add that the party's nationality, political belief, religion, status etc. are also not taken into account.

construed that the constitutionally protected right to a pension is more than simply the right to social security – simply because the amendment to the Constitution (Official Gazette RS, No. 69/2004) by which it was conferred the status of a human right would otherwise not have been required; and it is therefore necessary to ascertain how the right to a pension as a constitutional category is different from the right to social security – in short, it is necessary to answer the question as to what the *differentia specifica* of the constitutionally guaranteed right to a pension actually is (compared to the general right to social security, which includes the rights to benefits in cash and in kind in case of sickness, maternity leave, disability or unemployment under the conditions and to the extent provided by law). The interpretation would then follow this line of reasoning: If the right to a pension is not part of the right to social security that was guaranteed prior to the aforementioned amendment to the Constitution,<sup>11</sup> then the distinction between them can only be found in non-social elements of the right to a pension. These are of course financial elements, more specifically elements which are subject to insurance law (e.g. elements of non-life insurance which cover risks associated with old age based on the annuity system: the insured sum will be paid in the form of annuity (as a monthly pension) upon the occurrence of an insured risk, depending on whether the premiums (pension insurance contributions) were paid, as well as the duration for which they were paid and the amount. When this interpretation<sup>12</sup> is joined with the arguments in Paragraph 7 of the Decision, where the fact that the complainant was paying contributions into the pension insurance scheme in the Republic of Slovenia for almost 36 years is deemed constitutionally relevant,<sup>13</sup> we would eventually be confronted not only with the issue of the financial sustainability of the pension scheme but also with the even more important legal issue concerning the constitutional protection of the financial elements of the right to a pension (as the *differentia specifica* that was not constitutionally guaranteed by the previous constitutional regulation (prior to 2004)). To speculate, it is probably not unreasonable to assume that the constitutionally protected financial elements of the right to a pension would cause the pension scheme to collapse, since a scheme conceptualised in this way (subject to insurance law – annuities) would not be able to withstand the financial pressure of the changed ratio between the active and retired populations due to

11 The Constitutional Court ruled that the right to a pension is covered by the right to social security in its Decisions Nos. U-I-150/94, dated 15 June 1995 (OdlUS IV, 63), and U-I-29/96, dated 8 May 1998 (OdlUS VI, 56); and it ruled in its Decision No. U-I-230/00, dated 17 April 2003 (OdlUS XII, 37), that it would be incorrect to interpret the provision of Article 50 of the Constitution as if it guaranteed to the individual the protection of the economic or business status that he had achieved.

12 Such an interpretation may not be so different to the position expressed in Decision No. U-I-29/96, dated 8 May 1997 (OdlUS VI, 56).

13 This fact could be understood not only as a fact from which the right to a pension (in its existential nucleus) arose, but as a fact that also determined the scope of its constitutionally protected essence – which in monetary terms exceeds the social security essence of that pension, i.e. it is beyond the scope of its social function. This surplus can only be financial in nature and its protection therefore can only entail the protection of the financial elements of the right to a pension.

demographic changes. The pension contributions of the active population would not be able to satisfy the constitutionally protected financial requirements of the retired population based on an annuity system (the insured sum would be paid in the form of annuity (as a monthly pension) upon the occurrence of the insured risk, depending on whether the premiums (contributions to the pension insurance) were paid, as well as the duration for which they were paid and the amount). This is, of course, not going to happen. This is because the pension scheme simply must not, and will not, crash. In order for this to be the case, some sacrifices will need to be made. And the law would fall a victim to this. I am concerned that the position, which at least in its subtext (if not *expressis verbis* in Para. 7 of the Decision), includes a premise concerning the financial protection of the right to a pension (see Para. 13 and especially footnote 17 of this dissenting opinion), would represent only a small contribution to such scenario.

9. Even without this, it is difficult for me to imagine an interpretation of the right to a pension that would not take into account that it is, by its very essence, social in nature – this, at least in my opinion, represents its sole constitutional core.<sup>14</sup> The constitutional amendment that explicitly recognised the right to a pension as a constitutionally protected social security right (despite it having already been protected in the context of the general right to social security) corroborates this. The fact that it is included in Article 50 of the Constitution, under the heading “right to social security” (if it had been the intention of the constitution-framers to (also) protect its economic, proprietary elements, they would have included this in Article 33, which protects the right to private property and inheritance), in my opinion, serves as an important factor in interpretative guidance when looking for its constitutional core – the core which enjoys constitutional protection. This essence, which was clearly expressed by the constitution-framers when they proclaimed this right as a right to social security, can only be social in nature. If prior to the constitutional amendment it was perhaps still up for debate as to whether the right to a pension was constitutionally protected, with its social security as well as economic (proprietary) components, this issue was solved by being explicitly included in the Constitution among the social rights: That which is constitutionally protected does not include economic

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14 I concur with the position in Para. 6 of the Decision that a pension is obtained “on the basis of pension insurance contributions and if other reasonably determined conditions are met”. The economic nature of the right to a pension is crucial for its acquisition – those who do not pay their pension insurance contributions are not entitled to a pension. However, I believe that it is only its social nature that is important in terms of establishing its constitutionally protected scope. The property elements of the right to a pension are therefore necessary for its acquisition – and (only) in this context do they also enjoy constitutional protection. Any person who would be deprived of that right (by an unconstitutional interpretation of the pension legislation) could also protect the financial elements of the right to a pension before the Constitutional Court – simply because, without them, this right cannot even arise. Once this right comes into existence, its social security effect rather than its financial effect is what represents its constitutionally protected essence. The constitutional right to a pension is therefore financial in its origin, but social in its essence (that by which it is defined – in its further existence). Or, borrowing an analogy from biology, the nucleus of the constitutional right to a pension is (also) financial, but its plasma is social security.

(financial, proprietary) components, but only social security components of the right to a pension – the social function of a regular monthly income, i.e. a pension.

10. Even though, as far as positive rights are concerned, it is difficult to draw a distinction between the measures of the state that merely define the manner in which a right is exercised and those measures that already interfere with the constitutional core of the right, the finding that it is the social security aspect of the right to a pension that is constitutionally protected actually simplifies the solution to the problem of whether the courts assigned such content to Article 177 of the PDIA-1, which represents a limitation to the constitutional right to a pension (whereby I leave aside the question of whether this case is even regulated by law – in other words, whether the provision of the second paragraph of Article 177 of the PDIA-1 even refers to pensions of the same kind, or whether it applies only to pensions of different kinds, e.g. widow's, disability and old-age pensions): Such situation would only arise if the non-recognition of the right to choose between two or more pensions, based on the same period of pensionable service, had resulted in a pension so low that it failed to reach a constitutionally protected minimum of that right. The very low pension, which was claimed and received by the complainant, as a result of which the complainant lost the option to choose between this pension and the higher Slovene pension (pursuant to the courts' interpretation), falls below the social security standard (which represents the constitutionally guaranteed minimum of the right to a pension – its constitutionally protected core). If it remained so low (since it does not provide a social security minimum, i.e. that which is the meaning and purpose of the pension as a constitutional category), it could be said that this deprived it of its constitutional content, left it hollowed out from a legal perspective, and does not provide its (constitutionally guaranteed) meaning and purpose, i.e. social security.
11. However, that is not the case here. More specifically, the complainant has had the right to the supplement to the old-age pension since 19 February 2000 pursuant to the Provision of Social Security to Slovene Citizens Entitled to Pensions from the Former Republics of the SFRY [Socialist Federal Republic of Yugoslavia] Act (Official Gazette RS, No. 45/92 etc. – hereinafter referred to as the PSSA). The supplement, which he receives only because he is a recipient of a pension (if he did not have the pension he would not be entitled to this supplement either), provides security in addition to the pension that he receives (or that he could have received if he had not, as he claims, waived it) from the foreign insurance institution.<sup>15</sup> In this case, the challenged interpretation of the second paragraph of Article 177 of the PDIA-1 did not exceed its constitutionally admissible scope – it remained within the margins of the

15 "The purpose of the right to the supplement from PSSA is to provide social security to a particular category of persons that are socially disadvantaged precisely because they permanently reside in Slovenia and receive a pension from the states – former republics of the former SFRY". The purpose of the PSSA is therefore to provide social security to a specific category of citizens; however this (also) means "that they are guaranteed income that would correspond to the income received from the Slovene pension scheme", whereby "the basis for the calculation of the supplement [...] is their appurtenant pension and not the lowest pension guaranteed by Slovene legislation" (Decision U-I-101/98, dated 20 May 1999, Official Gazette 45/99).

manner of exercise of the right to a pension and did not develop into an interference or limitation of the (constitutionally protected core) of the right to a pension.

12. Lastly, it is necessary to address the question of whether the constitutional protection of the pension also includes the requirement that the institution disbursing the pension, or at least part of the pension in proportion to contributions paid, must be (none other than or precisely) a Slovene insurance institution.<sup>16</sup> In my opinion in the case of the right to a pension, what is essential is the right and not the duty which corresponds to that right. When we speak of constitutional rights, we focus on the right itself: a person who is constitutionally protected is a person entitled to that right. Of course there is no positive right without a duty so this is also relevant. However, it is relevant only secondarily, indirectly, and functionally. Only within these (functional) boundaries is the debtor constitutionally important, i.e. merely as an entity that is required to ensure that the constitutionally guaranteed right is fulfilled. And only when the person entitled to pension is left without this benefit. Therefore, it is not relevant which institution disburses the pension, regardless of whether it is a Slovene or foreign (Serbian) insurance institution, or both. It is important that the person entitled to a pension receives the pension (in an amount that provides social security). The constitutionally protected core of the right to a pension is, however, entirely indifferent to the issue as to which institution is disbursing the pension.
13. Ultimately, I am concerned as to what message this Decision conveys to the courts. How much room (and how much of the judicial autonomy) will there remain to interpret statutory law? I am troubled by the fact that there may be very little (or none). If this were not the case, the Decision would clearly indicate the line not to be crossed by the court when interpreting pension legislation, without interfering with the constitutional content of the right to a pension.<sup>17</sup> Will the courts interpret this Decision to be that the complainant is constitutionally entitled to a pension pursuant

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16 Paragraph 7 of the Decision states: "In view of the constitutionally defined core of the right to a pension, as evident from Paragraph 6 of the reasoning of this Decision, such position of the courts entails an interference with the complainant's right to a pension determined in the first paragraph of Article 50 of the Constitution, since it does not allow the complainant to claim his right to a proportional pension from a Slovene insurance institution". It would be possible to conclude from this paragraph (i.e. Paragraph 6) that the constitutionally protected content of the right to a pension is actually social in nature (in this regard, there are no differences between the majority opinion and my own), but that the courts have deprived the complainant of the right, since they did not acknowledge that he should receive a pension from the Slovene insurance institution. This would mean that the supporting argument for granting the constitutional complaint is the fact that the complainant is not also receiving a pension, or a part thereof, from the Slovene insurance institution (which is also a constitutional essence of this right).

17 Naturally, a line in the sand needs to be drawn somewhere. If not, the courts do not have any real interpretative freedom and therefore there is no freedom of judiciary, which is headed by the Supreme Court, the highest court in the state pursuant to the Constitution (the power of judiciary lies in the interpretation of statutory law). The position of the Constitutional Court (at least that which is implicitly expressed in Paragraph 7 of the reasoning of the Decision) that the complainant has the right to a pension in a proportion to contributions paid excludes the autonomy of the Supreme Court when interpreting statutory law. It is in fact the entire normative body of the pension legislation that leads to how the pension is calculated that is affected by such.

to the correct interpretation of the PDIA-1, whereby the Constitutional Court, and not the Supreme Court, has the final say as to what the correct interpretation of statutory law for assessing the pension would be? Or will they interpret the Decision in such a manner that it is merely the social function of the pension and the fact that the pension is disbursed (also) by the Slovene insurance institution that is constitutionally protected (it is also possible to interpret Paras. 6 and 7 of the Decision in this way) and will therefore be allowed to insist on their interpretation of the pension legislation and recognise to the plaintiff (only) as much as the amount of the (so interpreted) constitutionally guaranteed part of the right to a pension? I am therefore interested whether, upon new adjudication, the courts will be allowed to interpret the provision of the second paragraph of Article 177 of the PDIA-1 in the same way as in all the previous cases that were similar to this one (that the complainant exhausted his right to choose between the foreign and Slovene pensions, which is in my opinion within the boundaries of the manner in which the right is exercised and therefore within the judicial interpretative autonomy of the statutory law, but so that by such interpretation of the right to a pension (the manner in which the right is exercised), they do not interfere with its constitutionally protected core (as more or less explicitly defined in the Decision) – i.e. that he must not be deprived of its social function because he chose a foreign pension<sup>18</sup>. The question then arises as to how much the pension should be. This is naturally a constitutional question (that can be solved, in my opinion, as explained in Paragraphs 8, 9, and 10). However, the issue is still open as to whether the question comprises the entire normative body of pension legislation that leads to a specific calculation of the monthly pension amount. If the answer is in the affirmative, and I am concerned that the courts may construe it in this way (owing to the emphasis devoted to the importance of how long the complainant was paying pension contributions), then we may have already crossed the boundaries of our jurisdiction and found ourselves within the statutory interpretative autonomy of the judiciary.

14. To conclude, I would like to raise the question of what happens to the equality of all the persons who also paid contributions into the pension scheme of the Republic of Slovenia, but are not its citizens. Are they also entitled to constitutional protection of the right to a pension conceptualised in this way? Pursuant to the first paragraph of Article 50 of the Constitution, they are not. The right to a pension is guaranteed only to Slovene citizens. And now a leap: What is the meaning of the constitutional protection of the financial elements of the right to a pension in the context of the first paragraph of

18 The pension would then amount to the income the complainant is receiving now from the foreign (Serbian) pension and the supplement to the old-age pension under the PSSA (both providing social security), but with the difference being that it would have to be covered at least in part by the Slovene insurance institution (if the constitutionally protected essence of the right to a pension is conceived in this way). And what would that mean? Simply that the foreign (in this case Serbian) institution disbursing the pensions (insurance institution), and not the beneficiary (complainant), would be protected through the constitutional protection of the right to a pension. Since this would be absurd, I understand the Decision to mean that it is the non-social aspect of the right to a pension that is constitutionally protected. I have already explained why I refuse to accept this standpoint (see Paragraphs 8, 9, and 10 of this dissenting opinion).

Article 50 of the Constitution? Does the fact that the right to a pension was included in the Constitution among the rights to social security, in combination with the position that this protection (i.e. protection pursuant to the first paragraph of Article 50 of the Constitution) extends further to its financial components, mean that these (no longer) enjoy constitutional protection in the context of the protection of private property (Article 33 of the Constitution)? If the Decision conveys such a message (or if it is possible to construe it in this way), then non-Slovene citizens do not enjoy the protection of the financial elements of the right to a pension (since they are protected pursuant to the first paragraph of Article 50 and not pursuant to Article 33 of the Constitution). This is despite the constitutional guarantee of the right to private property not being dependent on citizenship (however, this would be inconsistent with the case law of the ECtHR which protects the financial aspects of pensions in the context of Article 1 of Protocol 1<sup>19</sup>). I hope this Decision will not be understood in this way.

*Jan Zobec*

*Mag. Marta Klampfer*

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**CONCURRING OPINION OF JUDGE MAG. MARIJA KRISPER KRAMBERGER,  
JOINED BY JUDGE DR CIRIL RIBIČIČ AND JUDGE MAG. MIROSLAV MOZETIČ**

1. I concur with the Decision and its reasoning. In my opinion, this is an important constitutional issue. I also wish to add several positions in this concurring opinion that were not included in the reasoning of the majority decision.
2. A position was expressed, among others, that the essence or core of the right to a pension is the right of an individual, under reasonable conditions, to obtain and enjoy a pension in the amount which, in the context of the broader objective to protect human dignity (Article 34 of the Constitution) as a fundamental value of modern society, provides a social security minimum, the lower limit of which affords a decent standard of living.
3. The Constitution was amended in 2004. In the first paragraph of Article 50, the wording “including the right to a pension” was added to the wording “Citizens have the right to social security under conditions provided by law” (Official Gazette RS, No. 69/2004, dated 24 June 2004). In this way, the constitution-framers supplemented, albeit not very aptly, a provision regarding social security. In my opinion, this addition is substantive and not merely “cosmetic” in nature. Through this, the constitution-framers emphasised that it is a special right in the context of social security that has its own specific content, making it different to other social security rights.
4. Since by way of statutory reservation the Constitution leaves to the legislature the manner in which social security is to be regulated, it is in my opinion vital to estab-

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19 Cf. Judgment in *Kjartan Asmundsson v. Iceland*, dated 30 March 2005.

lish the essence (core) for each right separately in relation to the statute<sup>1</sup> that regulates the individual right. Through statutory regulation, the legislature has expanded upon the brevity of the constitution-framers, who did not define the rights (not even the concept of a pension). In this way it is necessary to base the assessment as to what is the core of the right to a pension also on PDIA-1.

5. The right to a pension from pension insurance is based on the work performed and contributions paid by the insured persons. Other factors (such as intergenerational solidarity, the financial situation of the state etc.) are relevant for the pension (its amount) only to a lesser extent. It is compulsory for the insured persons to make contributions (*cf.* Article 8 of the PDIA-1). Precisely because of this compulsory insurance, this right differs from the rights of the social security system.
6. Social security is *inter alia* (with regard to what is relevant for this case) regulated in the Social Security Act (Official Gazette RS, No. 3/07, dated 13 November 1992, etc.). Since underprivileged social classes are unable to provide material security for themselves because of circumstances that are beyond their control, it is clear from the provisions of this act that its purpose is to provide financial and other social assistance to them. The state and the local communities are responsible for social security. These services are also financed from their budgets and not from the pension funds.<sup>2</sup>

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1 This is also the case with the international acts that are binding on the Republic of Slovenia. I do note, however, that the Republic of Slovenia and the Republic of Serbia have not yet entered into a bilateral agreement regulating pension insurance.

2 Article 3:

Social security rights include services and measures aimed at preventing and eliminating the social distress and difficulties encountered by individuals, families, and population groups, and the financial and social assistance intended for those individuals who are incapable of providing for themselves due to circumstances beyond their control.

Article 5:

- (1) According to this Act, the beneficiaries are the citizens of the Republic of Slovenia with permanent residence in Slovenia, and aliens with a permit to permanently reside in Slovenia. Chapter III: Financial social assistance.

Article 19:

- (1) Financial social assistance shall provide beneficiaries, during their residence in the Republic of Slovenia, with the means to satisfy the minimum needs that allow subsistence.
- (2) The subsistence referred to in the preceding paragraph shall be deemed to have been enabled if the beneficiary is guaranteed a level of income, after paying taxes and compulsory social protection contributions, that is equal to the minimum amount specified in this Act (hereinafter referred to as: minimum income).

Article 20:

- (1) Individuals shall be obliged to ensure to the best of their ability that they and their family members are provided with a decent level of subsistence.
- (2) Persons incapable of ensuring sufficient means of subsistence for themselves through their work, rights arising from work or insurance, income from property or from other sources, [...] shall have the right to financial social assistance in the amount and under the conditions specified in this Act.
- (3) The recipients of financial social assistance may not be in a more favourable social situation than the person who ensures means of subsistence through work or on the basis of rights arising from work.

7. Moreover, the Provision of Social Security to Slovene Citizens Entitled to Pensions from the Former Republics of the SFRY [Socialist Federal Republic of Yugoslavia] Act (Official Gazette RS, No. 45/92 etc. - hereinafter referred to as the PSSA) also follows this logic. Article 7 provides that the funds for the payment of the supplements are to be provided from the budget of the Republic of Slovenia. The Government of the Republic of Slovenia shall also conclude a contract with the Institute regarding the calculation and payment of the obligations arising from this act.
8. First in Decision No. U-I-147/94, dated 30 November 1995 (Official Gazette RS, No. 3/96, and OdlUS IV, 118), and then in Decision No. U-I-101/97, dated 20 May 1999 (Official Gazette RS, No. 45/99 and OdlUS VIII, 105), the Constitutional Court stated: *“The PSSA provides social security to Slovene citizens with permanent residence in Slovenia who have claimed their right to state pension in other republics of the former SFRY. The supplement to which the beneficiaries under this act are entitled is a right of a special kind. It is not a right arising from social insurance, as such rights are as a general rule provided by pension insurance institutions in the republics of former SFRY. By its very nature, it is a right which comes closest to the pecuniary rights of social security (social assistance), even though it is not subject to an income census.<sup>3</sup> Social security rights are, however, usually provided by the state and not social insurance institutions.”*
9. The manner in which the amount of that supplement is to be determined is now regulated in Articles 1 through 5 of the PSSA. The basis for this also depends on the pension amount (*cf.* Article 2). However, this does not change its legal nature. The supplement is therefore not a pension, but a form of social assistance. It is therefore possible to define this supplement as a benefit in the context of the other social security rights referred to in the first paragraph of Article 50 of the Constitution, but not as a right to a pension. The core of the (general) right to social security, which could only be affected when determining the amount of this supplement, as in the context of the broader objective to protect human dignity (Article 34 of the Constitution) this right guarantees a minimum level of social security to the individual, the lower limit of which represents a decent standard of living. For pensions, however, this criterion would only be relevant in cases where the lowest pension does not reach this minimum level. This is not the case here.
10. The reasoning for the majority decision does not include a position with regard to the allegation that the courts violated Article 14 of the Constitution by not recognising the pension on the basis of PDIA-1. The complainant exercised his right to a pension

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Article 21:

Financial social assistance shall be granted to those persons who, for reasons beyond their control, cannot ensure means for themselves and their family members in the minimum income amount, and have exercised the right to financial benefits on the basis of other regulations and the right to exemptions and reliefs pursuant to this Act, and fulfil the other conditions determined in this Act. Article 43: The state and municipalities shall provide for social security as a public service. Article 97: The social security services shall be financed from the state and municipality budgets.

- 3 When this Decision was issued, the PSSA had not yet included the criteria from Articles 1 through 5. Decision No. U-I-101/97 resulted in the amendment to the PSSA (Official Gazette RS, No. 18/01).

as a Slovene citizen in Slovenia, where he permanently resides and where he also fulfilled the conditions for the pension pursuant to the PDIA-1. In its Decision No. U-I-70/92, dated 5 November 1992 (Official Gazette RS, No. 55/92 and OdlUS I, 77), the Constitutional Court has already emphasised that the state may not limit the rights of its citizens on the basis of any criteria that could result in discrimination against other citizens. This also applies to “*the right to social security (Article 50 of the Constitution), which includes pension insurance and is guaranteed to citizens under the conditions determined by statutes. It is not possible to limit this constitutional right, particularly not contrary to Article 14 of the Constitution.*” Since the complainant had been paying contributions to the Slovene pension insurance institute for almost 36 years of service, and he also fulfilled the conditions concerning his age, there is no reason for him not to be in the same position as all the other citizens of the Republic of Slovenia.<sup>4</sup> If the Constitutional Court had not annulled the courts’ decisions on the grounds of a violation of the first paragraph of Article 50 of the Constitution, it would have been required to do so, in my opinion, on the grounds of a violation of the second paragraph of Article 14 of the Constitution, i.e. because of a violation of equality before the law.

11. I would like to further consider the question as to whether the Institute and the courts also violated Article 33 of the Constitution with the opposite decision. The right to a pension certainly includes at least some entitlements arising from the right to property. However, the Constitutional Court has not yet explicitly ruled on the question of whether this is a right which forms part of the right to private property referred to in the aforementioned Article of the Constitution. I believe that, in this

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4 The complainant, who was employed as a civilian in the former Yugoslav People’s Army, was insured with the Institute from 20 October 1991 and had by that time completed 35 years, 11 months and 17 days of pensionable service. By way of a resolution dated 15 October 1991, the employer transferred the complainant to work at the Army Post Office 8080 Kragujevac, where the complainant also went, before the Army Post Office then issued a resolution on early termination of the employment relationship (Resolution No. 10-263/03, dated 26 November 1991) as at 1 March 1992 on the grounds that he had fulfilled the conditions for early retirement on that day. In the Republic of Serbia, where he was last insured, the institution responsible for compulsory pension insurance recognised the complainant’s right to an early retirement pension as of 23 December 1992 and the right to an old-age pension as of 2 September 1998. After the termination of the employment relationship, the complainant initiated proceedings before the Institute for the recognition of the right to a pension. His claim was rejected because he had not yet met the conditions for an old-age pension and he was not entitled to an early retirement pension because he was not a Slovene citizen. At that time, the PDIA/92 was already in force in Slovenia (as of 1 April 1992) and it provided that anyone who was last insured at the Institute under the condition of the prescribed insurance density (this condition applied to everyone, including aliens), may claim the rights from the pension insurance of the Institute; Slovene citizens, however, had a choice. They could claim their rights from the pension insurance at the Institute, despite not having last been insured there, provided that they had spent the majority of time when they were insured in the area covered by the Institute. After he had obtained Slovene citizenship and at the time when PDIA-1 was already in force (it entered into force on 1 January 2000), the complainant again lodged a claim for recognition of a pension on the basis of his insurance held with the Institute. The latter rejected the claim but recognised the right of the complainant to have the old-age pension supplemented pursuant to the PSSA from the day he lodged the claim (i.e. 19 February 2000).

case, the complainant has a so-called legitimate expectation, a point on which both the European Court of Human Rights (ECtHR) and the Constitutional Court have already ruled.<sup>5</sup> This legitimate expectation is also covered by Article 33 of the Constitution. Therefore, by rejecting the complainant's claim,<sup>6</sup> an unacceptable interference with the right to (expected) private property could have arisen.

12. Finally, I would like to take up a position on the view that the Constitutional Court could have reached the same conclusion by taking the position that the courts had manifestly erred when applying the second paragraph of Article 177 of the PDIA-1, thereby violating Article 22 of the Constitution. First of all, I must emphasise that I have serious reservations regarding the application of the criterion of manifest error. I agree with those that claim that this criterion must only be applied to glaring errors. In my view, there is no error of this kind in the interpretation of the aforementioned legal norm. Nevertheless, the interpretation of this provision is vitiated by a constitutional error that is substantive and not procedural in nature. In a case such as this, it is not possible to view this provision as a (common) substantive law that does not reach the constitutional level and the correctness of which cannot be subject to review during proceedings to decide upon the constitutional complaint. The present case concerns the recognition of the right that the complainant obtained from the Slovene pension institute through the payment of pension fund contributions to the latter. The Institute has not yet recognised this right by interpreting the aforementioned Article. In Decision No. U-I-101/97, however, the Constitutional Court also stated that: “[t]he fundamental rule of pension insurance is that the pension is paid by the fund into which the insured persons, the employers or the state paid the contributions, i.e.

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5 See, for example, the Decision of the Constitutional Court No. Up-77/04, dated 11 October 2006 (Official Gazette RS, No. 118/2006, OdlUS XV, 98), and the decisions of the Constitutional Court and ECtHR cited therein. Paragraph 10 states *inter alia*: “The notion of legitimate expectation within the meaning of the protection pursuant to Article 1 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94) was mentioned for the first time by the European Court of Human Rights in the case *Pine Valley Developments Ltd. and Others v. Ireland* (29 November 1991, Series A no. 222, p. 23, § 51). [...] According to the case law of the European Court of Human Rights, the right to private property does not include the right to acquire property as such. If the complainant is to successfully invoke the right to private property, he has to demonstrate interest that he has a specific claim to acquire specific property based on applicable law. This claim has to involve an expectation that is based on a law or settled case law, to obtain a right to property, and not merely a hope to acquire it. The complainant is therefore required to demonstrate legitimate expectation that he will succeed with the claim.”

6 The insured person may claim the right from compulsory insurance on the day when the conditions to obtain the right are met (the first paragraph of Article 15 of the PDIA-1). Pursuant to the statutory regulation the person obtains the right to a pension if the contributions were paid and the conditions regarding age and the period of pensionable service or the insurance period are met. This right is also protected if the person concerned fulfils the aforementioned conditions and claims the right only for the part of the entire pensionable service period or the insurance period that was completed while being insured with the Institute. The fact that there is no social insurance agreement concluded with the state where the person completed the second part of the pensionable service period cannot in itself deprive the person of the right to a pension for which the conditions pursuant to PDIA-1 are fulfilled.

*the institution which insured the individual*". It is only a question of the enjoyment of the right or the possibility to exercise the same right twice as well as the scope of that right that must be solved in the present proceedings, and that is after the right has already been recognised.

*Mag. Marija Krisper Kramberger*

*Dr Ciril Ribičič*

*Mag. Miroslav Mozetič*

**DECISION**

At a session held on 1 July 1999 in proceedings to review constitutionality initiated upon the request of the Supreme Court, and in proceedings to examine the petition of Matjaž Gerlanc, Velenje, the Constitutional Court

*decided as follows:*

1. It is not consistent with the Constitution that, pursuant to Article 105 of the Marriage and Family Relations Act (Official Gazette SRS, No. 14/89 – official consolidated text), it is within the competence of the social work centre to decide on child custody, while, pursuant to Article 78 of the same Act, it is within the competence of the court to decide on the same matter.
2. Article 88 of the Social Security Act (Official Gazette RS, No. 54/92 and 42/94 – Constitutional Court Decision) is not inconsistent with the Constitution in the part that relates to the competence determined in the second paragraph of Article 105 of the Marriage and Family Relations Act.
3. The National Assembly must remedy the inconsistency referred to in Point 1 of the operative provisions within one year of the day of publication of this Decision in the Official Gazette of the Republic of Slovenia.

*Reasoning*

**A**

1. The Supreme Court challenges the provisions of Articles 105 and 114 of the Marriage and Family Relations Act (hereinafter referred to as the MFRA) insofar as they determine the competence of a social work centre to decide on child custody, and Article 88 of the Social Security Act (hereinafter referred to as the SSecA) in the part that refers to Article 105 of the MFRA. Owing to the inconsistency of the legislature, which in some cases determined that it is within the competence of a court to decide upon child custody, while in other cases such falls within the competence of a social work centre, Articles 104 and 105 of the MFRA are, in the opinion of the Supreme Court,

contrary to Article 14 (equality before the law) and Article 22 (the equal protection of rights) of the Constitution. The different competences allegedly entail different procedural guarantees (e.g. the possibility of issuing interim injunctions, the position of children in proceedings), and that different substantive and procedural rules could result in different decisions in similar cases. Allegedly, there are no reasonable grounds for such a distinction to be drawn. Furthermore, it is alleged, that the position of children varies in relation to the competence of the courts or the competence of the administration. If a court decides on child custody, it also simultaneously decides on their maintenance (and, if necessary, it may even establish paternity prior to this); however, if a social work centre decides on child custody, then it is necessary to initiate new proceedings before a court to decide on child support. It is alleged that such regulation is contrary to the right of children to special protection and care (first paragraph of Article 56 of the Constitution). Owing to the insufficient procedural guarantees in proceedings in which a social work centre decides, the challenged provisions of the MFRA and SSecA are allegedly contrary to the right to respect for family life (Articles 53 and 54 of the Constitution and Article 8 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). In an administrative procedure, the principle of free disposition, the right to be heard and to make statements, and the principles of direct adduction of evidence and adversary proceedings are allegedly curtailed due to the requirement to protect the public interest. An oral hearing is allegedly not mandatory. It is stated that a social work centre performs various functions in the area of family law, e.g. it decides on the right to adopt a specific measure that interferes with parental rights and the implementation of such measure, it provides for the protection of the child's interests in such proceedings, and it advises the parents after these proceedings have been concluded. It is alleged that this triple role held by the centre is incompatible with the right to respect for family life, which requires that an independent and impartial body decide on these issues. In addition, such role allegedly prevents the judicial protection from being effective. It is stated that if the social work centre does not appoint a guardian *ad litem* for the child, the child cannot file a law suit before the competent court due to lack of the necessary legal capacity; however, if the centre does appoint such a guardian *ad litem* for the child, in practice such person is an employee of the centre, who has no interest in filing an appeal against the centre's decision. The effectiveness of judicial protection is allegedly also impaired by the fact that affected persons are neither knowledgeable of the law nor aware of their rights in the event that a social work centre fails to act. Although both civil and administrative procedures guarantee fair proceedings to the individual pursuant to Article 23 of the Constitution and Article 6 of the ECHR, the Supreme Court deems that civil proceedings represent a stronger guarantee that the right to respect for family life will be respected. The Supreme Court therefore suggests that the Constitutional Court abrogate the challenged provisions on the competence of the administrative authority. At the same time, it states that a need may arise during the proceedings to review the constitutionality of other

MFRA provisions pursuant to which social work centres are responsible for deciding on interferences with the right to respect for family life (first paragraph of Article 106, second paragraph of Article 113, fourth paragraph of Article 114, Articles 119 to 121, and Article 150).

2. In substantiating the grounds for filing the request, the applicant stated that the question of the constitutionality of the challenged statutory provisions arose when deciding on the appeal to the Supreme Court against a decision on the rejection of a legal action to issue a new decision on child custody. In the challenged judgments, the courts of first instance and second instance allegedly held that a social work centre is competent to decide on child custody after the termination of a common-law marriage. The Supreme Court granted the appeal and remanded the case to the court of first instance for new adjudication. In general, the proceedings should have been stayed. Since the case was already finally decided, the potential annulment of the challenged statutory provisions, given the *ex nunc* effects of a Constitutional Court decision regarding such, could only have affected a decision in the case at issue if the case had been remanded to a stage before the final decision was issued.
3. In the same way as the Supreme Court, petitioner Matjaž Gerlanc also challenges the MFRA as, in the event of a divorce, a court decides on who should be awarded custody of the children, while, in the event of the termination of a common-law marriage, a social work centre decides thereon. Such regulation is allegedly contrary to Articles 14 and 53 of the Constitution. It is argued that, since the MFRA does not regulate cases where a child is born in a common-law marriage and the parents subsequently marry and then divorce, it is also contrary to Article 25 of the Constitution (right to a legal remedy). He substantiates his legal interest on the fact that the court that decided on his divorce from his daughter's mother also decided on the awarding of the custody of their daughter, who was born out of wedlock. He proposes that the Constitutional Court, taking European standards into account, impose on the legislature the obligation to amend the Act and determine the jurisdiction of specialised family courts.
4. The National Assembly believes that sufficient safeguards for the protection of the rights and legal interests of parties to the proceedings are built into both administrative and civil proceedings. The Supreme Court has already pointed to certain advantages of the administrative procedure, such as its speed and the flexibility of procedural rules. In the opinion of the National Assembly, the principle of the protection of the rights of citizens and the public interest, the principle of assistance to laypersons, the principle of procedural effectiveness and economy, and the principle of material truth are also important. In the National Assembly's opinion, the principle of the protection of the rights of citizens obliges the public administrative authority to make it easier for citizens to exercise their rights. The principle of the protection of public interest makes it impossible for parties to exercise their rights contrary to public interest, which, in the case at issue, is represented by the constitutional provisions on the special protection of children and respect for the family. In its opinion, this principle and the principle of material truth do not differ from the rules that apply in civil procedures. According to the National Assembly, the adversarial nature

of the proceedings is also sufficiently guaranteed in administrative procedures; in addition, and unlike in the civil procedure, it is obligatory to obtain the opinion of an expert commission. If the competent authority has failed to act, the parties may have a direct influence on accelerating the proceedings by filing a law suit due to the authority's failure to act. Last, but not least, it is also stated that a decision of a social work centre is subject to the two-stage judicial review of administrative acts. In the National Assembly's opinion, it is crucial that the competent authorities decide on the basis of the same rules of substantive law in both procedures. The existing regulation could, in its opinion, only be disputed in terms of the equal protection of rights or equality before the law. However, if also in regard to such the decisive question is whether each of the two procedures provide for sufficient safeguards, then, in the National Assembly's opinion, the two above-mentioned constitutional provisions have not been violated. The National Assembly agrees with the position that a special procedure should be provided for decision-making on family law issues. This procedure is to be regulated in the new family legislation which is being prepared; however, until its enactment, the MFRA will allegedly be complemented by the European Convention on the Exercise of Children's Rights that will be directly applied to concrete cases after its ratification.

5. The Government replied to the request. It stated that there are two reasons for the division of competences between the social work centres and the courts. Firstly, by determining that a centre has competence only if the parents, after they have terminated their common-law marriage, cannot agree on child custody, the negative aspect of the right to respect for family life determined in Article 8 of the ECHR was enacted. The second reason for such division was in the conceptualisation of family and common-law marriage. It is argued that even the European Court of Human Rights has only recently taken actual and not just legally established family relations into account. In the Government's opinion, the Supreme Court's allegation that, owing to insufficient procedural safeguards, the effective protection of the right to respect for family life is not guaranteed and that this could lead to a violation of Articles 53 and 54 of the Constitution is only partially substantiated. The General Administrative Procedure Act (Official Gazette SFRY], No. 47/86 – consolidated text – hereinafter referred to as the GAPA) allegedly sufficiently guarantees the implementation of the principle of free disposition, the principle of adversary proceedings, the right to be heard and to make statements, and the principle of direct adduction of evidence. Since the parties to custody proceedings are always parents with conflicting interests, an oral hearing is allegedly mandatory already pursuant to the GAPA. According to the Government, the obligatory presence of experts, which is determined in Article 88 of the SSecA, guarantees the protection of the child's interests in the proceedings. There have allegedly been no cases on which the social work centres have failed to decide. It is alleged that, in practice, the proceedings may only be prolonged due to the complexity of a specific case. The Government claims that such is supervised by both the competent Ministry and the Ombudsman. Only the claim of the Supreme Court that only one person decides on issues that arise on the basis of the challenged MFRA provisions

is, in the Government's opinion, partially substantiated. More specifically, it is argued that, according to the first paragraph of Article 55 of the GAPA, the social work centre is obliged to appoint a temporary guardian *ad litem* if the commenced proceedings must be continued due to the urgency of the matter. Moreover, the position of the Supreme Court that issues that arise after either a divorce or the termination of a common-law marriage and that are identical in substance should be decided on by a court is allegedly also substantiated. The Government deems that the right of common-law spouses to privacy should be limited by the positive aspect of the right to respect for family life, the right of children to special protection, and the right to judicial protection. According to the Government, such is to be regulated by the new family legislation which is being prepared; however, until its enactment, the European Convention on the Exercise of Children's Rights will complement the provisions of the MFRA.

### **B – I**

6. Pursuant to Article 23 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), a court may file a request for a review of the constitutionality of a law if an issue arises in relation to the proceedings it is conducting. According to its request, the Supreme Court challenges Articles 105 and 114 of the MFRA in their entirety, and Article 88 of the SSecA in the part that refers to Article 105 of the MFRA. Since the requirement determined in Article 23 of the CCA was met only with regard to the second paragraph of Article 105 in conjunction with the first paragraph of Article 114 of the MFRA, and with regard to Article 88 of the SSecA insofar as it refers to Article 105 of the MFRA, and since the statement of reasons for the request referred only to these provisions, the Constitutional Court limited the scope of the review to these provisions. In conjunction with the second paragraph of Article 105 of the MFRA, the first paragraph of Article 114 thereof determines the competence of the social work centres to decide on child custody if the parents do not live together and cannot reach an agreement on who the child will live with and, therefore, who will exercise the parental rights; the mentioned Article 105 of the MFRA and the challenged part of the provision of the SSecA determine two of the procedural rights of persons who participate in such proceedings. The issue of competence to decide on child custody if the parents do not live together was decisive in the proceedings in connection with which the Supreme Court submitted the request for the review of constitutionality. However, the Supreme Court had not stayed these proceedings but initiated the proceedings before the Constitutional Court after it had granted the appeal and remanded the case to the court of first instance for new adjudication.
7. If a court deciding on a matter deems a law which it should apply to be unconstitutional, pursuant to Article 156 of the Constitution, it must stay the proceedings and initiate proceedings before the Constitutional Court and continue the proceedings after the Constitutional Court has issued its decision on the constitutionality of the law. This has been the situation thus far in cases where the Constitutional Court has decided upon the request of a court (see, for example, Decisions No. U-I-172/94, dated

9 November 1994 – Official Gazette RS, No. 73/94, and OdlUS III, 123; No. U-I-48/94, dated 25 May 1995 – Official Gazette RS, No. 37/95, and OdlUS IV, 50; No. U-I-225/96, dated 15 January 1998 – Official Gazette RS, No. 13/98, and OdlUS VII, 7). In all the mentioned cases, which the Constitutional Court has already decided, the Supreme Court stayed the proceedings for deciding on the legal action filed in the context of the judicial review of administrative acts, i.e. prior to the final decision on the matter. However, in the Supreme Court's opinion, the finality of the decision in relation to which the Supreme Court initiated these proceedings represents an obstacle to the effects of a potential annulment of the challenged statutory provisions in the case at issue. The Constitutional Court has not yet decided as to whether this position is correct; however, it is not possible to deny its merits in advance. In this regard and in relation to the function that the Supreme Court, as the highest court in the country, holds in terms of ensuring the uniformity of case law (Article 127 of the Constitution and Article 109 of the Courts Act, Official Gazette RS, No. 19/94 – hereinafter referred to as the CtsA), the Constitutional Court decided that the requirement for initiating proceedings determined in Article 23 of the CCA had been met, despite the fact that the proceedings in this case had not been stayed.

8. Petitioner Matjaž Gerlanc did not explicitly state which of the provisions of the MFRA he is challenging, but it is clear from his petition that he is challenging Articles 78 and 105. During the proceedings for examining the petition, the Supreme Court submitted the request, in which the issues raised were similar to those in the petition, and therefore the Constitutional Court joined both proceedings.
9. The petitioner demonstrated his legal interest, which is a requirement for initiating proceedings (Article 24 of the CCA), by asserting that the same court which had decided on his divorce from his daughter's mother had also decided on the awarding of custody of his daughter, who was born out of wedlock.
10. The allegation that the MFRA does not determine the competence to award custody of a child in a case such as the petitioner's, and that thus his right to a legal remedy (Article 25 of the Constitution) has been violated, is not substantiated. It is clear from both statutory provisions, which were challenged by the petitioner, that in cases such as the petitioner's the courts have the competence to award the custody of children. Pursuant to the first paragraph of Article 78 upon divorce the courts also decide on child custody and child support. The provision refers to the children of spouses who divorce and does not draw a distinction between children born in or out of wedlock. Other statutory provisions do not contradict such an interpretation of the provision. Deciding on child custody is also the subject of the first paragraph of Article 105 of the MFRA, however, in relation to this provision, Article 78 is more specific. Article 105 is actually a general rule to be applied if the parents do not live together; Article 78, however, determines a special rule to be applied in instances when the parents' separate lives are a consequence of their divorce. The petitioner failed to explain the asserted inconsistency between the challenged MFRA provisions and Articles 14 and 53 of the Constitution, despite being requested by the Constitutional Court to do so. Therefore, the Constitutional Court has reviewed this allegation only on the basis of

the applicant's statements; however, it has taken into account the petitioner's request to respect European standards and determine the jurisdiction of special family courts.

## B – II

11. The second paragraph of Article 105 of the MFRA determines the competence of the social work centre to decide which parent the child is to live with if the parents live separately and cannot reach an agreement thereon. The parent with whom the child lives or who has been awarded custody of the child is entitled to exercise parental rights pursuant to the first paragraph of Article 114 of the MFRA. The challenged part of Article 88 of the SSecA determines that, before reaching a decision in administrative cases regarding the rights and interests of a child pursuant to Article 105 of the MFRA, social work centres must obtain the opinion of an expert commission in special declaratory proceedings and set a date for an oral hearing. The allegation made in the request, according to which the mentioned provisions of the MFRA and SSecA are contrary to the right to respect for family life (Articles 53 and 54 of the Constitution and Article 8 of the ECHR) due to insufficient procedural guarantees in the proceedings in which the social work centre decides, is therefore unfounded.
12. An essential element of the right to respect for family life guaranteed by Article 8 of the ECHR is the mutual enjoyment by parents and children of each other's company.<sup>1</sup> The safeguard guaranteed by the Convention obliges the state to take measures to ensure the actual existence and protection of a family.<sup>2</sup> Such measures include substantive rules on how to regulate the exercise of parental care and the maintaining of contacts between children and their parents who do not live together; to certain extent the provision of Article 8 also influences any procedure in which these issues are resolved. Effective respect for family life requires that the competent authority, on the basis of all the relevant circumstances, decide on future relations between parents and children, and that such is not left to be decided by the mere passage of time. The competent authorities must therefore proceed swiftly.<sup>3</sup> In proceedings regarding the relations between parents and children, parents must have sufficient opportunity to express their views and interests so that the competent authority takes these statements into account and the parents have the opportunity to use the legal remedies available in due time.<sup>4</sup> As substantiated hereinafter, Article 54, the first paragraph of Article 56, Article 22, and Article 23 of the Constitution guarantee these safeguards to parents and children. In the case at issue, there was therefore no need to separately review whether the challenged statutory provisions violated Article 8 of the ECHR.
13. The first paragraph of Article 54 of the Constitution provides that parents have the right and duty to maintain, educate, and raise their children. It is the parents who are

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1 Judgment in *W. v. United Kingdom*, dated 8 July 1987, Publications of the European Court of Human Rights (hereinafter referred to as the Publications), Series A No. 121, pp. 27, 59.

2 Judgment in *Marckx v. Belgium*, dated 13 June 1979, Publications, Series A No. 31, pp. 15, 31, and *Johnston v. Ireland*, dated 18 December 1986, Publications, Series A No. 112, pp. 25, 35.

3 Judgment in *W. v. United Kingdom*, *op. cit.*, pp. 29, 65.

4 *Ibidem*, pp. 28, 63–64.

primarily entitled and obliged to care for their children. The first paragraph of Article 56 of the Constitution specifically provides that this duty of parents corresponds to the right of children to be cared for and raised by their parents. According to this provision, children enjoy special protection and care, and shall enjoy constitutional rights consistent with their age and maturity. In this way, the Constitution also draws attention to how parental care and the right of children to the independent development of their personality are intertwined. The existence of this mutual relationship between parents and children is not contingent on whether or not the children were born out of wedlock or whether or not their parents live together.<sup>5</sup> The natural bond from which this legal obligation arises is the same in all instances. This constitutes the basis for the precept of the Constitution that children born out of wedlock have the same rights as children born in wedlock (the second paragraph of Article 54).

14. The fact that the above-mentioned provisions are included in the chapter on human rights and fundamental freedoms demonstrates that the state may not, in principle, interfere with this relationship between parents and children. If the guarantee of mutual connectedness between parents and children is to be effective, the state is also obliged to adopt rules that will enable the actual establishment and protection of such relationships. The procedure for deciding on the exercise of parental care and the maintaining of contact between children and their parents who do not live together forms part of these rules. The affected persons must be guaranteed participation in this procedure in a manner that allows for the protection of their rights. These safeguards are guaranteed in particular in Articles 22 and 23 of the Constitution. On the basis of the guarantee of the equal protection of rights (Article 22 of the Constitution), parents have the right to declare facts that are relevant to a decision, to express their opinion, and to have their opinion taken into account in proceedings to decide on child custody. Pursuant to the same provision, in conjunction with the first paragraph of Article 56 of the Constitution, children who are capable of forming an opinion also have the right to express their opinion, which the competent authority must take into account when making a decision. Taking into account age and maturity, on the basis of the above-mentioned constitutional provisions a child may also participate in proceedings either by himself or through a special representative who in the event of a dispute between the parents must not be either one of them. The right to judicial protection (Article 23 of the Constitution) provides affected persons access to an independent and impartial court, the right to request such court to decide on the merits of the case, and the right to request a decision to be made without undue delay. With regard to the allegations in the request submitted in the case at issue, there was

5 The Government's position that the European Court of Human Rights has only recently taken into consideration actual – and not just legally recognised – family relations is erroneous. The European Court of Human Rights does not make the concept of family conditional upon the parents being married. In 1986, in *Johnston v. Ireland* (cited in note 2), it already decided that family life also exists in cohabitation relationships, in particular in the case of unmarried partners and their children who have lived together for several years. In an earlier case, i.e. *Marckx v. Belgium* (cited in note 2), it found a violation of Article 8 of the ECHR as the state had not recognised the legal bond between a child born out of wedlock and the relatives of her mother.

no need to decide on whether, in addition to the mentioned procedural safeguards, the effective protection of the mutual connectedness between parents and children requires more than what is provided for by Articles 22 and 23 of the Constitution.

15. The allegations put forward in the request, in which the applicant substantiated the deficiencies of the procedure before the social work centre and, as a result, also the judicial procedure, are unfounded. The social work centre must act pursuant to the provisions of the GAPA, according to which a party to the proceedings is not only the person who has initiated the proceedings or the person against whom proceedings have been initiated, but also other persons who have the right to participate in proceedings in order to protect their rights or legal interests (Article 49 of the GAPA). In proceedings to decide on the custody of children, both parents and the child are parties to the proceedings. Parties to administrative proceedings have the right to state facts that are relevant to a decision, adduce evidence, respond to the statements and evidence adduced by opposing parties, participate in an oral hearing (Article 143 of the GAPA), and file legal remedies (Article 233 of the GAPA). The special provision of the second paragraph of Article 105 of the MFRA guarantees children who are capable of forming an opinion the right to express it. They are provided the opportunity to participate in administrative proceedings through a guardian *ad litem*. Article 213 of the MFRA imposes the duty to appoint such representative on the authority conducting the proceedings. According to this provision, minors are appointed a special guardian in the event of a conflict between them and their parents, for the minors to be able to perform specific legally relevant actions, and in other instances where their interests are in conflict with the interests of their parents. This provision can only be understood to mean that the appointment of a guardian *ad litem* is required in all instances of a potential conflict of interest between the parents and the children. Such is the case with a decision as to which of the parents the child will live with.
16. It is a fact that, when arranging relationships within the same family, the same social work centre can assume two different functions: that of an institution, the existence of which has been prescribed by the state in order to offer professional advice and help with arranging the relationships between family members (the second paragraph of Article 15 of the SSecA); and that of the competent authority that has been granted the power to decide on the rights and duties of individual members of the same family. This can influence the impartiality of the person who decides a case, but not necessarily. The fact that a professionally trained person is acquainted with the relations within a family and counsels them does not necessarily entail that this person will be biased in subsequent decision making. If an affected person believes that some other circumstances exist that cast doubt on the impartiality of the person who decides in the proceedings, the affected person may request his or her exclusion (Article 44 of the GAPA). In addition, such person is also guaranteed subsequent protection before an independent and impartial court, which has the possibility to examine the established state of facts and to investigate the relevant facts on its own (first paragraph of Article 14 of the GAPA). It is for the legislature to assess whether counselling is still possible despite such a connection between functions, and such is further not the subject of the request in question.

17. The allegations referring to judicial protection against the decisions of social work centres are also unfounded. As already stated, children must be appointed a guardian *ad litem*. It is already clear from the function of a guardian *ad litem*, who represents one of the parties to the proceedings, that a person who is an employee of the authority deciding in such proceedings and who is thus obliged to follow the instructions of this authority cannot be appointed as guardian. It therefore follows from the interpretation of the statutory provisions that, in the cases it is deciding on, a social work centre cannot simultaneously perform the function of a child's representative. The alleged violation of Article 23 of the Constitution is also not substantiated by the assertion that parties who participate in proceedings are laypersons and are unaware of their rights in the event that the administrative authority fails to act. This aspect of the effectiveness of the protection of rights is conditional upon the active participation of the parties and their due care for their rights in proceedings, and does not depend on whether their rights are decided on by an administrative authority or a court.
18. Moreover, the allegation that the right of children to special protection and care (the first paragraph of Article 56 of the Constitution) has been violated by the challenged provisions of the MFRA is unfounded. This constitutional provision does not require the legislature to vest the power to decide on all family-law related questions with either the court or the social work centre.
19. For all the above-mentioned reasons, the challenged part of Article 88 of the SSecA is not inconsistent with the Constitution. The provision explicitly prescribes two procedural safeguards – an oral hearing and the obtaining of the opinion of the expert commission. Both safeguards only extend the scope of rights of parties to proceedings before social work centres. The decision as to whether the applicant is correct to assert that the explicit provision on a mandatory oral hearing in certain family-law related cases excludes the mandatory nature of the hearing in other cases is not relevant to the case at issue.
20. However, the allegation put forward in the request that the challenged provision of the MFRA is contrary to the principle of equality before the law (the second paragraph of Article 14 of the Constitution) is substantiated since that provision, contrary to other similar cases, establishes the competence of a social work centre to decide on the exercise of parental rights. The second paragraph of Article 14 does not prohibit the legislature from regulating the positions of legal subjects differently, but from doing so arbitrarily, without reasonable and objective grounds. Such entails that differentiation must serve a constitutionally admissible aim, that this aim must be reasonably related to the subject of regulation by law, and that the differentiation introduced must be an appropriate means for achieving this aim.
21. Pursuant to Article 78 of the MFRA, a court decides on child custody in divorce proceedings, and also subsequently if changed circumstances and the children's interests require such decision to be altered. The second paragraph of Article 105 in conjunction with the first paragraph of Article 114 of the MFRA determines the competence of a social work centre to decide on which of the parents will exercise parental rights if the parents live separately and cannot reach an agreement on such.

Pursuant to both provisions, the subject of the decision making process is the same: the competent authority decides on which of the parents will exercise parental rights in instances when they do not live together.

22. By claiming that the competence of different authorities may lead to different decisions on the merits, the applicant fails to substantiate the difference that is relevant to the review in terms of the second paragraph of Article 14 of the Constitution. To be more specific, both cases relate to the application of the same substantive rules: in deciding which parent a child should live with, the competent authority must take into account the child's interests. Furthermore, both cases are finally decided by the Supreme Court as the court of last instance, which gives legal opinions that are binding for all its panels on issues that are relevant to the uniformity of the case law (Articles 109 and 110 of the CtsA). The difference between both groups of cases is in the competence to decide on this issue and, as a result, in the procedures in which the competent authority decides. In the first case, a court decides on the exercise of parental rights in a civil procedure; in the second case, however, it is a social work centre that decides in an administrative procedure, the judicial review of its decision being subsequently provided in proceedings for the judicial review of administrative acts. An important difference also lies in the fact that, if a social work centre decides on the exercise of parental rights, judicial proceedings must be initiated in order to determine child support; however, if a court decides on the exercise of parental rights, it also decides on child support in the same proceedings if the parents cannot reach an agreement thereon.
23. The connecting factor for the differentiation is the parents' divorce. Regardless of whether the children were born in wedlock or before the marriage was contracted, and regardless of whether it is the first decision on the awarding of custody of the children or a subsequent change to this decision, if the parents divorce, a court is competent to decide on the exercise of parental rights (the first and fourth paragraphs of Article 78 of the MFRA). In all other cases, i.e. if the parents do not divorce but only live separately, or if they have never married but lived in a common-law marriage that was terminated, or they lived together only for a short period of time, or have not lived together at all, a social work centre decides on child custody in an administrative procedure (the first paragraph of Article 105 of the MFRA and Article 86 of the SSecA).
24. The legislature did not have reasonable and objective grounds for the described differentiation. The Government claims that such solution gave priority to the negative aspect of the right to respect for family life, i.e. that the state is not to interfere if the parents have decided not to marry. Even if we ignore the fact that the challenged provision also applies to cases where married parents live separately, which entails that the above-mentioned position is therefore incorrect, the aim pursued by the challenged provision has not been achieved. More specifically, a social work centre's decision is also issued in an administrative procedure and is, as such, an administrative act that is authoritative in nature. It is also not possible to substantiate the difference with the assertion that only the union of spouses and children is (or has until recently been) a legally regulated family unit. Since the MFRA entered into force, relationships between parents and children have been legally regulated, regardless

of whether or not the parents are married, and such relationships are the subject of the challenged regulation. Both groups of cases primarily concern a dispute between parents who no longer live together, and not the state's interference with the relationships between parents and children. Thus, if the parents reach an agreement, the social work centre does not decide at all. Moreover, the fact that in divorce proceedings, which are within a court's competence, all issues related to divorce are decided concurrently could not have been a reason for determining different competences. If a court has already decided on child custody, it also decides on the issue again if circumstances change. As the issue of whether or not the parents are divorced has no connection with the subject of the decision, i.e. the decision on the exercise of parental rights, the second paragraph of Article 105 in conjunction with the first paragraph of Article 114 of the MFRA is contrary to the principle of equality before the law (the second paragraph of Article 14 of the Constitution).

25. Having established that the second paragraph of Article 105 in conjunction with the first paragraph of Article 114 of the MFRA is contrary to the principle of equality before the law, there was no need to review whether it was also inconsistent with the guarantee of the equal protection of rights referred to in Article 22 of the Constitution.
26. The challenged provision of the MFRA is not inconsistent with the Constitution because the legislature was not permitted to determine the competence of a social work centre to decide on the exercise of parental rights if the parents were not living together and had not reached an agreement on whom their children will live with. It is only inconsistent with the Constitution as, in some cases it determines the competence of a court to decide on child custody, while in other cases it determines the competence of a social work centre to decide thereon. Therefore, the Constitutional Court has not abrogated the challenged provision of the MFRA but has only established its unconstitutionality. For the same reasons, the provisions of the MFRA that determine the competence of a court to decide on the custody of children if their parents do not live together (the first and fourth paragraphs of Article 78 of the MFRA) are also inconsistent with the Constitution. Pursuant to Article 30 of the CCA, the Constitutional Court may also review the constitutionality of other provisions of the same or other regulation for which a review of constitutionality or legality has not been proposed, if such provisions are mutually related or if such is necessary to resolve the case. Since the establishment of the unconstitutionality of the second paragraph of Article 105 in conjunction with the first paragraph of Article 114 of the MFRA inevitably results in the unconstitutionality of the first and fourth paragraphs of Article 78 of the MFRA, the Constitutional Court decided that these two provisions are also inconsistent with the Constitution. When the already published Civil Procedure Act (Official Gazette RS, No. 26/99) enters into force, the fourth paragraph of Article 78 of the MFRA will cease to apply (the first paragraph of Article 501 of the Civil Procedure Act). Since the division of competences to decide on child custody that was challenged by the applicant and is provided in the MFRA at the time of the issuing of this Decision remains the same, the cessation of the application of the fourth paragraph of Article 78 of the MFRA has no effect on the decision in the case at issue.

27. The Supreme Court also drew attention to the possible unconstitutionality of other provisions of the MFRA according to which the social work centre is competent to decide on measures that entail an interference with the right to respect for family life. However, as the requirements for adjudication pursuant to Article 30 of the CCA were not met, the Constitutional Court did not extend the proceedings to a review of the constitutionality of these provisions.

### C

28. The Constitutional Court adopted this Decision on the basis of Article 21, the second paragraph of Article 26, Article 30, and Article 48 of the CCA, composed of: Franc Testen, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Dr Miroslava Geč-Korošec, Lojze Janko, Milojka Modrijan, Dr Mirjam Škrk, Dr Lojze Ude, and Dr Dragica Wedam-Lukić. The Decision was adopted by seven votes to two. Judges Testen and Ude voted against. Judge Ude submitted a dissenting opinion.

*Franc Testen*  
*President*

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#### **DISSENTING OPINION OF JUDGE DR UDE, JOINED BY JUDGE TESTEN**

I do not agree with the decision that the statutory regulation, which determines that, pursuant to Article 105 of the Marriage and Family Relations Act, it is within the competence of a social work centre to decide on child custody, while, pursuant to Article 78 of the same Act, it is within the competence of a court to decide on the same matter, is inconsistent with the Constitution. According to this decision, the regulation that determines that a court decides on child custody especially in the event of a divorce or if a decision regarding such is subsequently changed, while a social work centre decides on child custody if the parents live separately and cannot reach an agreement on the custody of their children (i.e. especially with regard to children born out of wedlock or in the event of the termination of a common-law marriage), is therefore unconstitutional. The majority decision rejected the majority of the reasons stated by the applicant (the Supreme Court of the Republic of Slovenia) to substantiate its claim that the statutory provisions on the competence to decide on child custody are contrary to the Constitution. The Decision dismissed the allegations that, when a social work centre decides on child custody, not all procedural safeguards are guaranteed either in the administrative procedure or in the subsequent proceedings for the judicial review of administrative acts and such statutory regulation violates the right of children to special protection and care (the right referred to in Article 56 of the Constitution). It was, however, decided that the provisions of Articles 105 and 78 of the MFRA are contrary to the principle of equality before the law (the second paragraph of Article 14 of the Constitution of the Republic of Slovenia) as that there are no reasonable and objective grounds for enacting different competences.

This finding is, in my opinion, erroneous. The reasons for different competences with regard to deciding on child custody may no longer be convincing. It is even possible to take the view that it would be justified from a professional perspective to determine the competence of the courts to decide on the custody of children, regardless of the question of whether these legal relationships are being decided on in divorce proceedings or when parents do not live together. It is however, in my opinion, impossible to claim that there are no reasonable and objective grounds to determine different competences, which would entail that such a regulation is arbitrary.

Different competences to decide on child custody were the result of the evolution of the legal regulation of family relationships and of procedural economy. It was logical that the legislature had determined the competence of courts for deciding on child custody in the case of divorce already before the MFRA entered into force. In divorce proceedings, a court decides on the legal relationships between spouses who are also often in conflict regarding the question of who will take care of and raise their children and how their maintenance will be ensured. However, it is primarily in affiliation proceedings that a court decides on children born out of wedlock and their maintenance, i.e. when the putative father does not attempt to obtain custody of the child. On the contrary, he disputes his paternity and this is the reason why judicial proceedings are necessary in the first place. Only later, after 1976, did legal relationships develop with regard to common-law marriage, for which the legal order determined several legal consequences. Only during this period did child custody disputes arise in relation to children born out of wedlock, i.e. in common-law marriages. Those disputes primarily arose after the termination of such common-law marriages; however, given their nature, these were not terminated in judicial proceedings, but by actual cessation. The evolution of legal relationships therefore led to different competences for decision-making. Common-law marriage – its establishment and termination – still differs from marriage in real life and in terms of legal regulation. What is particularly characteristic of common-law marriage is that it often evolves without the involvement of state authorities (i.e. a registrar) or intervention from the courts. Therefore, there also exist grounds for a different regulation concerning the custody of children born in such a union. It is therefore impossible to claim that there are no reasonable and objective grounds at all for such differentiation.

I am also of the opinion that the time is now ripe to determine the competence of courts for deciding on legal relationships of this kind. This is demonstrated by a new definition of the competence to decide on child custody and child support in the second paragraph of Article 406 of the new Civil Procedure Act, which emphasises that courts are competent to decide on child custody and child support regardless of whether they are decided upon independently or together with matrimonial disputes, or in proceedings to determine or contest paternity or maternity. Certainly, the mere fact that the competence of the courts was determined on the basis of convincing expertise does not entail that a different regulation is unconstitutional. In short, that which is based on convincing expertise is not always the sole constitutionally admissible option.

I believe that, on this occasion and by its decision, the Constitutional Court engaged in the professional polemics on the competence to decide on child custody and assumed the role of arbiter. Ultimately it even took the position that a regulation, according to which the administrative authorities and social work centres would have exclusive competence to decide on legal relationships of this kind, would also be constitutionally admissible. The Constitutional Court considered a different regulation of competence to be unconstitutional and adopted the position that either a court or a social work centre may be competent, but only to the exclusion of the other. Such finding could only be substantiated if the Constitutional Court assessed that legal protection standards are not equal in court and administrative proceedings (including proceedings for the judicial review of administrative acts) or that they are lower in one of them. In the case at issue, however, the Constitutional Court rejected the allegations regarding the lower legal protection standard in the administrative procedure, but nevertheless ultimately considered the division of competences to be unconstitutional. In my opinion, there are no reasonable grounds for such a decision.

*Dr Lojze Ude*

*Franc Testen*

**DECISION**

At a session held on 18 September 2013 in proceedings to decide upon the constitutional complaint of A. B., C., represented by Olivera Gomboc, attorney in Ljubljana, the Constitutional Court

*decided as follows:*

1. Supreme Court Judgment No. I Ips 200/2010, dated 13 January 2011, Higher Court in Ljubljana Judgment No. II Kp 707/2009, dated 8 April 2010, and Local Court in Ljubljana Judgment No. II K 99/2007, dated 20 February 2009, are abrogated.
2. On the basis of point 1 of Article 358 of the Criminal Procedure Act (Official Gazette RS, No. 32/12 – official consolidated text and 47/13), the complainant is acquitted of the substance of the summary charge of the District State Prosecutor's Office in Ljubljana, No. Kt (O) 4395/05, filed on 20 March 2007, amended on 28 November 2008 and 13 January 2009, that he committed the criminal offence of the abduction of a minor according to the first paragraph of Article 200 of the Criminal Code (Official Gazette RS, No. 95/04 – official consolidated text) by "unlawfully abducting a minor from a parent to whom the minor has been entrusted, detaining the minor, and preventing the minor from being with a person who has rights in respect of the minor, by – on 7 September 2005 in the afternoon, after C. D. brought the complainant's son F. G., born on X. X. X, to E. Street in Ljubljana, without the permission of the son's mother H. I. J., who was granted custody thereof by final Judgment of the District Court in Ljubljana No. P 2600/2003-IV, dated 24 May 2004, in conjunction with Judgment and Order of the Higher Court in Ljubljana No. IV Cp 38/2004, dated 21 October 2004 – taking the minor with him to his residence at No. X, E. Street in Ljubljana and detaining him there contrary to the mentioned judicial decisions until 22 May 2006, as he did not hand the minor over to his mother during the mentioned period of time in spite of Execution Order of the Local Court in Ljubljana No. In 2005/01241-3, dated 3 October 2005, and Order of the Higher Court in Ljubljana No. IV Cp 786/2006, dated 22 March 2006; and on 8 September 2005 by also demanding that the representatives of the child's school not allow the child to leave with his mother; therefore, in the described manner he prevented the mother as an entitled person from being with him.

3. The costs of the criminal proceedings referred to in the previous point are to be charged to the budget.

### *Reasoning*

#### **A**

1. By a final judgment issued by the Local Court in Ljubljana, the complainant was found guilty of committing the criminal offence of abducting a minor in accordance with the first paragraph of Article 200 of the Criminal Code (hereinafter referred to as the CC). He was sentenced to three months' imprisonment, suspended for two years. The complainant allegedly committed the criminal offence by unlawfully abducting a minor from his parent to whom the minor had been entrusted, detaining the minor, and preventing the minor from being with a person who has rights in respect of the minor. He allegedly committed the criminal offence from 7 September 2005 to 22 May 2006.
2. The Supreme Court confirmed the assessment of the lower courts that the complainant's conduct was unlawful and further pointed out that, as regards the criminal offence under the first paragraph of Article 200 of the CC, the [mentioned] unlawfulness is a special statutory element of such criminal offence and, therefore, when examining its existence, it is necessary to examine the legal basis that was violated by the perpetrator's conduct. The same as the lower courts, it considered that such legal basis was the final Judgment of the District Court in Ljubljana, No. P 2600/2003-IV, dated 24 May 2004, by which the mother was granted custody of the minor. Considering that the complainant was aware of this Judgment and that he was aware of the legal recourse with regard to changing the Judgment, the Supreme Court assessed that by conduct contrary to the mentioned Judgment the complainant clearly manifested unlawful conduct and thus fulfilled the statutory element of the mentioned criminal offence. Furthermore, it assessed that the subsequent judicial decisions (the Temporary Injunction dated 22 May 2006 and the Judgment of the District Court in Ljubljana dated 17 December 2008, by which the complainant was granted custody of the minor) could no longer influence the fact of unlawful conduct *ex tunc*. The Supreme Court also dismissed the allegations of the complainant's defence counsel that there was no unlawful conduct in the material sense since the complainant had pursued the child's interests, which had allegedly been threatened in this case. It adopted the position that it is precisely for the purpose of protecting the child's interests that the legal manner of regulating the relationships between parents and children in the event of divorces and especially in the event of disagreements between parents on such issues is provided for. It was precisely in order to protect the child's interests that by a judgment it was allegedly decided that the mother was granted custody of the minor. As long as such a judgment is in force, in the opinion of the Supreme Court, it is necessary to assess any conduct contrary thereto as conduct contrary to the child's interests and thus also materially unlawful. The Supreme Court dismissed as un-

founded also the allegations of the complainant's defence counsel that the complainant's conduct entailed conduct amounting to a minor offence under Article 14 of the CC. It assessed that the complainant's conduct needs to be considered as a whole. As such, it was allegedly extremely uncompromising and persisted despite the Execution Order on the basis of which the mother sought to legally regain custody of the minor.

3. The complainant alleges the violation of the first paragraph of Article 28 (the principle of legality in criminal law), Article 54 (the rights and duties of parents), and Article 56 of the Constitution (the rights of children). He states that when assessing whether he acted unlawfully and thus satisfied all the elements of the alleged criminal offence, the courts formalistically reasoned only from the finding that he had not respected the judicial decision by which the mother had been granted custody of the minor. The complainant deems that when examining the existence of unlawfulness as an element of the alleged criminal offence, the court did not consider Article 54 of the Constitution as he acted exclusively in the interests of his child, which should allegedly exclude unlawfulness in the substantive sense. He claims that he had a reasonable expectation that the criminal court would consider justified reasons – reasons benefitting the child, due to which he resolutely opposed going back to his mother. Therefore, the complainant considers it unacceptable that none of the courts that decided in the criminal proceedings had taken into account the fact that the child had run away from his mother and that he had tried to exercise his constitutional right with a clear and resolute expression of his will. The complainant deems that by weighing which of the values should be granted judicial protection – respect for a final judicial decision or the protection of the rights or interests of a child as a constitutional category – the courts should give priority to the protection of the rights or interests of the child because they were threatened.
4. The complainant points out that he immediately wanted to achieve legal regulation of the disputed relationship with the expectation that in order to protect the child's interests the civil court would decide quickly on his motion for a temporary injunction filed on 8 September 2005. The civil court only issued an order on the proposed temporary injunction on 22 May 2006 and a judgment only on 17 December 2008; in accordance with both, he was granted custody of his son. If the court had decided quickly, the disputed relationship between the parents regarding the child would have been regulated quickly in a legal manner, in accordance with the guarantees determined by Article 22 and the first paragraph of Article 23 of the Constitution. Thus, the basis for the court's assessment that the complainant's conduct was unlawful would also have formally ceased to exist. The legal manner of regulating the relationship between parents and children in the event of a divorce or disagreement between the parents, which in the opinion of the Supreme Court is allegedly in itself in the child's interests, in the case at issue allegedly proves to be just the opposite. According to the complainant, the situation in which the criminal court convicted him precisely of the criminal offence of abducting a minor, after the finality of the civil judgment by which the complainant was granted custody of the child, is intolerable from the legal point of view.

5. The complainant points out that the criminal judgment, despite imposing a suspended sentence, has caused him severe mental suffering and thus entails a heavy burden for him. In the circumstances of the case at issue, he considers the allegation that he committed the mentioned criminal offence unacceptable. Despite the existence of a judgment and the requirement to execute it, in his opinion it is difficult to force a child who is capable of reasonably stating his or her will to return against his or her will to the person whom he or she should be with according to the existing legal basis regarding such custody.
6. By Order No. Up-383/11, dated 28 June 2012, the Constitutional Court panel accepted the constitutional complaint for consideration. The Supreme Court was notified thereof.

### **B – I**

7. According to the second paragraph of Article 38.a of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), in order to protect the privacy of a participant in proceedings, upon the motion of such participant or on its own, the Constitutional Court may decide that the personal data of a participant in proceedings or the personal data of other individuals not be stated in the decision of the Constitutional Court. The Constitutional Court did not decide to conceal the identity because on the basis of the first paragraph of Article 60 of the CCA the Court itself decided whether the charges against the complainant were justified. As the mandate determined by the second paragraph of Article 38.a of the CCA allows even complete concealment of the identity of an individual, and thus allows also less than that, the Constitutional Court decided to anonymise the personal data when such decision is published because the information from the proceedings, from which the public was excluded, is evident from both the constitutional complaint and judicial decisions, and because there are circumstances that interfere with the privacy of the complainant, his former wife, and also their children.
8. In cases where the challenged final criminal judgment by which a suspended sentence had been imposed was expunged from the criminal record at the time of deciding upon the constitutional complaint, the Constitutional Court has hitherto rejected the constitutional complaint on the grounds that the complainant does not have a legal interest in a decision thereon (see Order of the Constitutional Court No. Up-94/02, dated 21 October 2004, OdlUS XIII, 88). Namely, by expunging the judgment, the legal consequences of the conviction allegedly cease to exist, i.e. the person is deemed to have never been convicted. It follows from the information sent by the Ministry of Justice upon the request of the Constitutional Court that in the complainant's case the anticipated date of the end of the probationary period is 23 April 2012. According to the relevant statutory provisions, it can therefore be concluded that the final criminal judgment had been expunged, although the Ministry of Justice did not explicitly notify the Constitutional Court thereof. Since the complainant explicitly draws attention to the fact that also the suspended sentence entails a heavy burden for him and has caused him mental suffering, the Constitutional Court reconsidered its position in Order No. Up-94/02 and decided to change it due to constitutional rea-

sons. Namely, the possible success of the constitutional complaint would entail that by a final judgment of conviction human rights and fundamental freedoms would be violated, which in a new trial might lead to a judgment of acquittal. Such person would be unjustly convicted. This is a sufficient reason for legal interest in the decision on the constitutional complaint, as Article 30 of the Constitution guarantees a wrongly convicted person the right to rehabilitation, compensation, and other rights provided by law. Moral rehabilitation, constitutionally recognized also as a human right, therefore entails a sufficient reason for changing this position. Namely, the mentioned right is also enjoyed by people regarding whom a judgment of conviction has been expunged from the criminal record. Therefore, the procedural conditions for deciding are fulfilled also in the case at issue.

## B – II

9. In proceedings to decide upon the constitutional complaint, the Constitutional Court inspected the following case files: No. II K 99/2007 of the Local Court in Ljubljana; No. P 2600/2003-IV (No. P 3558/2004-IV, No. P 1510/2009-IV) of the District Court in Ljubljana; and No. In 2005/01241 of the Local Court in Ljubljana. The inspected case files reveal the actual circumstances of the cases decided on, i.e. *inter alia* on the custody of the complainant's minor son, on the execution of the final judgment on the custody of the child which was granted to his former wife, and on the complainant's criminal liability. The subjects of decision-making in this constitutional complaint are only the judgments issued in the criminal case against the complainant. However, in the final judgment of conviction the time the criminal offence was committed is defined as the period from 7 September 2005, when the complainant allegedly abducted the minor from his mother, to 22 May 2006, when by a temporary injunction the District Court in Ljubljana granted the complainant custody of his minor son. Regarding such, the complainant claims that he requested that the court issue the mentioned decision already on 8 September 2005 and that on the one hand the courts did not proceed quickly, and on the other they found the complainant criminally liable for the unlawful detainment of a minor. In addition, the Supreme Court alleges that the complainant was uncompromising when committing the criminal offence, which allegedly persisted despite the execution order. Therefore, the Constitutional Court also inspected the civil and execution case files on the basis of which the decisions were issued which were also referred to in the challenged judgments.
10. It is, *inter alia*, evident from case file No. P 2600/2003 (No. P 3558/2004, No. P 1510/2009) of the District Court in Ljubljana in a civil case concerning divorce and deciding on granting parents custody of their minor children, that by final Judgment No. P 2600/2003-IV, dated 24 May 2004, the complainant and his former wife divorced and that the mother was granted custody of the minor children. Furthermore, it follows from the [relevant] case file (No. P 2903/2005-IV, which is joined with case file No. P 3558/2004) that the complainant brought an action on 8 September 2005 for the issuance of a new decision on the custody of his son and motioned for a injunction temporarily granting him custody of the child. By Order No. P 3558/2005,

dated 22 May 2006, the Court decided to temporarily grant the complainant custody of his minor son. Furthermore, by Judgments of the District Court in Ljubljana No. P 3558/2004, dated 17 December 2008, and No. P 1510/2009, dated 17 February 2010, the court *inter alia* decided that the minor's mother was to be stripped of custody and the complainant was to be granted such.

11. It *inter alia* follows from case file No. In 2005/01241 of the Local Court in Ljubljana, in relation to an execution case, that the complainant's former wife filed a motion for execution due to the transfer of her minor son on 9 September 2005 and that by Order No. In 2005/01241-3, dated 3 October 2005, the court allowed execution due to the transfer of the child and in the event of failure to comply with such an obligation imposed a fine on the complainant amounting to SIT 1,000,000.00 at that time. By Order No. 2874 In 1241/2005, dated 2 March 2012, the court dismissed the execution proceedings and by Order No. 2874 In 1241/2005, dated 12 October 2012, it dismissed the proceedings to decide upon the proposal for the imposition of a fine.
12. It *inter alia* follows from case file No. II K 99/2007 of the Local Court in Ljubljana, relating to a criminal case in which the challenged judgments were issued, that:
  - on 7 September 2005 the complainant's former wife notified the police station that the complainant did not want to return their minor son whom she had been granted custody of following their divorce;
  - on 7 September 2005 the president of the K. Society., a person whom the complainant's minor son trusts, and the minor son gathered at the Social Work Centre in order to ask the minor son whether he wished to live with his father, which allegedly followed also from his written statement, of which the police station was allegedly also notified already the same day;
  - on 8 September 2005, the competent employees of the Social Work Centre, the representatives of the police, the president of the K. Society., the complainant, and his former wife gathered at the elementary school in order to clarify the situation; after a discussion, in which the minor son insisted on going home with his father, with whom he wanted to live, the child's wish was followed in accordance with the instructions of the state prosecutor that the child's wishes were to be respected, if consensus was not possible, in order to avoid even greater traumatization of the child;
  - on 24 April 2006, the District State Prosecutor's Office in Ljubljana filed a motion for the execution of investigative acts with regard to the complainant and on 20 March 2007 a summary charge due to the reasonable suspicion of him having committed the criminal offences of the abduction of a minor in accordance with the first paragraph of Article 200 of the CC,<sup>1</sup> and the neglect and maltreatment of a minor in accordance with the first paragraph of Article 201 of the CC;

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1 The first paragraph of Article 200 of the CC determined: "Whoever unlawfully abducts a minor from his parent, adoptive parent, guardian, institution, or a person to whom the minor has been entrusted, or whoever detains a minor or prevents him from being with a person who has rights in respect of the minor, or whoever malevolently prevents the implementation of an enforceable judgment referring to a minor, shall be punished by a fine or sentenced to imprisonment for not more than one year."

- by the Judgment of the Higher Court in Ljubljana dated 8 April 2010, in conjunction with the Judgment of the Local Court in Ljubljana dated 20 February 2009, the complainant was convicted of a criminal offence in accordance with the first paragraph of Article 200 of the CC;
- by the Judgment of the Supreme Court dated 13 January 2011, the request for the protection of legality against the Judgment referred to in the previous indent was dismissed.

### B – III

13. The complainant *inter alia* claims that the challenged judgments violate his rights under Articles 54 and 56 of the Constitution, because the court did not weigh between the two [relevant] values, i.e. respect for a final judgment and the child's interests, which are constitutionally protected, and did not give priority to the latter. The first paragraph of Article 54 of the Constitution determines that parents have the right and duty to maintain, educate, and raise their children; this right may be revoked or restricted only for such reasons as are provided by law in order to protect the child's interests. Furthermore, the first paragraph of Article 56 of the Constitution determines that children enjoy special protection and care, and that they enjoy human rights and fundamental freedoms in accordance with their age and maturity. Therefore, the Constitutional Court assessed the positions of the courts in the challenged judgments in terms of their compliance with the first paragraph of Article 54 and the first paragraph of Article 56 of the Constitution.
14. On the basis of the mentioned constitutional provisions, it is parents who are primarily entitled and obliged to take care of their children. Such entitlement and obligation of parents entails, from the perspective of the position of children, the right of children to be taken care of and raised by their parents. Thereby children are guaranteed special protection, which is also a reflection of the right to respect for one's family life.<sup>2</sup> This refers to the mutual intertwinement of parental care and children's rights. The position of these provisions in the chapter on human rights and fundamental freedoms itself speaks for the fact that the state must generally not interfere with the mentioned relationship between parents and children. For the effective guarantee of the mutual connection between parents and children, the state must adopt measures that will enable the actual establishment and protection of these relationships.<sup>3</sup> In accordance with the mentioned duty of the state, the first sentence of the first paragraph of Article 56 of the Constitution should be interpreted in conjunction with the principle of the child's best interests,<sup>4</sup> which must be considered also by the courts when deciding on relationships between parents and children.

2 Cf. Decision of the Constitutional Court No. U-I-137/03, dated 26 May 2005 (Official Gazette RS, No. 56/05, and OdlUS XIV, 30), Paragraph 12 of the reasoning.

3 Cf. Decision of the Constitutional Court No. U-I-273/98, dated 1 July 1999 (Official Gazette RS, No. 60/99, and OdlUS VIII, 169).

4 Cf. Decision of the Constitutional Court No. U-I-116/03, dated 9 February 2006 (Official Gazette RS, No. 21/06, and OdlUS XV, 14), Paragraph 8 of the reasoning.

15. Parents must exercise the rights and duties referred to in the first paragraph of Article 54 of the Constitution in the interests of their children.<sup>5</sup> It is assumed that parents, aware of their responsibilities towards their children, are willing and able to act in the interests of their children.<sup>6</sup> Since the rights of parents towards a child are equal (the first paragraph of Article 54 in conjunction with the second paragraph of Article 14 of the Constitution), parents should in general care for a child together, even if they live separately.<sup>7</sup> The European Court of Human Rights (hereinafter referred to as the ECtHR) also considers that the child's best interests must be the main guidance when interpreting Article 8 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) as regards the exercise of parental care and the maintenance of contacts between parents and children,<sup>8</sup> and that the child's interests may, depending on their nature and seriousness, override the interests of the parents.<sup>9</sup> The child's interests are allegedly composed of two aspects. On the one hand, the child's interests allegedly require that the child's ties with his or her family be maintained, except in cases when the family has proved to be particularly inappropriate, while on the other hand it is clearly in the child's interest to ensure his or her development in a sound environment, and under Article 8 of the ECHR a parent cannot be entitled to take such measures as would harm the child's health and development.<sup>10</sup>
16. In proceedings regarding the relationships between parents and children, parents must have enough possibilities to express their views and interests, so that their statements are taken into consideration by the competent authority, and to apply available legal remedies.<sup>11</sup> Nevertheless, regarding such, parents have to bear in mind that a child is a person who should be respected as such also within the family circle, and therefore his or her will should be considered in accordance with his or her age and

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5 Cf. Decision of the Constitutional Court No. U-I-312/00, dated 23 April 2003 (Official Gazette RS, No. 42/03, and OdlUS XII, 39).

6 Also according to the provisions of the United Nations Convention on the Rights of the Child (Official Gazette SFRY, No. 15/90, Act on Notification of Succession concerning Conventions of the United Nations Organization and Conventions Adopted by the International Agency for Atomic Energy, Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the CRC), which is binding on the Republic of Slovenia, the child's interests are the main guidance in all actions concerning children (Article 3), while the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding (Preamble of the CRC).

7 Cf. Decision of the Constitutional Court No. Up-50/94, dated 22 January 1998 (OdlUS VII, 99).

8 Thereby, considering the circumstances of the case, it also refers to the Preamble of the Convention on the Civil Aspects of International Child Abduction (Official Gazette RS, No. 23/93, MP, No. 6/93 – hereinafter referred to as the Hague Convention), the purpose of which is not to provide for substantive settlement of disputes on issues of parental rights, but the restoration of the previous situation, thus to secure the child's return to the place of his or her habitual residence, however, also taking into account his or her views or objections to being returned (see the second paragraph of Article 13).

9 Cf. Judgment in the case *Neulinger and Shuruk v. Switzerland*, dated 6 July 2010, paragraph 134 of the reasoning.

10 Cf. paragraph 136 of the reasoning of the Judgment in the case *Neulinger and Shuruk v. Switzerland*.

11 Cf. Decision of the Constitutional Court No. U-I-273/98.

maturity. In such proceedings the child should be treated as a subject, which in particular entails that children who, in accordance with their age and maturity, are capable of understanding the circumstances and independently expressing their will thereon, should be enabled to do so, as well. Their will should be respected, as long as it is consistent with the principle of the child's best interests.<sup>12</sup> The right to express themselves with regard to the question of which of the parents who are getting divorced they wish to live with is provided by Article 22 of the Constitution in conjunction with the first paragraph of Article 56 of the Constitution to children who are sufficiently old and mature to exercise such right.<sup>13</sup> Such right is based on respect for their personal dignity (Article 34 of the Constitution). The above-mentioned is particularly true in cases when the children are, in accordance with their age and maturity, already capable of understanding their situation due to their parents' divorce,<sup>14</sup> and are, therefore, particularly vulnerable, of which both the parents themselves and the competent state authorities should be aware, when the latter are called upon to decide if the parents do not agree on the custody of the child. The child's right to personal dignity thus corresponds to the duty of responsible parents to ensure respect for these rights of their children; therefore, in the first paragraph of Article 54 the Constitution speaks of both the rights of parents towards their children, as well as their duties. Thus, all the above-mentioned rights are a concretisation of the principle of the child's best interests.

17. The above-mentioned should primarily be taken into account when deciding in the relevant proceedings on granting custody of minors to divorced former spouses. Nevertheless, the human rights of parents and children and in this framework also the principle of the child's best interests should also be respected in criminal proceedings initiated due to a criminal offence, the purpose of which is precisely to ensure, on the one hand, respect for the duties of parents, and on the other the children's rights. Therefore, the principle of the child's best interests referred to in the first paragraph of Article 56 of the Constitution, which corresponds to the parents' duty, even if they are divorced, to ensure the safety and education of their children so as to ensure the full and harmonious development of their personality (the first paragraph of Article 54 of the Constitution), is a constitutional value protected by the legislature also by the incrimination of conduct contrary to the mentioned principle.
18. It is assumed until proven otherwise that a final judicial decision by which custody of minor children is granted to divorced former spouses is based on respect for the principle of the child's best interests. Therefore, it is necessary to confirm the positions of the courts [at issue] that parents should respect such final judicial decisions and that

12 Cf. Article 6 and 7 of the European Convention on the Exercise of Children's Rights (Official Gazette RS, No. 86/99, MP, No. 26/99 – ECECR), which is also binding on the Republic of Slovenia.

13 A child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child has in particular the opportunity to be heard in any judicial and administrative proceedings affecting the child (see Article 12 of the CRC).

14 Also in cases when separating children from their parents is necessary, the child's interests must be regarded as essential circumstances (cf. Article 9 of the CRC).

in changed circumstances they have adequate legal remedies to enforce their right referred to in the first paragraph of Article 54 of the Constitution and especially in order to protect the child's right referred to in the first paragraph of Article 56 of the Constitution, which is the mirror image of parents' duties.

19. Respect for final judicial decisions is a generally important constitutional value and *inter alia* also one of the fundamental postulates of a state governed by the rule of law (Article 2 of the Constitution). As follows from the established constitutional case law, it is also an integral part of the right to effective judicial protection referred to in the first paragraph of Article 23 of the Constitution.<sup>15</sup> Its essence is to strengthen the legal relationship to the benefit of trust in the law, which is one of the principles of the rule of law.<sup>16</sup> In particular, the stability of legal relationships is aimed at protecting the holders of rights and obligations in such relationships by binding all participants with regard to the content of the decision (*res iudicata ius facit inter partes*), because the final decision is considered right and true (*res iudicata pro veritate accipitur*).<sup>17</sup> This leads to a prohibition on interfering in an already adjudicated matter (*ne bis in idem*).<sup>18</sup> Therefore, the institution of finality is essential as an instrument of legal certainty, which is also one of the principles of the rule of law. Final judicial decisions must be respected by all, first and foremost by state authorities. Therefore, not even the court itself should interfere in the content of a final judicial decision. Legal relationships regulated by a final decision of a state authority can be annulled, abrogated, or amended only in such cases and by such procedures as are provided by law (Article 158 of the Constitution). Respect for final judicial decisions is thus already in itself a constitutional value, moreover, when it comes to respect for court decisions regarding the question of which of the divorced parents should be granted custody of their child, respect for a final judicial decision on such question also presupposes that it was decided in accordance with the child's best interests.
20. However, it should also be taken into account that it is precisely in the field of child custody that the finality of judicial decisions cannot be an absolute value. Not only changed circumstances on the side of one parent or both of them, but especially the development of the child's capabilities to express him- or herself, in accordance with his or her age and maturity, on issues that are crucial for his or her upbringing, i.e. respect for his or her personal dignity, can lead to the conclusion that in the exceptional circumstances of an individual case recognition of the absoluteness of a final court decision might be in contradiction with the principle of the child's best interests. Therefore, also according to the position of the ECtHR, even in cases when the Hague Convention is applicable, a child's return cannot be ordered automatically or mechanically, but the child's best interests from a personal development perspec-

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15 Cf. Order of the Constitutional Court No. Up-206/02, dated 24 June 2003 (OdlUS XII, 116).

16 See T. Jerovšek, P. Kovač in: L. Šturm (ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A*, [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2011, p. 1405.

17 *Ibidem*.

18 *Ibidem*.

tive depends on a variety of individual circumstances, in particular his or her age and level of maturity, the presence or absence of his or her parents, the environment, and experience. Therefore, the child's best interests must be evaluated in each individual case.<sup>19</sup> The ECtHR is of the view that what is inherent in the concept of the child's best interests is the right of a minor to not be removed from one of his or her parents and retained by the other who considers (rightly or wrongly) that he or she has equal or greater rights in respect of the minor.<sup>20</sup> Referring to its already well-established case law,<sup>21</sup> the ECtHR points out that when examining whether the competent state authorities have taken all the necessary steps to facilitate the enforcement of the contact arrangements, it must strike a balance between the various interests involved: the interests of the child and the parent with whom the child lives, the interests of the other parent, and the general interest in ensuring respect for the rule of law.<sup>22</sup> When determining whether there has been a violation of Article 8 of the ECHR, the ECtHR also takes the child's age and behaviour into account.<sup>23</sup> When assessing whether the domestic courts failed to strike a fair balance between the best interests and wishes of the child and the rights of the parent with whom the child does not live, the ECtHR also points out that the approach of domestic courts that consider that it is

19 Cf. paragraph 138 of the reasoning of the Judgment in the case *Neulinger and Shuruk v. Switzerland*.

20 Cf. Judgment in the case *Maumousseau and Washington v. France*, dated 6 December 2007.

21 Cf. Judgment in the case *Kaleta v. Poland*, dated 16 December 2008, paragraph 53 of the reasoning.

22 Cf. Judgment in the case *Sbârnea v. Romania*, dated 21 June 2011. In the mentioned case, the complainant (the child's father, who on the basis of a judgment had rights of contact with his daughter) lodged a criminal complaint against the child's mother, alleging that she had not complied with the judgment that defined his contact rights. In December 2003, the public prosecutor decided not to pursue the child's mother criminally, considering that the non-compliance with the final judicial decision could not be imputed to her, but to the child's refusal. The decision of the public prosecutor was abrogated by the domestic court and the case referred back for the investigation to be continued, however, after an extensive investigation, the state prosecutor repeatedly decided not to pursue criminal proceedings because the child's mother did not intend to prevent the complainant from having a personal relationship with his daughter. After the applicant's judicial complaint the domestic court assessed that none of the evidence indicated that the daughter wanted to see the complainant and that her mother was preventing her from doing so. The court's conclusion that the conditions required to attract the criminal liability of the mother had not been met was abrogated and referred back to the investigating authorities, when the daughter precisely explained why she did not want to see her father. The public prosecutor repeatedly terminated criminal proceedings, concluding that the child's mother was not obstructing the execution of the judgment. The Romanian Criminal Code allegedly implied an action from the side of the accused, the mere fact that the mother had failed to inculcate a positive attitude in her daughter towards her father is allegedly not sufficient to assess her conduct as such. Thus, the domestic court upheld such a decision and explained that in this case the child's mother only expressed her disagreement with forcing the child to do something she did not want to do.

23 The ECtHR held that the applicant's daughter was at that time already of an age when she could not simply be handed over to the father if she refused to join him. The bailiff allegedly took into account the girl's refusal to join her father, however, the court did not find this consideration arbitrary or inappropriate. In the case *Sbârnea v. Romania*, the ECtHR concluded, taking into account all the very difficult circumstances of the case, that the competent authorities had struck a fair balance between the competing interests (see paragraph 138 of the reasoning of the judgment).

of greatest relevance to custody and access issues to establish the psychological situation of the child and take his or her wishes into consideration cannot be open to criticism.<sup>24</sup> Also in its recent decisions the ECtHR points out that in cases concerning the enforcement of decisions in the sphere of family law, what is decisive is whether the state authorities have taken all the necessary steps to facilitate the execution, as far as can reasonably be expected in the special circumstances of each case (they must in particular bear in mind the child's interests) and that coercive measures against children are not desirable in this sensitive area.<sup>25</sup>

21. As has already been pointed out, the rights referred to in the first paragraph of Article 54 and the first paragraph of Article 56 of the Constitution, which both require respect for the child's best interests, should be taken into account also in criminal proceedings in which a decision is issued on the possible criminal liability of a parent who does not respect a final judicial decision on granting parents custody of a child or on establishing contacts between the child and the other parent. Therefore, such court deciding in criminal proceedings should on the one hand ensure respect for final judicial decisions, and on the other hand consider the principle of the child's best interests and strike an appropriate balance between the two, precisely in order to implement the above-mentioned human rights. As also noted by the ECtHR, in such proceedings it is necessary to draw special attention to the balance between the public interest, which lies in respect for the final judicial decision, which is assumed to protect the principle of the child's best interests, and the interests of both parents and especially the actual, even newly-emerged, interests of the child, which may in exceptional circumstances prevail. Accordingly, in exceptional circumstances there may be a collision between respect for a final judicial decision and the principle of the child's best interests. In the event of such, the criminal court should, depending on the content of the constitutionally protected values and circumstances of the individual case, assess which constitutionally protected value should be assigned the higher weight. A position of the court that following such assessment would be contrary to the child's best interests entails a violation of the child's right referred to in the first paragraph of Article 56 of the Constitution. Such right corresponds to the parent's duty determined by the first paragraph of Article 54 of the Constitution to act in accordance with this right in each individual case. Thus, a parent who, in accordance with the circumstances of the individual case, also acted in such manner cannot be assessed as having committed unlawful conduct, the sanctioning of which is precisely the purpose of the criminal offence determined in the first paragraph of

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24 Cf. Judgment in the case *Plaza v. Poland*, dated 25 January 2011, paragraph 86 of the reasoning.

25 Cf. Judgment in the case *Pascal v. Romania*, dated 17 April 2012, paragraphs 70 and 88 of the reasoning. When assessing the alleged violation of Article 8 of the ECHR, the ECtHR did not deny the weight of the reasoning of the criminal court that the mother, whose conduct was allegedly the main reason for the unsuccessful execution of the decision, acted with concern for the best interests of her child. Regarding such, it emphasized that the conduct of the child's mother was such (also) due to the child's rejection of contact with the applicant, which also for the Romanian criminal court was allegedly the main reason for rejecting the applicant's criminal complaint. See paragraph 79 of the reasoning of the judgment in this case.

Article 200 of the CC.<sup>26</sup> Therefore, in the circumstances of the case at issue, the Constitutional Court assessed the complainant's allegation of a violation of the first paragraph of Article 54 of the Constitution precisely from the mentioned viewpoints.

#### B – IV

22. In the challenged judgments the court of first instance and the court of second instance assigned absolute validity to the final judicial decision by which the mother of the complainant's son was granted custody. Such a position was explicitly confirmed also by the Supreme Court, which emphasized that all conduct contrary to the final judicial decision is contrary to the child's interests and consequently also materially unlawful. Therefore, this allegedly applies without exception also to all conduct which would, in accordance with a careful assessment, later be proven to entail precisely respect for the child's best interests as a human right, which in the circumstances at that time was different from that protected by the final judicial decision. Such views of the courts are, therefore, in and of themselves inconsistent with the right determined in the first paragraph of Article 56 of the Constitution, which may entail a violation of the right determined by the first paragraph of Article 54 of the Constitution in criminal proceedings. By attributing unlawfulness to conduct that cannot be unlawful, if the mentioned rights are being respected, they might consequently also violate the right determined by the first paragraph of Article 28 of the Constitution. In the circumstances of the case at issue, for the reasons set out below, these views also *de facto* entail a violation of the complainant's right referred to in the first paragraph of Article 54 of the Constitution and consequently also a violation of the right referred to in the first paragraph of Article 28 of the Constitution.
23. As follows from the examined case files, during the time period when the complainant is alleged to have committed a criminal offence, an eleven-year old child clearly expressed his own will with regard to whom he would like to live with, and through adults, including ones who have been appointed trusted persons [Slo: *zaupne osebe*] precisely in order to ensure respect for his interests, tried to achieve that he was to live with his father instead of his mother. It follows from the information in the case file that on 7 September 2005 the child resolutely opposed being in his mother's custody any further and that he explicitly demanded that the complainant (his father) not return him to his mother. During the events that took place the next day, i.e. on 8 September 2005, at the school the child attended, also the police did not use coercive measures to execute the final judgment dated 24 May 2004 precisely due to respect for the child's best interests. By his conduct, which includes demanding that the school not release the child to his mother, the complainant in fact expressed his opposition to forcing an eleven-year old child to do something that he allegedly strongly opposed by his own will and allegedly did not want. As regards his age and maturity, the

26 The CC was in force at the time when the complainant allegedly committed the criminal offence, which in the current Criminal Code (Official Gazette RS, No. 50/12 – official consolidated text) is substantively the same criminal offence as determined in the first paragraph of Article 190.

eleven-year old child was capable of expressing his will on the essential circumstances regarding custody, which was also held by the courts. The courts took the view that the complainant should have convinced his son, in a manner understandable to him, to respect the final judgment until a different court decision was issued, which generally can be agreed with. However, it also needs to be considered that such conduct, bearing in mind the expressed persistence of the child, could only be achieved by force. Such coercive measures would formally ensure respect for the final judgment; however, it could have had severe consequences regarding the child's development in the circumstances and with regard to his traumatic experiences and traumatic comprehension of the environment, which was not in favour of respecting his will.

24. In addition, the complainant pursued the legal path to securing the child's rights already the same day, i.e. on 8 September 2005,<sup>27</sup> in order to achieve a change in the final Judgment of the District Court in Ljubljana, dated 24 May 2004. The fact is that instead of proceeding quickly, the competent court concluded only on 22 May 2006 by Decision No. P 3558/2005 that the complainant was thereby temporarily granted custody of his minor son. Nevertheless, by the final judgment of conviction the complainant allegedly committed a criminal offence from the day the child came to him in the company of a person whom the child trusted, to the day the mentioned temporary injunction was issued. After the issuance of the temporary injunction, the proceedings, which were concluded by a final judgment according to which the complainant was granted custody of his minor son, had lasted quite a few years. It is possible to concur with the complainant that these proceedings, ever since the decision-making regarding [i.e. the filing of] the motion for a temporary injunction, lasted unacceptably long, which was also clearly contrary to the principle of the child's best interests. On the one hand, the complainant was facing an allegation of unlawful conduct – in the Judgment of the Supreme Court he is even alleged to have been uncompromising because he allegedly did not comply with the execution proceedings for the execution of the final judgment – while on the other hand, the competent court decided upon his motion, which should have been decided on especially quickly, only after nearly nine months. All this despite the fact that it is precisely the possibility of the issuance of a temporary injunction that presents an effective means by which the child's best interests should immediately be protected in an individual case. The courts that decided on the complainant's criminal liability were also informed of all these circumstances.
25. The circumstance that in the situation at issue indicated respect for the requirement to ensure the child's best interests was the clearly and unambiguously expressed will of an eleven-year old child that, in light of the circumstances of the case, he does not want to return to his mother and wants instead to live with his father. It is indeed within the jurisdiction of civil courts to assess in each individual case whether such will is *de facto* in accordance with the child's best interests. In this case, the courts assessed that respect

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27 He brought an action seeking custody of both his children and *inter alia* proposed the issuance of a temporary injunction granting temporary custody of his son.

for the child's wish for the complainant to have custody of him is in accordance with the child's best interests. In the criminal proceedings the courts were aware of these facts because the summary charge against the complainant was not submitted before the issuance of the temporary injunction by which he was granted custody of his minor son. When assessing the complainant's unlawful conduct, these circumstances were important, especially given the fact that the complainant is alleged to have committed the criminal offence during a time period when the competent court, in spite of the complainant's repeated motions to expedite the proceedings, did not decide on the proposed temporary injunction. Nevertheless, in criminal proceedings the courts did not pay adequate attention thereto precisely because they *a priori* formalistically took the view that the final judgment of 2004 was absolutely valid and that compliance with the principle of the child's best interests, which was allegedly already established by the final judgment of 2004, cannot lead to any different conclusion.

26. If in the criminal proceedings the courts had considered the clearly expressed will of the minor son, who was, in accordance with his age and maturity, capable of making it clear that he did not want to return to his mother, if they had considered all the specific circumstances that were evident from both the criminal and civil case files, they would have had to conclude that the complainant had acted in the child's best interests, which is also his duty in accordance with the first paragraph of Article 54 of the Constitution, and these interests are also protected thereby. Regarding such, it is not insignificant that the state authorities, despite the fact that they are primarily bound by the obligation to respect final judgments, discontinued the execution of such precisely in order to protect the child's interests. Namely, on 8 September 2005 the police did not use coercive measures to execute the valid final judgment because at that time it assessed that priority should be given to the child's interests. The same conduct cannot, on the one hand, be desirable conduct of the state authorities to respect the child's best interests in the given case, and on the other hand unlawful conduct the complainant is alleged to have committed as an individual. When and as long as there existed a final judicial decision, it equally bound all state authorities as well as all individuals, thus also the child's parents and thus also the complainant. If justified reasons prevented even the authorities competent to execute the final Judgment from doing so, these also existed as regards the complainant and he was thereby imposed the duty to act in accordance with the first paragraph of Article 54 of the Constitution.
27. In the circumstances of the case at issue, failure to comply with the child's best interests (the first paragraph of Article 56 of the Constitution), in the light of the above-mentioned, led to a violation of the complainant's right referred to in the first paragraph of Article 54 of the Constitution and consequently also to a violation of the right referred to in the first paragraph of Article 28 of the Constitution. Therefore, the Constitutional Court abrogated the challenged judgments (point 1 of the operative provisions). However, the case was not remanded to the court of first instance for new adjudication because, based on the first paragraph of Article 60 of the CCA, the Constitutional Court itself ruled on the charge against the complainant.

## B – V

28. If the Constitutional Court abrogates challenged judgments, on the basis of the first paragraph of Article 60 of the CCA it may also decide on a disputed right if such is necessary in order to remedy consequences that have already occurred on the basis of an individual act, or if such is required by the nature of the constitutional right or freedom, and if such decision can be reached on the basis of information contained in the case file. On such basis, the Constitutional Court may also itself decide on the justification of the charge brought against the complainant, if the mentioned conditions have been met. The Constitutional Court has hitherto acted in such a manner particularly in cases when it was evident from the reasons for the determination of the violation of a human right by the abrogated judgments that in accordance with precisely this human right it is admissible to adopt precisely the opposite decision from the one adopted by the courts.<sup>28</sup>
29. The Constitutional Court has a sufficient amount of information in the case file in order to decide on the justification of the charge brought against the complainant, and it is bound by the state of the facts established by the competent courts, however, the justification of the charge depends on the question of whether in accordance with an interpretation of the first paragraph of Article 200 of the CC consistent with the Constitution the complainant can be assessed as having committed unlawful conduct in the material sense. If such cannot be attributed to his conduct, conviction due to the alleged criminal offence would entail being convicted for something that is not punishable by law. Therefore, it would entail a violation of the first paragraph of Article 28 of the Constitution. The criminal offence the complainant was charged with was allegedly committed already eight years ago. Remanding the case to the competent court for new adjudication would entail for the complainant the renewed initiation of criminal proceedings after a long period of time. Therefore, all the conditions referred to in the first paragraph of Article 60 of the CCA for a decision on the justification of the charge in this case are fulfilled.<sup>29</sup>
30. At the time when the alleged criminal offence was allegedly committed, the criminal offence of abducting a minor was determined by the first paragraph of Article 200 of the CC. The first paragraph of Article 200 of the CC determined: "Whoever unlawfully abducts a minor from his parent, adoptive parent, guardian, institution, or a person to whom the minor has been entrusted, or whoever detains a minor or prevents him from being with a person who has rights in respect of the minor, or whoever malevolently prevents the implementation of an enforceable judgment referring to a minor, shall be punished by a fine or sentenced to imprisonment for not more than one year." As follows from the mentioned provision, the

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28 *Cf.*, for example, Decision of the Constitutional Court No. Up-332/98, dated 18 April 2002 (Official Gazette RS, No. 39/02, and OdlUS XI, 117); similar also in Decisions of the Constitutional Court No. Up-50/99, dated 14 December 2000 (Official Gazette RS, No. 1/01, and OdlUS IX, 310) and No. Up-406/05, dated 12 April 2007 (Official Gazette RS, No. 35/07, and OdlUS XVI, 51).

29 Having established a violation of the first paragraph of Article 28 of the Constitution, it acted in such a manner also in Decision No. Up-332/98.

legislature considered that it is precisely unlawfulness that is a special element of this criminal offence.<sup>30</sup>

31. In cases when a final judicial decision on the question of which parent is granted custody of a child exists, conduct contrary to such decision generally establishes unlawfulness in the sense of the first paragraph of Article 200 of the CC. However, it does not establish it automatically and absolutely because such would in the circumstances of an individual case entail a denial of respect for the principle of the child's best interests (the first paragraph of Article 56 of the Constitution), which corresponds on the side of the parents to their duty to act (the first paragraph of Article 54 of the Constitution) in accordance with such principle (paragraphs 20 and 21 of the reasoning of this decision). In order to determine that a parent's conduct is unlawful, it is therefore necessary to carefully consider all the relevant circumstances. Unlawfulness cannot be already assumed on the basis of the existence of a final judicial decision requiring the parent to act in accordance therewith. Changed circumstances on the side of one or both of the parents after the final judicial decision on the custody of the child, as well as the development of the child's capacity to understand the current situation and taking into account his will, as long as such is consistent with the principle of the child's best interests, may, depending on the circumstances of an individual case, exclude unlawfulness in the parent's conduct in the material sense. The same holds in the case at issue when the complainant acted formally in contravention to the enforceable judicial decision, but did everything he could to change it (by bringing an action with a request for a change in the custody of his son and a motion for a temporary injunction on this issue already the same day after the events at the elementary school on 8 September 2005 and immediately the next day after his son came to him and did not want to return to his mother). Thereby, it must be presupposed, according to the nature of the matter, that not only the formation of an action and a motion for a temporary injunction and the lodging of such, but also judicial deciding on the merits thereof, take an appropriate period of time. However, the court must decide on a motion for a temporary injunction as soon as possible. The court's inadmissibly long delay in deciding on the motion for a temporary injunction in the complainant's case was concurrently changed by the charge into the duration of the alleged criminal offence. While the court did not decide for more than eight months on the motion for a temporary injunction by which a change in the custody of the child was requested, the execution proceedings regarding the final judicial decision, which could have been changed by the temporary injunction and which subsequently in fact changed so as to grant the complainant custody of the child, had already been initiated. Nevertheless, it is above all important that the child's best interests in circumstances such as in the case at issue outweigh the importance of respect for a final judicial decision and the execution thereof.

30 See M. Deisinger, *Kazenski zakon s komentarjem – Posebni del* [Criminal Code with Commentary – Special Part], GV Založba, Ljubljana 2002, p. 320.

32. The complainant acted as a parent in accordance with his duties towards his child, as respect for the judicial decision, even though he deemed that it needed to be changed, could only be achieved by forcing his son, who was capable, in accordance with his age, of understanding the circumstances in which a decision regarding him was made (this finding follows from Order No. P 3558/2005 and Judgment No. II K 99/2007, dated 20 February 2009), to do something that he in fact strongly opposed. Therefore, it also cannot be alleged that the complainant, despite the threat of a significant fine for [not respecting] the execution of the final judicial decision (Order of the Local Court in Ljubljana No. In 2005/01241-3, dated 3 October 2005), did not force his son to return to his mother. Forcing the child in such circumstances would entail conduct that is not only a violation of the child's personal dignity (Article 34 of the Constitution) at his age and maturity (Paragraph 16 of the reasoning of this decision), but also precisely contrary to the child's best interests. Such could further negatively affect the child's psychological development, which due to all the circumstances was already affected, which is also evident from the intensity of the child's reaction to the events on 8 September 2005. Forcing a child, physically or mentally, would result in a conflict with the complainant's duties imposed by the first paragraph of Article 54 of the Constitution. Therefore, the complainant's conduct cannot be held to be unlawful.
33. Final judicial decisions must be respected by everyone, first and foremost by the state authorities. At the events on 8 September 2005, the competent state authorities held that forcing the child to return to his mother would be contrary to respect for the child's best interests. It is not possible to assess that such conduct of the competent authorities was on the one hand correct and in accordance with the principle of the child's best interests, and at the same time declare that the complainant should have ignored the principle of the child's best interests in order to respect the same final judicial decision. Therefore, to reiterate, such conduct of the complainant cannot be held to be unlawful.
34. Given the above, the conduct of the complainant cannot be assessed as having been unlawful. Because unlawfulness is an essential element of the criminal offence referred to in the first paragraph of Article 200 of the CC, the alleged conduct of the complainant does not have all the elements of a criminal offence. The complainant's conviction for such conduct would entail that the complainant was convicted for a criminal offence that at the time when it was committed was not punishable. Therefore, this would entail a violation of the first paragraph of Article 28 of the Constitution. On the basis of point 1 of Article 358 of the Criminal Procedure Act (hereinafter referred to as the CrPA), a defendant is acquitted of a charge if the alleged conduct is not punishable. In accordance therewith, the Constitutional Court decided as follows from point 2 of the operative provisions of this decision. Because the Constitutional Court itself decided on the case and acquitted the complainant, it also had to be decided in accordance with the first paragraph of Article 96 of the CrPA that the costs of the criminal proceedings are charged to the budget (Point 3 of the operative provisions).

## C

35. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 and the first paragraph of Article 60 of the CCA in conjunction with point 1 of Article 358 and the first paragraph of Article 96 of the CrPA, composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, and Dr Jadranka Sovdat. Judges Dr Dunja Jadek Pensa and Jan Zobec were disqualified from deciding in the case. The decision was reached by six votes against one; Judge Klampfer voted against.

*Dr Ernest Petrič*  
*President*

**DECISION**

At a session held on 20 April 2006, in proceedings to review constitutionality initiated upon the petition of the company Petrol, Slovenska energetska družba [Petrol, Slovene Energy Company], d. d., Ljubljana, Tibor Feher, s. p., Lendava, and others, represented by Mitja Ulčar, attorney in Kranj, and the company Poslovni sistem Mercator [Mercator Business System], d. d., Ljubljana, represented by legal representative Žiga Debeljak, the Constitutional Court

decided as follows:

1. The first paragraph of Article 2 of the Consumer Protection Act (Official Gazette RS, Nos. 20/98, 25/98 – corr., 110/02, 14/03 – official consolidated text, 51/04, and 98/04 – official consolidated text) is not inconsistent with the Constitution.
2. The Consumer Protection Act is inconsistent with the Constitution, as it does not determine a time limit for the adjustment of the business operations of business entities. The National Assembly must remedy the established unconstitutionality within a time limit of six months from the publication of this Decision in the Official Gazette of the Republic of Slovenia.
3. The application of Order of the Constitutional Court No. U-I-218/04, dated 13 October 2004 (Official Gazette RS, No. 117/04), is extended until the expiry of the time limit referred to in the preceding point.

*Reasoning***A**

1. The petitioners challenge the first paragraph of Article 2 of the Consumer Protection Act (hereinafter referred to as the CoPA)<sup>1</sup> in the part in which it imposes on compa-

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1 The matter concerns Article 2 of the Act Amending the Consumer Protection Act (Official Gazette RS, No. 51/04 – hereinafter referred to as the CoPA-B).

nies the obligation,<sup>2</sup> in the areas where the autochthonous Italian and Hungarian national communities reside, to also conduct business with consumers in the language of the respective national community. They allege that in these defined areas the challenged provision imposes on them the obligation (under penalty of a high fine) to conduct business with consumers bilingually, which allegedly entails an inadmissible limitation of free economic initiative and an unjustified interference with the right determined by Article 74 of the Constitution. They allege that in their view no reasons exist that would justify an interference with the right to free economic initiative. The interference allegedly does not ensure the two national communities protection of the constitutional right to use one's own language, as the Constitution does not explicitly require that all legal entities and natural persons that trade in goods and services with consumers in the areas in which the autochthonous national communities reside conduct such business bilingually. Furthermore, they are of the opinion that Article 11 of the Constitution – which determines that in those municipalities where the Italian and Hungarian national communities reside, in addition to Slovene, Italian or Hungarian are also official languages – requires only state authorities, other entities of public law, and bearers of public authority to conduct business with members of the autochthonous national communities in their languages, but not also individuals and companies. They allege that the interference is not necessary due to a public interest. The challenged provision is allegedly also inconsistent with the second paragraph of Article 14 in relation to the third paragraph of Article 74 of the Constitution, because it puts companies that conduct business in the areas in which the two autochthonous national communities reside in an unequal position compared to companies that do not conduct business in these markets. The former must namely conduct their business bilingually in these markets. In these areas, the [mentioned] provision allegedly only applies to those companies that conduct business directly with consumers. Moreover, they allege that when determining the new obligation or the new conditions for conducting business, the legislature did not determine an appropriate time limit for the adjustment of business operations to the new requirements, as the new conditions entered into force the day after the CoPA-B was published in the Official Gazette. Such conduct of the legislature allegedly violated the principle of trust in the law determined by Article 2 of the Constitution. The petitioners demonstrate their legal interest for filing the petitions by alleging that they have offices in the areas where the two autochthonous national communities reside.

2. In its reply, the National Assembly argues that the challenged provision was included in the text of the draft act on the basis of an amendment tabled during the legislative procedure on the grounds that the obligation to adopt such regulation follows from Article 11 of the Constitution. It draws attention to the connectedness of the challenged provision with Article 3 of the Public Use of the Slovene Language Act (Official Gazette RS, No. 86/04 – hereinafter referred to as the PUSLA), which alleg-

<sup>2</sup> In conformity with the third paragraph of Article 1 of the CoPA, a legal entity or natural person carrying out for-profit activities, regardless of its legal form or ownership, is considered a company.

edly is a consequence of the efforts of the two deputies of the national communities to expand the actual possibilities to use their respective languages in the areas where the two communities reside. The National Assembly is of the opinion that the challenged regulation is in itself not inconsistent with the Constitution, although it would need to be legally defined in more detail and the rights and obligations that refer to individuals and legal entities that operate in the areas where the two national communities reside would need to be clearly determined, and an appropriately long transitional period for adjusting to the new conditions for operating would need to be determined upon the introduction of the new obligations. It concurs that what is at issue is an interference with the right to free economic initiative; however, it is of the opinion that it is in conformity with the Constitution and thus does not entail a violation of Article 74 of the Constitution. It rejects the allegation that the second paragraph of Article 14 of the Constitution is thereby violated. Finally, it states that a draft law to amend the challenged regulation of CoPA has already been submitted to the legislative procedure; however, a debate on such was postponed with the argument that the final decision of the Constitutional Court should first be adopted.

3. In its [submitted] opinion, the Government explains the reasons due to which it proposed the adoption of the CoPA-B. According to the Government, the challenged provision, which was not adopted upon its proposal, turned out to be disputable and ambiguous, and subject to different interpretations.
4. The municipal councils of the municipalities of Izola, Koper, Piran, and Lendava submitted applications to the Constitutional Court in which they express their disagreement with the allegations made in the petitions and with the decision of the Constitutional Court to temporarily suspend the implementation of the challenged provision. They are of the opinion that from Article 11 of the Constitution there follows the obligation to conduct business with consumers in the territories of those municipalities in which the autochthonous Italian and Hungarian national communities reside also in the language of the respective national community.

#### **B – I**

5. By Order No. U-I-218/04, dated 13 October 2004, the Constitutional Court suspended, on the basis of Article 39 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), the implementation of the challenged provision until the final decision is adopted. Due to joint consideration and decision-making, it joined all the petitions and accepted them for consideration. Since the conditions determined by the fourth paragraph of Article 26 of the CCA were fulfilled, it proceeded to decide on the merits of the case.

#### **B – II**

6. The petitioners challenge the first paragraph of Article 2 of the CoPA in the part in which it obliges natural persons and legal entities that carry out for-profit activities to also conduct business with consumers in the areas where the autochthonous Italian and Hungarian national communities reside in the language of the respective

national community. They allege that by the challenged provision, the legislature interfered with the right to free economic initiative determined by Article 74 of the Constitution. However, not every regulation by the legislature on how business activities shall be carried out entails an interference with the right determined by the first paragraph of Article 74 of the Constitution.

7. The first paragraph of Article 74 of the Constitution determines that free economic initiative shall be guaranteed. However, the Constitutional Court has already stressed numerous times that an extreme liberalistic conception of free enterprise would not be in conformity with the Constitution. It follows already from the first sentence of the second paragraph of Article 74 of the Constitution that the conditions for establishing commercial organisations are established by law, while the second sentence determines that commercial activities may not be pursued in a manner contrary to the public interest. In addition, the second paragraph of Article 15 of the Constitution vests in the legislature the authority to regulate by law the manner in which human rights are exercised also when this is not envisaged already by the Constitution itself but is necessary due to the nature of an individual right or freedom.
8. The right determined by Article 74 of the Constitution is one of the human rights that cannot be exercised directly on the basis of the Constitution. Therefore, the legislature must determine legal forms [of entities] for carrying out business activities (for which it is authorised by the first sentence of the second paragraph of Article 74 of the Constitution) and, with respect to the type of business activity, the conditions for carrying out such as well. In conformity with the above, the CoPA determines the rules that business entities must observe when offering, selling, and [carrying out] other forms of marketing of goods and services, and determines the duty of state authorities and other entities to guarantee such rights (Article 1). One such rule is also the provision regarding the language that such companies must use when conducting business with consumers. In this respect, the question is raised whether the legislature was entitled, on the basis of the authorisation determined by the second paragraph of Article 15 of the Constitution, to also prescribe the language of the respective national community as an [obligatory] language for conducting business.
9. The issue of the use of a particular language in conducting business with consumers is related to constitutional issues relating to the protection of the autochthonous Italian and Hungarian national communities. In its reply the National Assembly asserted that the determination of the obligation to conduct business with consumers also in the language of the respective national community follows from Article 11 of the Constitution. According to this provision, the official language in Slovenia is Slovene, while in those municipalities where the Italian or Hungarian national communities reside, Italian or Hungarian, respectively, is also an official language. From this provision follows the duty of state authorities, other bodies that perform public services, and local community bodies to conduct business and perform official activities in Slovene, and in those municipalities where the Italian or Hungarian national communities reside, also in Italian or Hungarian. What indirectly follows from this provision is also the right of individuals to use the Slovene language before state

authorities and authorities performing public services, and in the mentioned territories also the Italian or Hungarian language.<sup>3</sup> With regard to the above, the obligation to conduct business with consumers also in the language of the respective national community cannot be substantiated by Article 11 of the Constitution.

10. Democratic states pay special attention to the protection of national minorities. The protection of national minorities is ensured in two forms: the first form entails the prohibition against discrimination on the basis of national, linguistic, religious, and racial affiliation, and the guarantee of special rights that only pertain to a minority or its members. The second form of protection is in theory known as the positive protection of minorities.<sup>4</sup> Positive protection entails so-called positive discrimination,<sup>5</sup> since the members of a minority are ensured rights that the members of the majority do not have. Such measures entail a high degree of protection of national minorities that is recognised to them by the majority, and which thereby emphasise the democratic character of the society.
11. In international law, the rights of national minorities are regulated by bilateral agreements and international conventions. The position of the Italian minority or national community was regulated after the Second World War by the Special Statute of the Free Territory of Trieste Annexed to the London Memorandum of Understanding between the Governments of Italy, the United Kingdom and Northern Ireland, the United States, and Yugoslavia (Official Gazette FPRY, MP, No. 6/54). The Special Statute ceased to be in force when the Treaty between the SFRY and the Italian Republic signed in Osimo (Official Gazette SFRY, MP, No. 1/77, Act on the Notification of Succession, Official Gazette RS, No. 40/92, MP, No. 11/92 – hereinafter referred to as the Treaty of Osimo) entered into force. Although the Special Statute ceased to be applicable when the Treaty of Osimo entered into force, it remained a standard for ensuring the rights of the two national communities in the neighbouring countries. The position of the Hungarian national community in Slovenia is regulated by the Agreement on Ensuring the Special Rights of the Slovene National Community in the Republic of Hungary and of the Hungarian National Community in the Republic of Slovenia, signed on 6 November 1992 and ratified by law on 26 March 1993 (Official Gazette RS, No. 23/93, MP, No. 6/93). Article 7 of this Agreement determines that the contracting parties assumed the obligation to consider the special interests of minorities in their spatial and economic development plans, and to ensure the economic and social development of the areas in which the autochthonous minorities reside so as to enable the social and economic equality of the minorities.

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3 T. Jerovšek in: L. Šturm (Ed.) *et al.*, *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, pp. 160–161.

4 This is an expression established in recent theory and case law, American in particular (“affirmative action”). See Decision of the Constitutional Court No. U-I-416/98, dated 22 March 2001 (Official Gazette RS, No. 28/01, and OdlUS X, 55).

5 See Decision of the Constitutional Court No. U-I-283/94, dated 12 February 1998 (Official Gazette RS, No. 20/98, and OdlUS VII, 26, Paragraph 17 of the reasoning). See also B. Flander, *Pozitivna diskriminacija* [Positive Discrimination], Fakulteta za družbene vede, Ljubljana 2004.

12. The rights of the autochthonous Italian and Hungarian national communities are regulated by Articles 5 and 64 of the Constitution. The first paragraph of Article 5 of the Constitution determines, *inter alia*, that in its own territory the state protects and guarantees the rights of the autochthonous Italian and Hungarian national communities. Article 64 of the Constitution determines special rights of the autochthonous Italian and Hungarian national communities in Slovenia. The Constitution thus protects the autochthonous Italian and Hungarian national communities and their members in two different ways. On the one hand, it ensures everyone, i.e. including them, equal human rights and fundamental freedoms irrespective of a person's nationality (the first paragraph of Article 14), and, on the other hand, it also grants them certain special rights (Article 64). Such institutional framework is a prerequisite for the preservation of the identity and for the equal integration of both autochthonous national communities and of their members into social life. In regulating the special position and special rights of the autochthonous national communities, the legislature is not limited by the principle of equality, which with regard to the regulation of human rights and fundamental freedoms prohibits any discrimination based on nationality or any other circumstance determined by the first paragraph of Article 14 of the Constitution. The Constitution allows the legislature to ensure the two autochthonous national communities and their members special (additional) protection (Decisions of the Constitutional Court No. U-I-283/94, dated 12 February 1998, Official Gazette RS, No. 20/98, and OdlUS VII, 26; No. U-I-94/96, dated 22 October 1998, Official Gazette RS, No. 77/98, and OdlUS VII, 196; No. U-I-296/94, dated 28 January 1999, Official Gazette RS, No. 14/99, and OdlUS VIII, 21). By the challenged provision, the legislature ensured members of the national communities such special protection. In order for the members of [the mentioned] minorities to be able to effectively exercise their rights that they have as consumers, they namely must have the possibility to use the language that they speak and understand best. In such context, the fact that the right granted by the challenged provision to the members of [such] minorities is not explicitly envisaged by Article 64 of the Constitution is not decisive. This right is based on the obligation of the state determined by Article 5 of the Constitution to protect and guarantee the rights of national minorities in its territory. The purpose of the challenged provision is also to achieve a high level of protection of the autochthonous national communities and their members. The positive protection that the majority nation grants national, ethnic, linguistic, and other communities (minorities) namely reflects the readiness of the state to foster and exercise the rights of the mentioned communities as an integral part of the democratic development of the entire state (as the Constitutional Court stated in Decision No. U-I-416/98). Such treatment is also in conformity with international instruments, in particular with the Framework Convention for the Protection of National Minorities (Official Gazette RS, No. 20/98, MP, No. 4/98 – hereinafter referred to as the FCPNM), which in Article 4 contains the commitment of the signatory states to ensure members of national minorities the right to equality before the law and to adopt, in all areas of economic, social, political, and cultural life, appropriate measures for accelerating full and ef

fective equality between the members of the national minority and the members of the majority nation, with regard to which such measures are not deemed to entail discriminatory actions. Also relevant to the case at issue is the European Charter for Regional or Minority Languages (Official Gazette RS, No. 69/2000, MP, No. 17/2000), which in Article 13 contains the commitment of the signatory states regarding the use of minority languages in the field of economic and social life.

13. In the areas where these two autochthonous national communities reside, the Constitution ensures their members a high degree of protection of their rights. In the field of consumer protection, the provisions of the CoPA on the use of a language serve this purpose. The regulation of the public use of a language also extends to fields that traditionally were not the subject of legislative regulation. The PUSLA regulates the issue of the use of a language or languages also in the field of conducting business with customers. It follows from the provisions of the PUSLA that in the territories of the municipalities where the Italian and Hungarian national communities reside, the public use of Italian or Hungarian as official languages is ensured in the same manner as this Act regulates the public use of Slovene, and in conformity with the provisions of individual acts. Hence, in the area where the two autochthonous national communities reside, the PUSLA prescribes that business with customers shall be conducted in Slovene and in the language of the respective national community.
14. With regard to the above, by determining that in the areas where the two autochthonous national communities reside, companies must also conduct their business with consumers in the language of the [respective] national community, the legislature acted in conformity with the authorisation determined by the second paragraph of Article 15 of the Constitution. Therefore, what is at issue is not an interference with the right to free economic initiative determined by the first paragraph of Article 74 of the Constitution, which the Constitutional Court would have to assess in accordance with the strict test of proportionality, nor is it an inconsistency with the mentioned constitutional provision.
15. The petitioners also allege that the challenged provision is inconsistent with the second paragraph of Article 14 of the Constitution in relation to the third paragraph of Article 74 of the Constitution. They substantiate such inconsistency by alleging that due to higher operating costs caused by the challenged regulation, companies that conduct business with consumers in the areas where the two autochthonous national communities reside are in an unequal position compared with companies that conduct business outside these areas. The petitioners are of the opinion that due to the small size of the mentioned two areas they do not represent the "relevant" market, but only an "administrative area". Thus, what is at issue allegedly concerns the determination of different rules for conducting business with consumers in the same market, without there existing a sound reason for such differentiation. Due to the above, the companies that will have to bear additional costs caused by providing business operations in Italian or Hungarian will have more difficulties competing with the other companies that conduct business in the same market and that will not [have to] bear such costs. The petitioners allege an inconsistency of the challenged provision with the second

paragraph of Article 14 of the Constitution also due to the fact that the obligation to conduct business in both languages was allegedly only imposed on the companies that conduct business with consumers, but not also on other [types of] companies.

16. The principle of equality before the law (the second paragraph of Article 14 of the Constitution) cannot be understood as the simple general equality of everyone. In accordance with the established constitutional case law, the principle of equality before the law does not mean that a regulation – where the circumstances determined by the first paragraph of Article 14 of the Constitution are not the basis for a different regulation – should not regulate equal positions differently, but that it should not do such arbitrarily, without objective and reasonable grounds.
17. In regulating business with consumers, the legislature determined that companies that conduct business in the areas of municipalities in which the autochthonous Italian and Hungarian national communities reside are required to conduct business with consumers in the Slovene language and in the language of the respective national community whereas outside these areas companies are required to conduct business with consumers only in Slovene. The area in which a company conducts business is thus the differentiating criterion. As stated in Paragraph 12 of the reasoning, a high level of protection of national minorities, which is a prerequisite for the preservation of the identity and for the equal integration of both autochthonous national communities and their members into the social (thus also economic) life, entails reasonable grounds for a special regulation on conducting business with consumers in the mentioned areas. It is not possible to argue that the legislature acted arbitrarily as it wanted to protect, by the challenged regulation, the interests of the autochthonous Italian and Hungarian national communities. Consequently, since the legislature had a sound and concrete reason for differentiation, the challenged provision is not inconsistent with the second paragraph of Article 14 of the Constitution.
18. Likewise, the legislature had reasonable grounds to only introduce the obligation to conduct business in both languages as regards companies that conduct business with consumers, but not also for other companies. The reason for such regulation follows from the purpose of the CoPA. The purpose of this Act is consumer protection. As consumers in the areas where the two national communities reside also include members of national minorities, they can only effectively exercise their rights if in doing so they can use the language that they know and understand best. Therefore, the legislature had reasonable grounds to adopt a regulation in accordance with which the duty to conduct business in Slovene and in the language of the respective national community only extends to those companies that conduct business with consumers. With regard to the above, the challenged provision is not inconsistent with the second paragraph of Article 14 of the Constitution.
19. The challenged regulation determines new conditions for conducting business, with regard to which the legislature should have given the affected business entities the possibility to prepare for the new regulation. The Constitutional Court thus determined a time limit by which the legislature must remedy the established inconsistency. In such manner, the affected business entities will be provided the possibility to be

able to adjust their operations to the requirement determined by the first paragraph of Article 2 of the CoPA. In order for such to be effectively carried out, the Constitutional Court had to extend, on the basis of the second paragraph of Article 40 of the CCA, the applicability of the temporary suspension of the challenged provision.

**C**

- 20.** The Constitutional Court adopted this Decision on the basis of Article 48 and the second paragraph of Article 40 of the CCA, composed of: Dr Janez Čebulj, President, and Judges Dr Zvonko Fišer, Lojze Janko, Milojka Modrijan, Dr Ciril Ribičič, Dr Mirjam Škrk, Jože Tratnik, and Dr Dragica Wedam Lukić. The decision was reached unanimously.

*Dr Janez Čebulj*  
*President*

**DECISION**

At a session held on 7 April 2011, in the procedure for examining the petitions of Numizmatično društvo Slovenije [the Slovene Numismatic Society] and Urban Mate, both Ljubljana, represented by the law firm Breclj, Korošec, Mate, Zupančič, d. o. o. – o. p., Ljubljana, and in proceedings to review constitutionality initiated upon the petition of the sole proprietor Janez Švajncer, s. p., Logatec, and Urban Mate, the Constitutional Court

*decided as follows:*

1. Points 2 and 3 of Article 3 of the Cultural Heritage Protection Act (Official Gazette RS, Nos. 16/08, 123/08, and 8/11) are not inconsistent with the Constitution.
2. The first paragraph of Article 6, Article 53, the tenth indent of the first paragraph of Article 127, and Article 135 of the Cultural Heritage Protection Act are inconsistent with the Constitution.
3. The National Assembly of the Republic of Slovenia must remedy the unconstitutionality established in the preceding Point of the operative provisions within one year after the publication of this Decision in the Official Gazette of the Republic of Slovenia.
4. The implementation of the tenth indent of the first paragraph of Article 127 of the Cultural Heritage Protection Act is suspended until the unconstitutionality established in Point 2 of these operative provisions is remedied.
5. The petition to initiate proceedings to review the constitutionality and legality of Instruction No. 2, dated 24 March 2009, is rejected.
6. The petition of the Slovene Numismatic Society to initiate proceedings to review the constitutionality of Article 3, the first paragraph of Article 6, Article 53, the tenth indent of the first paragraph of Article 127, the second and third paragraphs of Article 127, and Article 135 of the Protection of Cultural Heritage Act is rejected.

*Reasoning***A**

1. The petitioners challenge points 2 and 3 of Article 3, the first paragraph of Article

6, Article 53, the tenth indent of the first paragraph of Article 127, the second and third paragraphs of Article 127, and Article 135 of the Cultural Heritage Protection Act (hereinafter referred to as the CHPA-1) because they are allegedly inconsistent with Articles 2, 8, 27, 28, 33, 42, 59, 67, 69, 70, 74, and 155 of the Constitution. They argue that the challenged regulation is also inconsistent with Article 1 of the First Protocol to 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 First Protocol to the ECHR) and the legal order of the European Union (hereinafter referred to as the EU), i.e. Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods (OJ L 395, 31.12.1992, pp. 1–5), which was replaced by Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.02.2009, pp. 1–7 (hereinafter referred to as Council Regulation No. 116/2009). The first petitioner is a sole proprietor who manages the privately owned Logatec War Museum and has been issued a licence from the Ministry of Culture to store, preserve, exhibit, and present movable cultural heritage that he has collected himself; he has also accumulated an extensive numismatic collection. The other petitioners are the Slovene Numismatic Society (hereinafter referred to as the SNS) and Urban Mate, a member of this society who has a collection of antique and other coins in his possession and is an owner of several cartridge casings.

2. The petitioners the sole proprietor, Janez Švajncer, and Urban Mate, are collectors of antique coins and arms. In accordance with the first paragraph of Article 135 of the CHPA-1, they notified the authorised museum that they hold collections of objects for which they did not have a certificate of origin. The petitioners claim that, according to the regulations that had been in force until the enactment of the CHPA-1, there had been no prohibition on the sale, purchase, or collection of such objects, and thus neither their origins nor the locations in which they were discovered were known when they were acquired. They claim that on the basis of the challenged provisions of the CHPA-1 the objects that are part of the collection of the War Museum or the coins that are part of the numismatic collection became state property. Therefore, the challenged regulation is allegedly inconsistent with Articles 33, 67, and 69 of the Constitution. They argue that the CHPA-1 introduced a new obligation for persons who hold an archaeological find or a collection of such finds, i.e. an obligation to possess proof of origin for those objects (Article 53 of the CHPA-1), and failing to do so is considered a minor offence (Article 127 of the CHPA-1). As the CHPA-1 allegedly failed to define the content of such certificate, in their opinion this Act declared that all acquisitions of archaeological finds before its entry into force were illegal and are therefore to be punished as a minor offence. This is allegedly inconsistent with Article 28 of the Constitution (the principle of legality in criminal law) and other fundamental principles of criminal law, especially the presumption of innocence (Article 27 of the Constitution), and Article 155 of the Constitution (the prohibition of the retroactive effect of legal acts). It is true that Article 135 of the Act provides that criminal and minor offences committed before its entry into force will not be prosecuted; however, the procedure that follows the notification of

the museum that an archaeological find has been held without a certificate of origin allegedly entails a risk of such objects being nationalised arbitrarily. In this regard, the petitioner SNS stresses that the definitions of the terms archaeological find and archaeological remains in Article 3 of the CHPA-1 are vague, making it difficult to implement the entire act in a reasonable and impartial manner. It is alleged that the first paragraph of Article 6 of the CHPA-1 does not regulate clearly the property right of the state, and that Article 53 of the CHPA-1 is inconsistent with the principle of precision of regulations, and consequently the collectors do not know which objects must be reported as archaeological finds in accordance with Article 135 of the CHPA-1 nor what is supposed to happen to those objects in that procedure. The petitioners Janez Švajncer and Urban Mate state that, under the previous Cultural Heritage Protection Act (Official Gazette RS, No. 7/99 – hereinafter referred to as the CHPA), a person who found an object under ground or in water had a possibility to disprove the presumption that the object has the characteristics of cultural heritage. They state that an object could only be defined as such if it was found in the territory of the Republic of Slovenia, while the new CHPA-1 no longer contains such a provision. They also allege that the CHPA-1 contradictorily and incorrectly transposed Council Regulation No. 116/2009 into the Slovene legal order because the purpose of that regulation is to define the rules of trading with objects constituting cultural heritage with third (i.e. non-EU) countries and not to determine the rules for the EU market. In their opinion it was precisely because of the trading with such objects that the Court of the European Communities in its Judgment, dated 10 October 1985, in *Guns Gmbh & Co. Kg proti Hauptzollamt Koblenz*, C-252/84 (hereinafter referred to as Case C252/84), defined collectibles in more detail in the context of the common customs tariff. Therefore, the Act is allegedly inconsistent with EU law and Article 1 of the First Protocol to the ECHR and, consequently, also with Article 8 of the Constitution.

3. The petitioner SNS states that the society was established in order to promote collector activity, to provide for the conservation of antiques that may also be objects of cultural heritage, to facilitate the acquisition and exchange of such objects among its members, and for educational and publishing purposes. In its opinion, the challenged provisions of the CHPA-1 entail a serious interference with the interests of the society's members, the economic non-profit activity of the society, and consequently the activity of the society in general. Therefore they are allegedly inconsistent with Articles 42, 74, and 59 of the Constitution.
4. The National Assembly of the Republic of Slovenia did not respond to the petitions.
5. The Government of the Republic of Slovenia submitted its opinion. In its assessment, some of the challenged statutory provisions do not apply at all to the situation of the SNS, as it neither holds nor collects archaeological finds. It claims that, pursuant to the Societies Act (Official Gazette RS, Nos. 61/06 and 58/09 – hereinafter referred to as the SA-1), the SNS may not carry out profit-making activities. The claims that the requirement to possess a proof of origin would paralyse the society's activities are in its opinion unfounded, because the CHPA-1 does not interfere with the regulation of publications or exhibitions, and it does not prohibit collection.

6. The Government emphasises that the assumption underlying the allegations of the petitioners, i.e. that the CHPA-1 introduces *ex lege* state ownership of archaeological finds and the land plots where archaeological remains are located, is erroneous. The Government has presented in detail the previous regulations from 1945 until the entry into force of the CHPA-1, which had allegedly always contained provisions determining that any archaeological finds, i.e. movable objects found on land, under ground, or in water to which the law ascribed a cultural value were state property or, between 1960 and 1999, social property. Whoever found such objects was allegedly always obligated to notify the authorised institution and hand over the objects to it. Regarding archaeological finds raised from the ground or water before 1945, the Government explains that it is practically no longer possible to find them in private collections because during the last fifty years these finds were gradually transferred to the collections of public museums, owned by the state, and therefore there is only a slight possibility that archaeological finds from this period would be available on the market. Since 1945, archaeological finds could only have emerged from excavations or chance discoveries; therefore the legislation, which required that notification be made of any objects raised from the ground or water and that they be professionally evaluated, also applied to the petitioners. If an object with such characteristics had been on sale during this period, with regard to the applicable regulations such could allegedly only have been an unlawfully acquired object that was put on the market (concealment of a chance discovery, sale on the black market by participants in excavations, theft of excavations, unauthorised excavations).
7. The Government deems that the presumptions underlying the petitioners' challenge of the first paragraph of Article 6 of the CHPA-1 are erroneous. This provision allegedly only continues the sequence of legal norms that maintained state ownership of archaeological finds in our legal order since the beginning of the statutory regulation of this area. Therefore, in the Government's opinion, the CHPA-1 did not affect the nationalisation of specific archaeological finds or collections but was intended to ensure legal continuity of the regulation of this area. The CHPA-1 allegedly only makes it possible to determine in specific cases which objects, pursuant to the previously applicable legislation, have undoubtedly been state property since 1945 and have such characteristics that their inclusion in a public museum collection is justified. The Government also deems that the challenged first paragraph of Article 6 of the CHPA-1 is not less strict than the provision of Article 58 of the CHPA that was in force before its enactment. It is allegedly absolutely clear that the CHPA-1 can also only refer to the territory of the Republic of Slovenia. However, it assesses that the provision of the previously applicable statute was less precise because it did not include any condition regarding age and did not differentiate between archaeological and other cultural heritage. It emphasises that, pursuant to the CHPA and CHPA-1, it is particularly important to professionally determine whether the specific object possesses the characteristics of cultural heritage. The Government is of the opinion that the first paragraph of Article 6 of the CHPA-1 does not prescribe the nationalisation of movable objects and it is therefore not inconsistent with Article 69 of the Constitution and consequently also not with Articles 33 and 67 of the Constitution.

8. The Government explains that point 2 of Article 3 of the CHPA-1 defines the term archaeological find as movable archaeological remains and it is therefore clear that it is a movable object. The term archaeological remains is allegedly a basic term that is defined in point 3 of Article 3 of the CHPA-1 as including real property and movable objects associated therewith that are traces of historical human activity and for which it is possible to assume that they were in water or under ground for more than 100 years (50 years with regard to weapons) and that they possess the characteristics of cultural heritage. Archaeological remains allegedly become cultural heritage once they are professionally identified and registered. The Government explains that the definition of archaeological remains includes protection of the stage immediately preceding their identification as objects of archaeological heritage, as determined in the European Convention on the Protection of the Archaeological Heritage (Revised) (Official Gazette RS, No. 24/99, MP, No. 7/99 – hereinafter referred to as the ECPAH). As the term archaeological remains includes various archaeological elements on land, under ground, or in water, regardless of whether they are movable or immovable, the requirement to possess proof of origin, as determined in Article 53 of the CHPA-1, and the notification obligation determined in Article 135 of the CHPA-1 are allegedly neither logical nor reasonable with regard to such archaeological elements. However, the definition of the term archaeological find, which is subject to a special regulation regarding ownership (state or social property), research, discoveries, and export, has allegedly always been broad already in accordance with previous regulations. In view of the above, the Government considers that the basic terms defined in the CHPA-1 cannot be interpreted and applied arbitrarily and therefore it does not consider points 2 and 3 of Article 3 of this Act to be inconsistent with Article 2 of the Constitution.
9. As regards the challenged Article 53 of the CHPA-1, which introduced the proof of origin, the Government considers that the introduction of such provision was necessary in order to consistently promote the public interest in preserving cultural heritage as defined in Article 5 of the Constitution. In its opinion, this regulation does not interfere with the rights of the persons in possession of archaeological finds if they had already had those rights before the CHPA-1 entered into force. The purpose of this provision was merely to enable the traceability of the trading with archaeological finds, and not to interfere with acquired rights. The obligation of the state to ensure that objects of movable cultural heritage are traceable allegedly arises from international conventions in the area of fighting unlawful trade with movable cultural heritage that bind Slovenia. It is argued that since the entry into force of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Official Gazette RS, No. 54/92, MP, No. 15/92, and Official Gazette SFRY [Socialist Federal Republic of Yugoslavia], MP, No. 50/73 – hereinafter referred to as the UNESCO Convention),<sup>1</sup> every legal transac-

1 In accordance with the UNESCO Convention, the State Parties to this Convention are required to regulate control over the import and export of cultural property (issuing export certificates and prohibiting the import of stolen objects of this kind) and to introduce measures to control the domestic trade of cultural property or cultural heritage.

tion with archaeological finds and coins (irrespective of whether they originate from archaeological contexts) is registered, the traders are required to inform the buyers of the possibility of restrictions on legal transactions, and the state is required to implement corresponding measures to prevent illicit conduct, including illicit transfer of the ownership of such objects. However, these requirements were not introduced into national law until the CHPA was adopted in 1999, which also took into account the requirements of the ECPAH and EU legal acts in relation to the export and return of objects of cultural heritage. The transitional provision of Article 135 of the CHPA-1 allegedly made it possible for persons who hold archaeological finds in good faith in Slovenia to transition painlessly and in a legally safe manner from a system that did not regulate proof of origin to a system that requires it. On the basis of those arguments the Government considers that the challenged Articles 53 and 127 of the CHPA-1 are not inconsistent with Articles 155, 27, and 28 of the Constitution. As regards the proof of origin, the Government recognises that it is actually not defined in the act; however, it deems that defining its content in more detail would narrow down possibilities to establish the traceability of the objects' origin that must be proved by the persons who hold those objects. In the submitted opinion, it listed possible contents or forms of the certificate of origin, from a decree of distribution to publications in journals. It states that this certificate merely establishes the circumstances in which the person in possession of such object personally acquired it and therefore serves as evidence that makes it possible to trace the circulation of archaeological finds and their origin. As the purpose of this provision is only to establish facts and take evidence, the Government considers this provision to be clear.

10. The Government claims that the challenged Article 135 of the CHPA-1 does not allow for the nationalisation of archaeological finds and their collections, and that timely notification allows for the legalisation of all objects, even those which were acquired illegally. The Government then describes the procedure that is to be followed by the national or authorised museum (hereinafter referred to as the museum) that was notified of the fact that an archaeological find is kept without a certificate of origin by the persons storing that archaeological find. Through this, these persons allegedly obtain either a certificate of origin for those objects that remain in their possession or they receive compensation for storing those archaeological finds or collections for which it was established that they have the characteristics of a cultural monument of national importance and which were included in the public museum collections. The Government explains that the unlawful actions determined in the second paragraph of Article 135 of the CHPA-1 that will not be prosecuted have to be precisely defined to ensure the precision of the legal norm.
11. In relation to the statements regarding the inconsistency of the challenged regulation with the EU legal order, the Government explains that on the basis of Article 30 of the Treaty establishing the European Community (consolidated text, OJ C 321, 29.12.2006, Official Gazette RS, No. 27/04, MP, No. 7/04 – hereinafter referred to as the TEC) the Member States can restrict or prohibit the circulation of goods on the EU internal market on the grounds of protection of national treasures possessing

artistic, historic, or archaeological value. Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ L 74, 27.03.1993, pp. 74–79), Council Regulation No. 116/2009, and other EU legal acts in this area contain provisions that clearly indicate that they do not interfere with the competencies of the Member States pursuant to Article 30 of the TEC. With the CHPA-1, Slovenia defined a national treasure in order to monitor trading and to prevent illicit transfer or export with the aim of protecting that treasure. It is true that national treasures are also regulated in the Return of Unlawfully Removed Cultural Heritage Objects Act (Official Gazette RS, No. 126/03 – hereinafter referred to as the RURCHOA); however, this act refers only to procedures associated with the unlawful removal of such object from one EU Member States to another. In accordance with Article 9 of Council Regulation No. 116/2009, Slovenia is only required to introduce rules and penalties for infringements of this Regulation into the internal legal order and shall take all measures necessary to ensure that the regulation is implemented. The Government also explains that the petitioners Janez Švajncer and Urban Mate misinterpret Annex A1 to this Regulation, i.e. that any trading and export of the collectors' pieces that fall under the categories referred to in Case C-252/84 was free. More specifically, point 2 of Article 2 of Council Regulation No. 116/2009 clearly states in which cases a Member State is not required to issue export licences for the export of objects of cultural heritage from the Community's customs territory. With regard to the above the petitioners' claim that the CHPA-1 is inconsistent with the EU legal order is allegedly unfounded.

12. The Government further states that, in accordance with Article 135 of the CHPA-1, persons storing weapons and other military materials from the First and Second World Wars were not required to report them. In accordance with Article 10 of the CHPA-1, such objects are not considered a national treasure; however the purpose of classifying them as archaeological finds and archaeological remains is to introduce a statutory prohibition to remove such materials from the sites contrary to Article 32 of the CHPA-1.
13. The petitioners responded to the Government's opinion. They oppose the Government's assertion that, in relation to archaeological finds, the CHPA-1 only reproduces the regime that applied to those objects pursuant to previous regulations. In their opinion, it is clear from the acts that the Government adduces as evidence for its position regarding the continuity of the state ownership of archaeological finds that those acts included additional essential conditions, especially within the meaning of the wider quality of the object, and that the CHPA-1 does not determine those conditions (e.g. objects of a cultural, historical, artistic, or ethnological nature found during excavations made on behalf of the state). They claim that it was only when the CHPA had been adopted that all the objects found on land, under ground, or in water were declared state property, but – unlike in the law currently in force – such only applied to those that were presumed to constitute heritage. In their opinion, in relation to archaeological finds raised from the ground or water before 1945, the Government is clearly aware that they are not state property, but failed to take that

exception into account in the Act. Archaeological objects originating from Slovene sites were allegedly mostly excavated before the Second World War and during that period the discovery of archaeological objects was governed by the General Civil Code [Translator's note: The term General Civil Code refers to the Austrian *Allgemeines bürgerliches Gesetzbuch* that was adopted in 1811 and was applied throughout the Habsburg Monarchy, i.e. also in the Slovene territory. In Slovenia, it was translated as *Obči državljanski zakonik* and some of its provisions continued to be applied until the adoption of the Code of Obligations in 2001]. They dispute the Government's statement that after 1973 due to the validity of the UNESCO Convention, every transaction involving archaeological finds was recorded, because the state (first Yugoslavia and then Slovenia) failed to do anything to create conditions to ensure compliance with the obligation arising from Article 10 of that Convention.<sup>2</sup> It was allegedly only in 1999 that the CHPA imposed on antique dealers the obligation to keep corresponding records. The petitioners emphasise that they can accept the assurances of the Government and the Ministry of Culture that the CHPA-1 does not allow for the nationalisation of any movable objects or collections and that the procedure to include movable objects in a museum collection may only commence if it is established beyond doubt that these objects are state property, that they originate from the territory of the Republic of Slovenia, that they possess archaeological characteristics, were acquired by archaeological excavations or chance discovery, that they have the attributes of a monument of national importance, that there is no certificate of origin relating to them, and that the so-called abolition does not include weapons and military material from the First and the Second World Wars. However, they also believe that in accordance with Article 2 of the Constitution, these assurances would have to be clearly stipulated in the CHPA-1, which lacks clarity precisely in these areas and allows for different interpretations. They argue that this particularly applies to weapons and military material that, according to a grammatical interpretation of the CHPA-1, have been classified as an archaeological find simply due to having been under ground or in water for more than fifty years, unlike coins, which are required to possess the characteristics of archaeological remains and also, at the very least, the presumption that they constitute cultural heritage must apply to them. The Government's explanations in relation to the definition of terms notwithstanding, the petitioners insist that the terms in Article 3 of the CHPA-1 (and subsequently in relation to other challenged provisions) are unclear and contradictory. They point out that the CHPA-1 does not include the term archaeological heritage, which the Government uses in its opinion and that is legally more appropriate than the term archaeological find. They believe that because the professional and legal aspects of the term archaeological find are confused and due to the unclear statutory definition of the

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2 The State Parties to this Convention undertook to oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each object of cultural property, names and addresses of the supplier, description and price of each object sold, and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject.

terms, the recording of private collections may in fact result in decision-making on the ownership of specific objects, the restrictions of legal transactions with those objects, and the nationalisation of objects that do not possess the characteristics of cultural heritage at all. In their opinion, this risk is even more tangible because Article 135 of the CHPA-1 does not provide any detailed rules on how the authorised institutions should act or the procedure that they should follow, so that the arbitrariness of their decision-making is not excluded. They deem that the public interest in protecting cultural heritage that could justify such a strict regulation of the proof of origin is not demonstrated, and the measure itself is also disproportionate and inappropriate. The legislature could have allegedly achieved the same effects through milder archaeological heritage protection measures. They argue that the legislature could have established a special regime to protect archaeological heritage from illegal excavations on site, ensured consistent control at the borders to protect it from illegal export abroad, and by implementing the regulation of property pursuant to the Property Code (Official Gazette RS, No. 87/02) in instances where the ownership of the state has been proved. The petitioners reject the argument of reduced control as a consequence of becoming part of the Schengen area and the arguments that are based on international conventions. In their opinion, in relation to a special export and import regulation, these conventions refer only to the cultural objects that are important for the state, are rare and valuable, and not to just any object.

14. A direct risk of nationalisation is allegedly demonstrated by Instruction No. 2 for the Implementation of Article 135 of the CHPA-1 (hereinafter referred to as Instruction No. 2) issued by the Ministry of Culture on 24 March 2009, which the petitioner SNS received on 26 May 2009, i.e. after it had lodged the petition. For this reason the mentioned petitioner extended its petition to review constitutionality also to Instruction No. 2, as in its opinion it entails a general act of the Ministry even though it was not published. It believes that by that instruction the Ministry determined contrary to the CHPA-1 and the Constitution an ownership regime for notified objects pursuant to Article 135 of the CHPA-1, and thus the petitioner, as the one who submitted a notice pursuant to Article 135 of the CHPA-1, is at risk that its collections will be decided upon contrary to the CHPA-1 and the Constitution and the objects included in those collections will be actually nationalised or legal transactions involving such objects restricted. It argues that, for this reason, Instruction No. 2 entails an unconstitutional interference with its acquired right to private property and inheritance determined in Article 33 of the Constitution, and it is also inconsistent with Articles 2, 15, 67, and 153 of the Constitution. It proposes to the Constitutional Court to annul or abrogate Instruction No. 2.
15. The Ministry of Culture responded to the allegations from the extended petition in relation to Instruction No. 2. It did not take a position on the allegations regarding Instruction No. 2, but did send information regarding the implementation of Article 135 of the CHPA-1.

#### **B – I**

16. Anyone who demonstrates legal interest may lodge a petition that the procedure for the review of constitutionality be initiated (the first paragraph of Article 24 of the

Constitutional Court Act, Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA). According to the second paragraph of that article, legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his rights, legal interests, or legal position.

17. In accordance with the settled case law of the Constitutional Court, political parties, societies, chambers, and associations have legal interest only to challenge those regulations that directly interfere with their rights, legal interests, or legal position. Legal interest is therefore not demonstrated with regard to the petitions lodged by these entities on behalf of their members, or to further the interests of those members, or because they believe they act in the general interest of society.<sup>3</sup> Consequently, the SNS cannot demonstrate its legal interest by asserting that the challenged regulation also interfered with the rights of its members with regard to the trading organised by the society. The claims that its activity and reputation were damaged also do not justify direct interference with the society's rights, legal interests, or legal position. It is true that, pursuant to its Statute,<sup>4</sup> the SNS engages in profit-making activity that is also related to archaeological finds; however, it does not engage in this activity in the context of the right to free economic initiative in accordance with Article 74 of the Constitution, but for the purpose of contributing to the SNS's non-profit objectives pursuant to Article 25 of the SA-1. Such is, however, not affected by the challenged regulation. The scientific endeavour associated with archaeological finds, which is protected by Article 59 of the Constitution, cannot by its very nature constitute an activity performed by the society as a legal entity, because the society's activity, publishing, is simply the way in which scientists' and researchers' discoveries in that field are presented to the public. With regard to the above, the SNS has failed to demonstrate legal interest for the review of the constitutionality of the challenged regulation. Therefore the Constitutional Court rejected its petition (Point 6 of the operative provisions).
18. In accordance with Article 160 of the Constitution the Constitutional Court has the power to review regulations and general acts issued for the exercise of public authority. Instruction No. 2 was issued by the Cultural Heritage Directorate of the Ministry of Culture and signed by the director of that Directorate, and sent directly to the museums that are responsible for the implementation of Article 135 of the Act. The purpose of this act is clearly to instruct the museums on how to implement the Act and not to regulate its content in more detail. Therefore, in terms of content, it is not an act that regulates the rights and obligations of an unknown number of addressees, but an internal act of the Ministry. Consequently, the requirements that apply to a regulation, which has the formal characteristics determined in Article 74 of the State Administration Act (Official Gazette RS, Nos. 113/05 – official consolidated text, and 48/09) cannot apply to the Instruction. As Instruction No. 2 is not a

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3 See Order of the Constitutional Court No. U-I-202/09, dated 4 February 2010.

4 See [www.nds.si/pravila.htm](http://www.nds.si/pravila.htm).

regulation or general act issued for the exercise of public authority, its review does not fall within the jurisdiction of the Constitutional Court. Consequently, it rejected the petition to initiate proceedings to review the constitutionality of Instruction No. 2 (Point 5 of the operative provisions).

19. The petitioners, who are natural persons, reported their collections on the basis of the first paragraph of Article 135 of the CHPA-1. The museum decides on the characteristics of the notified objects in the procedure carried out pursuant to this provision. It is the museum that decides whether the notified object is classified as an archaeological find or a collection of national importance. The third, fourth, and fifth paragraphs of Article 135 of the CHPA-1 also regulate how the museum should treat the notified objects. As no legal remedy is provided against the museum's decisions, Article 135 of the CHPA-1 has direct effect. As Article 135 of the CHPA-1 is substantively directly related to the other provisions that are being challenged by the petitioners, the challenged regulation directly affects their rights, legal interests, or legal position. Consequently, the first and the third petitioner have demonstrated a legal interest for the review of the challenged regulation.
20. The Constitutional Court accepted the petitions to initiate proceedings to review the constitutionality of points 2 and 3 of Article 3, the first paragraph of Article 6, Article 53, the tenth indent of the first paragraph of Article 127, and Article 135 of the CHPA-1. It is true that the first paragraph of Article 135 of the CHPA-1 ceased to have effect because the deadline set therein had already expired; however, the Constitutional Court reviewed the constitutionality of the entire Article 135 of the CHPA-1 as the content of the first paragraph is related to the other provisions of this Article. As the conditions determined in the fourth paragraph of Article 26 of the CCA have been met, the Constitutional Court proceeded to decide on the merits of the case.

## B – II

21. The petitioners claim that points 2 and 3 of Article 3 of the CHPA-1, which define the terms archaeological remains and archaeological find, are inconsistent with Article 2 of the Constitution because they are unclear.
22. One of the principles of the state governed by the rule of law requires regulations to be clear and precise so that the content and the purpose of norms can be established with certainty. The requirement that a regulation be clear and precise does not entail that regulations must leave no room for interpretation. With regard to legal certainty, which is one of the principles of a state governed by the rule of law determined in Article 2 of the Constitution, a regulation becomes disputable when the content of the regulation cannot be clearly established by the rules of interpretation of legal norms (Constitutional Court Decision No. Up-679/06, U-I-20/07, dated 10 October 2007, Official Gazette RS, No. 101/07, and OdlUS XVI, 109).
23. Points 2 and 3 of Article 3 of the CHPA-1 define the terms archaeological remains and archaeological find. The term archaeological remains includes real property and movable objects that may be assumed to have been under ground or in water for a specific period of time (i.e. at least 100 years) and possess the characteristics listed in

point 3 of Article 3 of the CHPA-1.<sup>5</sup> Archaeological finds are movable archaeological remains.<sup>6</sup> Archaeological remains and archaeological finds are also objects related to burial grounds, which are determined as such on the basis of the regulations governing war graves, as well as to warfare<sup>7</sup> that have been under ground or in water for at least 50 years. The key characteristics of archaeological remains and archaeological finds are as follows: the circumstances of their discovery<sup>8</sup> (on land, under ground, or in water, by excavations or by chance discovery), the minimum required age, and their importance for cultural heritage. Archaeological remains and archaeological finds include objects that are presumed to possess the characteristics of cultural heritage.<sup>9</sup> Archaeological remains and archaeological finds refer to objects that are yet to be defined as cultural heritage. Therefore, the finding that a specific real property or movable object can be classified as archaeological remains or an archaeological find does not necessarily entail that this real property or movable object also constitutes an element of cultural heritage. It is only when archaeological remains and archaeological finds have been professionally identified and registered that they become cultural heritage (the last sentence of point 3 of Article 3 of the CHPA-1). Only then can we speak of archaeological (cultural) heritage. On the basis of such finding or assessment, an entry into the cultural heritage register or a classification as a national treasure may be made or archaeological remains or an archaeological find may be declared a monument. It clearly follows from the Act that cultural heritage, which comprises several stages, including archaeological remains (Article 8 of the CHPA-1), is the subject of protection for reasons of public interest. Archaeological remains are protected in order to prevent the impoverishment of objects of archaeological value

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- 5 The term archaeological remains means all objects and any evidence of human activity over different historical periods on land, under ground, and in water, the conservation and study of which would enhance existing knowledge of the historical development of humankind and its connection with the natural environment, the main sources of information of which are archaeological researches or discoveries, and which may be presumed to have been under ground or in water for at least 100 years and possess the characteristics of heritage. Archaeological remains also include objects connected with burial grounds in accordance with regulations governing war graves, and also objects connected with the more general archaeological and natural context of war, which have been under ground or in water for at least 50 years. Professionally identified and registered archaeological remains shall become heritage (point 3 of Article 3 of the CHPA-1).
  - 6 The term archaeological find means movable archaeological remains which have been under ground or in water for at least 100 years, and also arms, ammunition, other military material, military vehicles and vessels or their parts, which have been under ground or in water for at least 50 years (point 2 of Article 3 of the CHPA-1).
  - 7 In the definition of archaeological finds, movable objects connected to warfare are precisely listed: arms, ammunition, other military material, military vehicles and vessels or their parts.
  - 8 Archaeological remains usually presuppose a discovery because they primarily concern areas, buildings, and objects that are covered by soil or water.
  - 9 The term cultural heritage means resources inherited from the past which Slovenes, members of the Italian and Hungarian ethnic communities, and of the Roma community, as well as other citizens of the Republic of Slovenia, determine to reflect and express their values, identities, religious and other beliefs, knowledge, and traditions. The concept of heritage includes features of the environment which have been shaped by the interaction between people and places over time (the second paragraph of Article 1 of the CHPA-1).

that are yet to be identified as such. The measures for their protection are therefore different to the measures in place for protecting cultural heritage because their purpose is to secure their acquisition from the ground or water (at archaeological sites and through archaeological research). This entails that protection measures, the purpose of which is to permanently protect cultural heritage, can be introduced for those movable and immovable objects of archaeological origin that are registered, classified as a national treasure, or declared a monument, and therefore also constitute cultural heritage from a legal perspective. Therefore, archaeological remains and archaeological finds also include objects for which it can be established, on the basis of a professional evaluation, that they are not examples of cultural heritage.

24. The terms archaeological remains and archaeological find were not used in the previous regulations governing cultural heritage protection.<sup>10</sup> The key difference intro-

10 The regulations governing cultural heritage protection used different terms to name the objects that are part of the cultural heritage. From 1945 to 1948, the laws regulating cultural heritage protection (the Protection of the Cultural Monuments and Natural Sights Act, Official Gazette DFY [Democratic Federal Yugoslavia], No. 54/45 – hereinafter referred to as the Act/45, the General Act on Protection of Cultural Monuments and Natural Rarities, Official Gazette DFY, No. 81/46, the Protection of Cultural Monuments and Natural Sights in the People's Republic of Slovenia Act, Official Gazette PRS [People's Republic of Slovenia], No. 23/48 – hereinafter referred to as the Act/48) were using the term cultural monument. A cultural monument was an object determined as such by way of a decision. The object was required to be of cultural and historical, artistic, and ethnological importance. The Act/48 provided that cultural monuments were movable and immovable objects or groups of objects that are of historical, archaeological, cultural and historical, artistic, ethnographical or sociological importance or are characteristic of a rural environment, and especially monuments related to the NOB [the National Liberation War]. The cultural monument was only that object which was determined as such by way of a decision. The Protection of Cultural Monuments and Natural Sights Act (Official Gazette PRS, No. 22/58 – hereinafter referred to as Act/58) provided that cultural monuments were movable and immovable objects or groups of objects that are of importance to society because of their archaeological, historical, cultural and historical, sociological, ethnographical, scientific, artistic, historical and technical, or urbanistic value, and especially monuments of the National Liberation War. Due to its characteristics, the object was a cultural monument in and of itself. The Federal General Act on the Cultural Monuments Protection (Official Gazette of FPRY [Federal People's Republic of Yugoslavia], No. 17/59 – hereinafter referred to as the Act/59) provided the same definition of the term cultural monument. However, the object became a cultural monument only when a special decision was issued. The Protection of Cultural Monuments in the People's Republic of Slovenia Act (Official Gazette PRS, Nos. 26/61 and 11/65 – hereinafter referred to as the Act/61) provided that cultural monuments are movable and immovable objects or groups of objects that are of importance to society because of their archaeological, historical, sociological, ethnographical, artistic, urbanistic, or other scientific and cultural value. A special decision by which an object would obtain the status of a monument was not required. The federal Basic Act on Cultural Monuments Protection (Official Gazette SFRY, No. 12/65 – hereinafter referred to as the Act/65) provided that cultural monuments are immovable and movable objects and groups of objects that are of special significance to society due to their scientific, technical, or other cultural value. A special decision by which an object would obtain the status of a monument was not required. In 1981 the regulations began to draw a distinction between the terms cultural heritage and cultural monument. In essence, cultural heritage is synonymous with what was previously understood to be a cultural monument. An object that had the characteristics determined by law became a cultural monument, which was established by the competent authority. The Natural and Cultural Heritage Act (Official Gazette SRS, Nos. 1/81, 42/83, and Official Gazette RS, No. 26/92 – hereinafter referred

duced by those terms is that both clearly focus on the archaeological origin of objects and that they also include weapons and other military material or objects connected to war graves and warfare in this context. They are new statutory terms introduced by the CHPA-1 that designate a protected preceding stage in the system for the protection of cultural archaeological heritage.

25. The terms archaeological remains and archaeological find therefore include real property and movable objects that are only presumed to constitute an element of archaeological cultural heritage. This entails that they include objects for which the authorised authorities establish by a professional evaluation that they are part of the cultural heritage as well as the objects for which it is established that they do not form part of the cultural heritage. Furthermore archaeological remains and archaeological finds that have been professionally identified and registered include objects that formed part of the cultural heritage already pursuant to the previous regulations as well as objects that became part of cultural heritage in accordance with the CHPA-1. Specific objects that are classified as archaeological remains or archaeological finds pursuant to the CHPA-1 can therefore have different statuses. These different statuses must be taken into account during the drafting of the regulation as well as in the interpretation of statutory provisions. This also applies to the provisions in the CHPA-1 that regulate the protection of archaeological remains and archaeological finds.
26. On the basis of the rules on the interpretation of legal norms, it is therefore possible to establish the clear content of both terms, and thus points 2 and 3 of Article 3 of

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to as the Act/81) defined cultural heritage as immovable and movable objects, groups of objects, and areas that have cultural, scientific, historical, or aesthetic value for the Socialist Republic of Slovenia or any area within its territory. Cultural heritage primarily included objects or groups of objects of historical, archaeological, artistic, ethnological, anthropological, and scientific importance documenting historical events in Slovenia; buildings and other objects that were associated with important figures from our political and cultural history; archives, archaeological sites, art and designed items, ethnological objects, old tools, devices, machines, buildings, and groups or parts of buildings that are artistically, historically, or technically persuasive; settlements and old village and city centres. Cultural heritage was protected pursuant to that Act. Objects of cultural heritage, which enjoyed special cultural, scientific, historical, or aesthetic value, were cultural and historical monuments that enjoyed special societal protection. The CHPA defined cultural heritage as areas and sites, constructed and otherwise designed buildings, objects or groups of objects or preserved materialised works resulting from the creative process and various activities of humankind, as well as social development and events that are characteristic of specific periods in Slovenia and the wider region, the protection of which is in the public interest because of its historical and cultural importance and the importance it has for civilisation as such. Heritage was defined to include in particular archaeological sites and objects; settlements, especially old city and village centres, designed landscape and cultural landscape, buildings, their parts or groups of buildings that are artistically, historically, or technically persuasive; buildings and other objects that were associated with important figures from our political, economic, and cultural history; archives; items from libraries; objects or groups of objects that are of historical, artistic and historical, archaeological, artistic, sociological, anthropological, ethnological, or scientific importance and serve as evidence of the historical events in Slovenia. An individual object was deemed heritage if it was entered into a register. Heritage that contained elements that demonstrated the continuity of cultural development and development of civilisation or a specific stage of such development, or entailed a high-quality creative achievement, obtained the status of a cultural monument *ex lege* or by way of a promulgation act.

the CHPA-1 are not inconsistent with Article 2 of the Constitution (Point 1 of the operative provisions). The Constitutional Court would not be required to interpret the meaning of the statutory provisions merely in order to examine their alleged lack of clarity, as it would be sufficient to establish that the content of the provisions can be determined on the basis of the rules on the interpretation of legal norms. However, the petitioners also claim that the challenged provisions interfere with the right to property. In order to review the latter, the Constitutional Court was required to interpret the content of the challenged provisions.

### B – III

27. Article 33 of the Constitution protects the right to peaceful enjoyment of property. Its purpose is to ensure that the holders of fundamental rights may act freely with regard to their property. Its protective effect is two-fold. It protects a specific position of the holder of the right against authoritative interferences with his or her property, it reflects the relationship between the individual and the community, and protects the legal concept of property or the right to property. It includes the following elements: freedom to acquire property, enjoyment of property, right to dispose of property, and relying on the acquired rights. The right to property is composed of various entitlements, the content of which must be regulated by law. Therefore the substance of the constitutional concept of property is provided only by statutory regulation. The first paragraph of Article 67 of the Constitution authorises the legislature to determine the manner in which property is acquired and enjoyed in order to ensure its economic, social, and environmental functions.<sup>11</sup> The authorisation given to the legislature to determine the manner in which property is acquired and enjoyed is, however, not unrestricted. If the legislature exceeds its power, the regulation no longer constitutes a determination of the manner in which property is enjoyed, but is instead deemed an interference with the right to private property. As to where this boundary lies is dependent not only on the nature of the object owned but also on the obligations that the legislature imposed on the owner in the context of determining the manner in which to enjoy the property. Restrictions of the right to property, which are required in order for the property to achieve its economic, social, and environmental functions,

11 It is clear from previous case law that the right to property guaranteed by Article 33 of the Constitution (right to private property) may not be considered without taking into account Article 67 of the Constitution, which provides for the economic, social, and environmental functions of property. This Article of the Constitution is based on the presumption that, apart from the individualistic function, property must also have a function that serves society as a whole. The owner's right must also serve the freedom and personal development of others and society as a whole. Article 67 of the Constitution allows and obligates legislature to determine the substance of property (Decision No. U-I-40/06, dated 11 October 2006, Official Gazette RS, No. 112/06, and OdlUS XV, 70). The constitutional guarantee of property presupposes the existence of property as a legal concept. The subject-matter of private property and the protected entitlements which arise from property are determined by the legal order in accordance with the purpose of the constitutional guarantee and the economic and societal relationships in general (Decision No. Up-156/98, dated 11 February 1999, Official Gazette RS, No. 17/99, and OdlUS VIII, 118).

must therefore be assessed with regard to the specific circumstances involved.<sup>12</sup> When regulating property, the legislature must respect the fundamental value that the Constitution attaches to private property as well as the social function of property. Its task is to strike an appropriate balance between the peaceful enjoyment of property and the public interest arising from the economic, social, and environmental functions of property.<sup>13</sup> The substance of the constitutional protection of property or the substance of the constitutionally guaranteed entitlements arising from the right to property with regard to specific categories of objects may change over time, depending on the objective importance of that category of objects for the community as well as on the prevailing value that is attached to the relationship between the owner and the community. The authorisation to determine the substance of the right to property by law leads to a different statutory regulation of the right to property on specific categories of objects. Due to the different intensities with which public interest is expressed in relation to specific types of objects, there are differences in the statutory regimes governing property that apply to specific types of objects. The greater the importance of a specific type of object for the community, the greater the legislature's room for manoeuvre when regulating the substance of the right to property.<sup>14</sup>

28. The first paragraph of Article 5 in the general provisions of the Constitution provides some positive obligations of the state,<sup>15</sup> including the obligation to preserve cultural heritage. The fact that the preservation of the cultural heritage was explicitly included in the Constitution next to the protection of human rights and fundamental freedoms and among the general provisions that regulate fundamental constitutional principles shows the importance of this constitutionally enshrined value. Furthermore, the special meaning of cultural heritage preservation is also emphasised in Article 73 of the Constitution, where, in addition to the state, the local communities are also obligated to promote the preservation of cultural heritage (the second paragraph of Article 73 of the Constitution). However, the first paragraph of this Article of the Constitution states that it is the obligation of everyone to protect cultural monuments that are classified as cultural heritage. Notwithstanding that the second paragraph of Article 73 of the Constitution does not explicitly refer to the law, it is clear that the state can only fulfil this positive obligation on the basis of corresponding statutory regulation. More specifically, the Constitution itself does not define in detail the substance and scope of those values which, arising out of the achievements of our forbearers, are not only of extraordinary importance for the present existence and identity

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12 J. Čebulj, *O ustavni presoji določanja načina uživanja lastnine na naravnih dobrinah* [On Constitutional Review of Determining how Property on Natural Resources is to be Enjoyed], *V. dnevi javnega prava* [The Fifth Days of Public Law], Portorož 1999, pp. 126–127.

13 Adapted from G. Virant, *Odvzem in omejitev lastninske pravice v javno korist ter socialna vezanost lastnine* [Deprivation and Limitation of the Right to Property due to the Public Interest and the Social Function of Property], doctoral thesis, Ljubljana 1997, p. 63.

14 *Ibidem*, pp. 70–71 and 342–344.

15 See B. M. Zupančič in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary to the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana, 2002, pp. 112–116.

of the nation, but their preservation is also invaluable for the future. The substance and scope of cultural heritage as well as the manner in which it is protected today in order to be preserved for the future generations are therefore, by their very nature, left to statutory regulation. In this context and with regard to the above-mentioned constitutional provisions, the legislature is not free to decide whether a statutory regulation is necessary, as the failure to regulate this area by law would entail a violation of the constitutional requirement determined in Articles 5 and 73 of the Constitution. The legislature is, however, free to determine within the limits determined by the Constitution the measures required to preserve the cultural heritage, that is to say the measures that ensure its protection today in order to be preserved for the future.

29. The Republic of Slovenia also has obligations arising from international law in relation to cultural heritage protection. The international community has protected cultural heritage as an expression of human development and civilisation through international legal instruments with the objective of preserving the identity of people and nations, thereby preventing the impoverishment and degradation of the cultural property and illicit trade therewith. Unique and irreplaceable cultural and natural property as part of the world heritage of humankind as a whole is protected by the Convention Concerning the Protection of the World Cultural and Natural Heritage (Official Gazette RS, No. 54/92, MP, No. 15/92, and Official Gazette SFRY, No. 56/74), which provides that *inter alia* “structures of an archaeological nature” shall be considered cultural heritage. Within Europe, the importance of cultural heritage is determined in the Framework Convention on the Value of Cultural Heritage for Society (Official Gazette RS, No. 22/08, MP, No. 5/08), in which cultural heritage is recognised as a resource for sustainable development and quality of life in a constantly evolving society. In order to prevent that the illicit import, export, and transfer of ownership of cultural property would hinder the understanding between nations, the UNESCO Convention obligated the State Parties to the Convention to define cultural properties of national importance (public and private). Archaeological excavations (including regular and clandestine) as well as archaeological discoveries and sites (Article 1) also fall under that definition. The UNESCO Convention also determined the scope of cultural heritage for each state (Article 4) and obligated the State Parties to the Convention to adopt statutory measures designed to protect cultural property, in particular to end the illicit trade of cultural property, to control archaeological research, to promote the development of institutions such as museums, libraries, laboratories, etc., and to establish appropriate services for the effective performance of the functions of this Convention (Article 5). Due to the importance of cultural heritage for promoting understanding between peoples, the UNIDROIT Convention on Stolen or Illegally Exported Cultural objects (Official Gazette RS, No. 23/04, MP, NO. 6/04) also regulated the procedures for the restitution and return of cultural objects between Contracting States and the payment of compensation to *bona fide* possessors. This Convention also considers objects that are of importance for archaeology to be cultural objects (Article 2). Cultural heritage of archaeological origin is always referred to separately in these international instruments. Thus its importance is emphasised.

30. The archaeological heritage as part of cultural heritage is the subject of a special international convention of the Council of Europe (ECPAH). Pursuant to this Convention, all remains and objects, or any other traces of human existence which bear witness to epochs and civilisations, for which excavations or discoveries are the main source or one of the main sources of scientific information, and which are located in any area within the jurisdiction of the Parties, shall be considered archaeological objects (Article 1). It obligates the Contracting Parties to institute a legal order for the protection of archaeological heritage. Among other it determines the mandatory reporting to the competent authorities by a finder of a chance discovery of elements of archaeological heritage and making them available for examination (Article 2) and the obligation of each Party to implement measures for the physical protection of archaeological heritage, making provision for appropriate storage places for archaeological remains that have been removed from their original location (Article 4).
31. With regard to the constitutional requirement of the protection of cultural heritage and the international obligations of Slovenia, the CHPA-1 was required to provide effective measures for the protection of these objects. In the CHPA-1, cultural heritage protection is based on the principles of the integrated conservation of cultural heritage, the democratic character of cultural heritage protection, respecting the rights of the owners of cultural heritage, exercising the right to inheritance, and the participation of the public in cultural heritage matters.<sup>16</sup> Chapter II of the CHPA-1 specifies the characteristics that specific movable objects, immovable objects, and other valuable items must possess in order to become the subject of protection for reasons of public interest. Article 8 of the CHPA-1 determines that such include: registered heritage, national treasures, cultural monuments, heritage protection areas, and archaeological remains. Only after it is established that the protection of the specific movable object, immovable object, or other valuable item is in the public interest, is it possible to implement the protection measures in one of the five different manners specified in the Act. The type of protection is determined by the classification of a specific immovable object, movable object, or other valuable item into a specific category of objects protected for reasons of public interest.
32. With regard to the content of the first paragraph of Article 5, the first paragraph of Article 67, and the first paragraph of Article 73 of the Constitution, the measures by which the legislature protects objects of cultural heritage can also affect the substance of the property rights of the owners of elements of the cultural heritage and the manner in which they enjoy their property. Article 73 of the Constitution serves as the basis for determining the social function of property (Article 67 in conjunction with Article 33 of the Constitution).<sup>17</sup> The CHPA-1 must therefore be interpreted as a *lex*

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16 Summarised from the draft of the Cultural Heritage Protection Act (CHPA-1) – first reading – EPA 1605-IV (Gazette of the National Assembly, No. 74/07 – hereinafter referred to as Draft CHPA-1).

17 See J. Čebulj in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary to the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 709.

*specialis* compared to the general regulation of property issues, i.e. as an act by which the legislature acts in accordance with the constitutional requirement of preserving cultural heritage and as an act of the national legal order intended for the implementation of international obligations.

#### B – IV

33. The petitioners claim that the challenged provisions are inconsistent with Article 33 of the Constitution.
34. Articles 5 and 6 of the CHPA-1 regulate property rights on cultural heritage. It follows from this Act that movable objects, immovable objects, and other valuable items that constitute cultural heritage, may be private or public<sup>18</sup> property. The Act is based on the principle of respecting the owners' rights. This entails that property rights and other rights *in rem* on cultural heritage may be restricted only to the minimum extent necessary for the protection. Those in charge of the protection must choose such measures that least restrict the owners and direct possessors of the heritage but achieve the same effects.
35. The first paragraph of Article 6 of the CHPA-1 provides as follows: "An archaeological find or archaeological remains which are movable objects and found by any person on land, under ground, or in water shall be the property of the state." Pursuant to Article 53 of the CHPA-1, anyone who holds an archaeological find or a collection of such finds is required to possess proof of their origin. Pursuant to the tenth indent of the first paragraph of Article 127 of the CHPA-1, it is considered a minor offence if a legal entity, sole proprietor or individual who independently performs an economic activity, or the responsible person of the legal entity, sole proprietor, state, regional or municipal authority, or an individual does not possess proof of origin pursuant to Article 53 of that Act. Article 135 of the CHPA-1 includes a provision on the notification of an archaeological find in the possession of a person who does not possess a certificate of origin (the first paragraph),<sup>19</sup> the provision that previous criminal conduct in relation to an archaeological find will not be prosecuted (the second paragraph), provisions on the issuing of a proof of origin together with instructions for storage (the third paragraph), the drafting of a proposal to declare the notified archaeological find a monument or collection of monuments (the fourth paragraph), the right to hold an archaeological find and to be reimbursed for the costs incurred by the storage (the fifth paragraph), and the provision that the competent ministry decides on such reimbursement (sixth paragraph).

18 The term public property is used in the sense of ownership of the state, local communities, or public law entities.

19 In Article 53 and the tenth indent of the first paragraph of Article 127 of the CHPA-1, the legislature used the term proof of origin, and in Article 135 of the CHPA-1 the term certificate of origin. It is possible to assume that the legislature inconsistently used different terms for the same thing and thus the Constitutional Court deemed both terms to mean the same.

### **The First Paragraph of Article 6 of the CHPA-1**

36. The first paragraph of Article 6 of the CHPA-1 provides that any objects that are found by any person on land, under ground, or in water and that can be defined as an archaeological find or movable archaeological remains pursuant to the definition in points 2 and 3 of Article 3 of the CHPA-1 are the property of the state. This provision can only apply to those objects of the mentioned type that were found after the CHPA-1 entered into force. Real property and movable objects do not become cultural heritage by themselves but only if they are perceived and assessed as such by a person or a society. Therefore the type and the scope of the objects defined as cultural heritage can change in time. The legislature's task is to take into account these changes when adopting statutory regulation, and to appropriately protect objects when required. On the basis of the second paragraph of Article 73 of the Constitution, the legislature has a wide margin of appreciation when deciding which archaeological finds to protect in order to preserve cultural heritage. A change in the scope of the archaeological finds or movable archaeological remains that are defined by the Act as the property of the state that does not in itself entail an interference with the right to property, provided it refers to archaeological finds or movable archaeological remains discovered after the entry into force of the amendments to the statutory regulation. To be more specific, this authorisation does not allow the legislature to interfere with the existing ownership relations. The property right on objects that could be defined as archaeological finds or movable archaeological remains pursuant to points 2 and 3 of Article 3 of the CHPA-1, but were discovered before this Act entered into force, is entirely dependent on the legal regulation that governed property rights on these objects when they were found or appropriated.<sup>20</sup> If an individual validly acquired the right to property on an object on the basis of the regulations that had been applicable before the CHPA-1 entered into force, the first paragraph of Article 6 of the CHPA-1 cannot be understood as depriving that individual of such right to property. If the legislature were to nationalise privately owned movable objects, this would entail an interference with the right determined in Article 33 of the Constitution and would only be constitutionally admissible in exceptional cases and under the conditions determined in the third paragraph of Article 15 and Article 2 of the Constitution and against compensation. However, it is not possible to attribute such content to the first paragraph of Article 6 of the CHPA-1. Therefore, this provision does not interfere with the property right of individuals or legal entities on archaeological finds or movable archaeological remains that was validly established in accordance with the regulations in force before the enactment of the CHPA-1.
37. However, the CHPA-1 uses the terms defined in points 2 and 3 of Article 3 of the CHPA-1 in the first paragraph of Article 6 in Article 53, to which reference is made

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20 State ownership of specific cultural objects was governed by Article 12 of the Act/45, Article 9 of the Act/48, Article 12 of the Act/58, Article 49 of the Act/59, the first paragraph of Article 9 of the Act/61, the second paragraph of Article 2 of the Act/65, Article 53 of the Act/81, and Article 58 of the CHPA.

by the tenth indent of the first paragraph of Article 127 of the CHPA-1, as well as in Article 135, in which a transitional regime is established due to the entry into force of the Act. These terms are used for different situations. If individuals obtained ownership of certain objects, this right also includes the right to alienate these objects. It was therefore necessary to examine the petitioners' claims regarding the interference with the right to property also in that regard.

38. Taking into account the definitions of the terms in points 2 and 3 of Article 3 of the CHPA-1, the first paragraph of Article 6 of the CHPA-1 classifies all archaeological finds or movable archaeological remains as state property. This also includes objects which, after it was established that they have archaeological characteristics (which must be established on a case-by-case basis), are merely presumed to form part of archaeological cultural heritage. The legislature was correct to establish this presumption because of the constitutional requirement to preserve cultural heritage determined in the second paragraph of Article 73 of the Constitution. Undoubtedly, this presumption is correspondingly reflected in the provisions of Articles 26 and 27 of the CHPA-1 that, upon the discovery of archaeological remains, impose special obligations on the person who found the object, the owner of the land, any other person entitled to the land under the law of property, or the possessor of the land, and, in the event of construction work, also on the investor and responsible construction manager. The third paragraph of Article 26 of the CHPA-1, however, expressly provides that, after the authorised institute has completed its preliminary research and it transpires that the object in question does not constitute cultural heritage, it must return all the dispossessed movable objects to the person who found them. More specifically, in accordance with point 3 of Article 3 of the CHPA-1, only archaeological remains that have been professionally identified and registered become cultural heritage. If, after professional examination, the objects cannot be classified as such, they will be returned to the owner of the real property. However, this cannot entail that the movable archaeological remains referred to in the first paragraph of Article 26 of the CHPA-1 became state property immediately upon their discovery in accordance with the first paragraph of Article 6 of the CHPA-1. If the professional evaluation concluded that the remains did not constitute cultural heritage, the owner of the real property would again obtain ownership of the movable archaeological remains in question. Therefore, by declaring movable archaeological remains or an archaeological find that are only presumed to possess the characteristics of archaeological cultural heritage to be state property, the first paragraph of Article 6 of the CHPA-1 interferes with the right determined in Article 33 of the Constitution.
39. The first paragraph of Article 67 and Article 73 of the Constitution authorise the legislature to define the content of the right to property by law and to regulate the manner in which it is acquired and enjoyed in order to ensure its social function – in the case at issue preserving the cultural heritage. Therefore the regulation that provides that a specific part of that cultural heritage may be exclusively owned by the state in order to preserve such cultural heritage, does not entail an interference with

the right determined in Article 33 of the Constitution.<sup>21</sup> The regulation that provides that objects that are merely presumed to be cultural heritage are also state property, even though a professional evaluation may later establish that they are not, no longer lies within the boundaries of determining the manner in which property is enjoyed, but is already of such character that it entails an interference with the right to private property determined in Article 33 of the Constitution.

40. An interference with a human right is constitutionally admissible only if it is based on a constitutionally admissible, i.e. an objectively justified aim (the third paragraph of Article 15 of the Constitution) and consistent with the general principle of proportionality as one of the principles of the state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court assesses the consistency of the challenged regulation with the general principle of proportionality on the basis of the so-called strict test of proportionality, which comprises an assessment of three aspects of the interference, i.e. an assessment of whether such is necessary, appropriate, and proportionate in the narrower sense, provided that it has established beforehand that the restriction is based on a constitutionally admissible aim (see Constitutional Court Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03, and OdlUS XII, 86, Paragraph 25 of the reasoning).
41. Due to the origin (i.e. chance discovery or excavations) of archaeological remains and archaeological finds, they have special characteristics which must be taken into consideration if they are to be protected effectively. As it is usually impossible to establish immediately upon discovery of a movable or immovable object whether such is part of the cultural heritage or not, it is necessary to prevent free disposition with the object already upon its discovery and to secure it. Therefore, it is only possible to ensure the effective protection of archaeological remains and archaeological finds by providing protective measures already for objects that are merely presumed to possess the characteristics of cultural heritage (i.e. before they are professionally identified and evaluated). In the opinion of the Constitutional Court, the purpose of such a measure is to ensure the effective protection of cultural objects and therefore it pursues a constitutionally admissible aim.
42. However, the regulation that with the purpose of protecting cultural heritage provides that objects that are merely presumed to be part of cultural heritage already become state property is not a necessary measure. It is evident from Articles 26 and 27 of the CHPA-1 that a milder measure is available to the legislature, which was in fact also enacted. The finder, the owner of the land, any other person entitled to the land under the law of property, or the possessor of the land, and, in the event of construction work, the investor and responsible construction manager who find archaeological remains on land, under ground, or in water are required to ensure that they are kept in good condition, at the location where they were found, and in the position in which they were found. They are required to report the finding to the

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21 The archaeological cultural heritage is also determined as state property in some other countries, e.g. Italy, some States in the Federal Republic of Germany, and the United Kingdom.

Institute for the Protection of Cultural Heritage of Slovenia (hereinafter referred to as the Institute) by no later than the next working day. If the authorised person of the Institute establishes that the find can be classified as heritage, it must issue a decision on the archaeological find. This decision determines the area of the site, the nature and extent of the preliminary research, and it may restrict or prohibit any economic and other uses of the site that may endanger the archaeological remains in question. The aim of the legislature to ensure the effective protection of objects forming part of cultural heritage is achieved by this procedure and thus the enactment of an even stricter measure is not necessary.

43. In light of the above, the first paragraph of Article 6 of the CHPA-1 is inconsistent with the right determined in Article 33 of the Constitution.

**Article 53, the Tenth Indent of the First Paragraph of Article 127,  
and Article 135 of the CHPA-1**

44. The legislature was also careless when subsequently using the term archaeological find, attributing it to different situations and thereby essentially interfering with the right to property. Article 53 of the CHPA-1 introduced the requirement to possess proof of origin for an archaeological find. In the context of protective measures for protecting cultural heritage in order to preserve it and on the basis of the second paragraph of Article 73 and Article 67 of the Constitution, the legislature may impose obligations on the owners of cultural heritage which, although relatively restrictive in nature, do not constitute an interference with the right to property. To this end, it may even impose such restrictions that by their nature have already evolved into an interference with the right to property; however, even such interferences may be constitutionally admissible provided that the conditions determined in the third paragraph of Article 15 and Article 2 of the Constitution are met. If Article 53 of the CHPA-1 can be understood as requiring a proof of origin for archaeological finds or collections of such finds that are classified as archaeological cultural heritage, which is state property and may be kept by an individual or legal entity, such requirement could not entail an interference with the right to property. However, if this provision can be understood as requiring a proof of origin for an archaeological find for which it was established in the procedure carried out pursuant to Article 26 of the CHPA-1 that it is not cultural heritage and it was returned to the owner of the real property, this constitutes an interference with his or her right to property. Such interference could also be constitutionally admissible if its purpose was to achieve the traceability of all archaeological finds. However, pursuant to the CHPA-1, a violation of this provision is considered a minor offence, and it is not even entirely clear which situation is supposed to be covered by Article 53 of the CHPA-1. Furthermore, the transitional regulation in Article 135 of the CHPA-1 refers to the proof of origin determined in Article 53 of the CHPA-1.
45. The first paragraph of Article 135 of the CHPA-1 imposed on each person who was, on the day when this Act entered into force, in possession of an archaeological find as defined in point 2 of Article 3 of this Act (i.e. also an archaeological find, for which it was established in the procedure that it is not cultural heritage, and an archaeo-

logical find that was not defined as such pursuant to previous regulations) the obligation to notify a national or authorised museum thereof. In accordance with the second paragraph of this Article of CHPA-1, in such instances potential past criminal conduct will not be prosecuted<sup>22</sup> It is clear that the legislature acted in this way in the knowledge that specific objects that would have to be part of the archaeological cultural heritage already on the basis of the regulations that were in force before the enactment of the CHPA-1 had been acquired illegally. However, by using the term archaeological find it also encompassed objects that should not have been included, because the objects were either the lawful private property of the owner or they could not have been retroactively considered to constitute an archaeological find.<sup>23</sup> If, in order to define the term archaeological find, we turn not only to Article 3 of the CHPA-1 but also to the first paragraph of Article 6 of the CHPA-1, which declares that all archaeological finds are state property,<sup>24</sup> we obtain the complete framework on the basis of which the petitioners reasonably claim that the challenged provisions actually deprive them of the right to property that was validly acquired pursuant to the regulations that were in force before the enactment of the CHPA-1. The deprivation of the right to property undoubtedly entails an interference with the right determined in Article 33 of the Constitution.

46. The basis for the deprivation of the ownership right on a movable object cannot be found in Article 69 of the Constitution that governs only the expropriation of real property. The public interest does not in itself suffice for a deprivation of the ownership right on a movable object; there must exist a serious threat to constitutional values.<sup>25</sup> Therefore, the deprivation of the ownership right on movable objects is also constitutionally admissible, but only exceptionally and provided the conditions determined in the third paragraph of Article 15 and Article 2 of the Constitution are met; furthermore, the compensation for the dispossessed objects must be determined. Only in this way can such a measure also be proportionate. However, the legislature must clearly and precisely define the instances where a specific movable object is really of such exceptional importance for preserving the cultural heritage (in the case at issue archaeological heritage) that it requires an interference with an acquired right to property. Such interferences with the right to property on a movable object may only be decided on in individual procedures, in which respect of the right to property and the compensation for its deprivation are guaranteed; furthermore, all the other rights of the individual or legal entity in question, including

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22 The third to sixth paragraphs of Article 135 of the CHPA-1 define in detail how archaeological finds are to be notified.

23 For example, weapons, ammunition, other military material, military vehicles and vessels and their parts, provided they were under ground or in water for at least 50 years, which are included in point 2 of Article 4 of the CHPA-1. With regard to these objects even the Government expressly claims that they did not fall under the concept of archaeological find before the CHPA-1 entered into force.

24 It must first be established in an individual procedure whether the object possesses archaeological characteristics and whether it has the characteristics of archaeological cultural heritage and is, as such, state property.

25 Summarised from G. Virant, *op. cit.*, p. 148.

the right to judicial protection determined in the first paragraph of Article 23 of the Constitution, have to be respected.

47. The challenged statutory regulation does not take into account the above-outlined conditions, which derive from the Constitution, and therefore entails a constitutionally inadmissible interference with the right determined in Article 33 of the Constitution and is inconsistent therewith.
48. As the Constitutional Court has established that the first paragraph of Article 6, Article 53, the tenth indent of the first paragraph of Article 127, and Article 135 of the CHPA-1 are inconsistent with Article 33 of the Constitution, it did not review the other allegations of the petitioners.

### B – V

49. In terms of content, it is not possible to abrogate the first paragraph of Article 6, Article 53, the tenth indent of the first paragraph of Article 127, and Article 135 of the CHPA-1. Their abrogation would entail that objects of archaeological cultural heritage would no longer be state property, and would lead to the abrogation of these provisions also with regard to that interpretation of their content, which cannot be deemed inconsistent with the Constitution. Therefore, on the basis of Article 48 of the CCA, the Constitutional Court established their unconstitutionality (Point 2 of the operative provisions) and determined the deadline for the legislature to remedy it (Point 3 of the operative provisions).
50. As the challenged provisions thus continue to apply, except for the first paragraph of Article 135 of the CHPA1, the content of which was actually exhausted when the deadline set therein expired, in accordance with the second paragraph of Article 40 of the CCA, the Constitutional Court determined the manner in which its decision must be implemented. In order to prevent the inadmissible prosecution of individuals for the minor offence defined in the tenth indent of the first paragraph of Article 127 of the CHPA-1 until the established unconstitutionality had been remedied, the Constitutional Court suspended the implementation of that provision during the relevant period (Point 4 of the operative provisions).

### C

51. The Constitutional Court adopted this Decision on the basis of Article 21, the third paragraph of Article 25, the second paragraph of Article 40, and Article 48 of the CCA, composed of: Mag. Miroslav Mozetič, Vice President, and Judges Dr Mitja Deisinger, Dr Etelka Korpič-Horvat, Jasna Pogačar, Mag. Jadranka Sovdat, Jože Tratnik, and Jan Zobec. The decision was reached unanimously.

*Mag. Miroslav Mozetič*  
*Vice President*

**DECISION**

At a session held on 15 March 2012 in proceedings to review constitutionality initiated upon the requests of the Confederation of Trade Unions of Slovenia PERGAM, Ljubljana, represented by Dr Janez Posedi, President, the Slovene Public Authorities Trade Union, Ljubljana, represented by Ivan Stošič, attorney in Ljubljana, and the Slovene Veterinaries Trade Union, Ljubljana, represented by Bojan Grubar, attorney in Maribor, the Constitutional Court

*decided as follows:*

1. The first to tenth paragraphs of Article 42 of the Public Sector Salary System Act (Official Gazette RS, No. 108/09 – official consolidated text, 13/10, 59/10, 85/10, 107/10, and 35/11) and Article 2 of the Act Amending the Public Sector Salary System Act (Official Gazette RS, No. 85/10) insofar as it refers to the aforementioned provisions are inconsistent with the Constitution.
2. The National Assembly of the Republic of Slovenia must remedy the established inconsistency within two years from the publication of this Decision in the Official Gazette of the Republic of Slovenia.
3. The first to tenth paragraphs of Article 42 of the Public Sector Salary System Act and the Collective Agreement for the Public Sector (Official Gazette RS, Nos. 57/08, 23/09, 91/09, and 89/10) continue to apply until the established inconsistency is remedied.

*Reasoning***A**

1. The Confederation of Trade Unions of Slovenia PERGAM (hereinafter referred to as the first applicant) has lodged a request to review the constitutionality of the second, third, fourth, sixth, seventh, eighth, ninth, and tenth paragraphs of Article 42 of the Public Sector Salary System Act (hereinafter referred to as the PSSSA) and Article 2 of the Act amending the Public Sector Salary System Act (hereinafter referred to as

the PSSSA-O). It states that it is a representative confederation of trade unions for the entire national territory that unites representative sectoral and occupational trade unions, including trade unions that primarily unite public sector employees. It has enclosed decisions on representativeness for the national territory and for several activities. The first applicant explains, *inter alia*, that the challenged amendment to the conditions that are required to be met in order for a collective agreement to enter into force, or to be amended, interferes with the rights of the members of the seven representative trade unions who are signatories of the Collective Agreement for the Public Sector (hereinafter referred to as the CAPS<sup>1</sup>), and that it also directly affects the rights of civil servants who are members of the first applicant. In this way, two annexes to the CAPS (Official Gazette RS, No. 89/10) have already been concluded on the basis of the amended conditions and without the involvement of the trade unions of the first applicant; in the opinion of the first applicant these annexes interfered retroactively with the rights of civil servants.

2. It is alleged that, contrary to Article 76 of the Constitution, the PSSSA interfered with the applicable CAPS, which is an autonomous source of law. The PSSSA allegedly now provides that the collective agreement for the public sector may be amended in a manner which is different from that which was freely agreed upon by the parties to the CAPS in Article 4 thereof. It emphasises that the autonomy of collective bargaining, which is also an international standard, is a constitutional right derived from the freedom of trade unions determined in Article 76 of the Constitution. In the opinion of the first applicant, the measures through which the state unilaterally replaces the adopted and established autonomous legal norms of collective agreements limit the autonomy of collective bargaining and are inconsistent with Article 4 of the Convention of the International Labour Organization concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Official Gazette FPRY [Federal People's Republic of Yugoslavia], MP, No. 11/58 – hereinafter referred to as ILO Convention No. 98). The first applicant alleges that the challenged regulation, which interferes with the part of the CAPS regarding the obligations of the parties to the agreement, is also inconsistent with the requirement of conformity of legal acts. The first applicant further believes that all the challenged provisions that determine to the manner of establishing whether the signatory trade unions meet the conditions regarding the number of members that is required in order to conclude and amend the collective agreement for the public sector to be inconsistent with Article 76 of the Constitution. The fact that employers may count the number of members of a trade union among their employees allegedly entails an inadmissible and disproportionate interference with the freedom of action of trade unions and the freedom to join trade unions. The first applicant adds that access to the membership forms of trade union members involves the processing of particularly sensi-

1 The abbreviation CAPS is used to refer to the specific collective agreement for the public sector that was applicable at the time the Constitutional Court decided on the case at issue. The text uses the term “collective agreement for the public sector” as a generic term for such collective agreements.

tive personal data, which is also protected by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23 November 1995, pp. 31–50). In its opinion, the tenth paragraph of Article 42 of the PSSSA actually prevents trade unions that do not consent that their members be counted from representing their members' interests, which is contrary to Article 76 of the Constitution.

3. The first applicant points out that, on the basis of the second paragraph of Article 42 of the PSSSA, a collective agreement for the public sector could be adopted or amended by trade unions, the membership of which includes more than 40% of public sector employees, even though trade unions, the membership of which includes more than 50% of public sector employees, were opposed thereto. In its opinion, this would be illogical, undemocratic, and conceptually inconsistent with the regulation of the Representativeness of Trade Unions Act (Official Gazette RS, No. 13/93 – hereinafter referred to as the RTUA), according to which a representative trade union represents all employees to the extent to which it acquired representative trade union status. It is therefore alleged that, contrary to the RTUA and Article 76 of the Constitution, the above-mentioned provision inadmissibly and disproportionately restricts the possibilities of trade unions to represent employees' interests in the areas for which they have acquired the status of a representative trade union.
4. In its opinion, the second paragraph of Article 42 of the PSSSA and Article 2 of the PSSSAO are unclear and therefore inconsistent with Article 2 of the Constitution. The first applicant takes the view that, by adopting the challenged regulation, the legislature abused the rules of the legislative procedure and the state acted fraudulently because, by amending the law, it retroactively reduced the quorum. Therefore, in its opinion, the challenged regulation is inconsistent with one of the principles of a state governed by the rule of law enshrined in Article 2 of the Constitution, to be precise the principle that obligates bearers of authority to respect the law. Lastly, the first applicant alleges that the challenged provisions are also inconsistent with Article 155 of the Constitution, which prohibits legal acts from having retroactive effect. The PSSSA-O, which amended Article 42 of the PSSSA, allegedly amended the conditions that have to be met in order to amend the collective agreement for the public sector during the on-going negotiations [for its amendment], which indicated that the majority required for the amendment according to the CAPS will not be achieved.
5. The Slovene Public Authorities Trade Union (hereinafter referred to as the second applicant) challenges Article 42 of the PSSSA and Article 2 of the PSSSA-O on the grounds that they are inconsistent with Articles 2, 76, and 155 of the Constitution. In its opinion, both provisions affect the existing CAPS as they changed the quorum that was determined in the CAPS for amendments thereto. Such was allegedly enacted during the negotiations in order to deceive the social partners, while the conditions for the urgent legislative procedure were not met. It further adds that an “interference with the actual number of members” entails an inadmissible interference with Article 76 of the Constitution.

6. The Slovene Veterinaries Trade Union (hereinafter referred to as the third applicant) challenges the eighth paragraph of Article 1 of the PSSSA-O. It claims that it is inconsistent with Articles 38 and 76 of the Constitution. The challenged regulation allegedly requires that sensitive personal data regarding the membership in a trade union be submitted without the explicit consent of its members. The disclosure of the data regarding membership allegedly also interferes with the right of individuals to freely decide on whether or not they want to become members of a trade union.
7. The Constitutional Court served the first applicant's request on the National Assembly. The National Assembly did not respond thereto; however, the Government of the Republic of Slovenia submitted an opinion thereon. In this opinion, the Government explains that the allegations of an unconstitutional interference with the CAPS are unfounded. By referring to several positions of the Constitutional Court and the European Court of Human Rights (hereinafter referred to as the ECtHR),<sup>2</sup> the Government deems that the freedom of trade unions, determined in Article 76 of the Constitution, does not provide for the right to effectiveness and therefore the right to conclude any collective agreement. On the contrary, in its opinion, it is possible to infer from Article 76 of the Constitution, Article 11 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), Article 6 of the European Social Charter – revised (Official Gazette RS, No. 24/99, MP, No. 7/99 – hereinafter referred to as the ESC), and ILO Convention No. 98 that collective agreements are to be concluded freely and voluntarily. In the Government's opinion, Article 76 of the Constitution does not prevent the state from amending, without the trade unions' consent, the conditions under which the collective agreement applies to the non-signatories and non-members of the trade unions. In relation to such, the Government stresses that, according to the PSSSA (and, in particular, Articles 7 and 13 thereof), the collective agreement for the public sector applies to all employers and employees in the public sector and therefore has the same effects as a collective agreement with *erga omnes* applicability pursuant to the Collective Agreements Act (Official Gazette RS, No. 43/06 – hereinafter referred to as the CAA). The Government deems that only a law may determine the conditions for the *erga omnes* applicability of a collective agreement, meaning that it also applies to trade unions that did not sign it, to employees that are not trade union members, and for sectors from which no representative trade union participated in the conclusion of the collective agreement. As the amendments to the collective agreement for the public sector also have *erga omnes* effect, the same also applies with regard to determining the conditions for the applicability of the amendments. In its opinion, ILO Convention No. 98 does not apply to civil servants, and the challenged regulation is not inconsistent with the Convention of the International La-

2. Namely the positions expressed in Constitutional Court Decision No. U-I-57/95, dated 5 February 1998 (Official Gazette Republic of Slovenia, No. 13/98, and OdlUS VII, 21), and the judgments of the ECtHR summarised therein: *National Union of Belgian Police v. Belgium*, Judgment dated 27 October 1975; *Swedish Engine Drivers' Union v. Sweden*, Judgment dated 6 February 1976; *Schmidt and Dahlström v. Sweden*, Judgment dated 6 February 1976.

bour Organization concerning the Promotion of Collective Bargaining No. 154 (Official Gazette RS, No. 46/08, MP, No. 12/08, Official Gazette RS, No. 121/05, MP, No. 22/05 – hereinafter referred to as ILO Convention No. 154), which regulates this subject matter. The Government further deems that the prescribed manner in which the quorum is determined is not inconsistent with the freedom of trade unions or with the right of individuals to freely join trade unions determined in Article 76 of the Constitution. Allegedly, it only prescribes a counting of the submitted membership forms that are returned to the trade union after the authorised person has inspected them, while it does not require that members are specifically verified by name.

8. The Government also dismisses the allegations regarding vagueness, the violation of the principle of legal certainty, retroactive effect, misuse of its role in the legislative procedure, and the deceit of the social partners. In its opinion, the urgent procedure in which the PSSSA-O was adopted was consistent with the Rules of Procedure of the National Assembly (Official Gazette RS, No. 972/07 – official consolidated text, and 105/10); the reason underlying this procedure was to avoid the occurrence of consequences for the operation of the state that would be difficult to remedy. Such consequences would have allegedly ensued as the collective agreements for the public sector, due to inadequate provisions regarding the adoption of amendments thereto, could not have been concluded. As a result, it would have allegedly been impossible to implement measures regarding public sector salaries for 2011 and 2012, which are crucial in terms of achieving fiscal sustainability. In the conclusion of its opinion, the Government describes in detail the negotiations with the representative trade unions regarding the salary policy for the public sector, which it initiated due to the requirement to strike a balance between salary trends in the public and private sectors and because of fiscal sustainability. Such allegedly illustrates that the state attempted to maintain social dialogue, which had been seriously jeopardised and even blocked because a specific group of trade unions was not prepared [to co-operate], and the state was therefore forced to find other solutions to facilitate further social dialogue.

#### **B – I**

9. The first applicant challenges the second paragraph of Article 42 of the PSSSA which, in a subsidiary manner, determined the conditions for concluding and amending the collective agreement for the public sector. It stated that it also challenges the third and fourth, and sixth to tenth paragraphs of Article 42 of the PSSSA. It follows from the grounds for this part of the request that the first applicant opposes the manner in which one of the conditions determined in the second paragraph of Article 42 of the PSSSA is established, i.e. the number of members of representative trade unions that signed the collective agreement for the public sector. Therefore, the Constitutional Court deemed that, in addition to the second paragraph of Article 42 of the PSSSA, the first applicant challenges all the provisions of the same article that refer to establishing the fulfilment of the condition regarding the number of members and the consequences that follow if a trade union does not give its consent thereto. Those

provisions are the third and fourth paragraphs of Article 42 of the PSSSA to the extent that they refer to its second paragraph, and the sixth, seventh, eighth, ninth, and tenth paragraphs of the same article of the PSSSA. The first applicant further states that it challenges Article 2 of the Act amending the PSSSA. The first paragraph of this Article determines that the provisions of the Act apply to the conclusion of a collective agreement for the public sector or amendments thereto which have been adopted after the Act entered into force. The second paragraph, however, provides that the Government shall, within three days after the Act enters into force, invite representative trade unions for the public sector to sign Annex No. 4 to the CAPS and that the provisions of the Act shall apply in order to determine if the conditions for its conclusion are met. It is clear from the content of the request that the first applicant opposes this article only insofar as it refers to those provisions of Article 42 of the PSSSA that have been challenged by this request.

10. The second applicant states that it challenges Article 42 of the PSSSA and Article 2 of the PSSSA-O. It follows from the grounds of its request that, in terms of content, it only challenges the second paragraph of Article 42 of the PSSSA, the third and fourth paragraphs of Article 42 of the PSSSA only insofar as they refer to its second paragraph, and the sixth to tenth paragraphs of Article 42 of the PSSSA. Furthermore it also challenges Article 2 of the PSSSA-O insofar as it refers to the entry into force of the aforementioned provisions.
11. The third applicant states that it challenges the eighth paragraph of Article 1 of the PSSSA-O, which constitutes the content of the eighth paragraph of Article 42 of the PSSSA.
12. The Constitutional Court joined the requests for joint consideration and decision. The Constitutional Court did not send the requests lodged in cases No. U-I-259/10 and No. U-I-51/11 to the opposing party in order for that party to respond thereto. In those two cases there are in fact no substantive allegations that have not already been included in the request in case no. U-I-249/10, of which the National Assembly was already informed.
13. On the basis of an analysis of the challenged provisions and their position within the broader legislative context, the Constitutional Court estimates that the first paragraph of Article 42 of the PSSSA, although not challenged by the applicants, also has the same constitutionally significant effect as the challenged provisions. More specifically, both, the first and second paragraphs of Article 42 of the PSSSA, enable the collective agreement for the public sector to enter into force, even though it was not signed by all the representative trade unions representing the civil servants to whom the collective agreement refers. As the first and second paragraphs of Article 42 of the PSSSA have the same effect, i.e. both determine the quorum, and as they are mutually significantly related (the provisions are subsidiary to each other), according to Article 30 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court expanded the proceedings for the review of constitutionality to include the first paragraph of Article 42 of the PSSSA and the other provisions related thereto. On this basis it reviewed the first to tenth paragraphs of Article 42 of the PSSSA and Article 2 of the PSSSA-O insofar as they refer to these provisions.

## B – II

14. The first and second paragraphs of Article 42 of the PSSSA read as follows:

- “(1) The collective agreement for the public sector, or amendments thereto, are concluded when signed by the Government of the Republic of Slovenia and the majority of the representative trade unions for the public sector, representing at least four different public sector services.
- (2) In the event that the collective agreement for the public sector, or amendments thereto, are not concluded in accordance with the previous paragraph, the collective agreement for the public sector, or amendments thereto, may also be concluded if they are signed by the Government of the Republic of Slovenia and representative trade unions for the public sector of at least four different public sector services, the total membership of which must exceed 40% of all the public sector employees to whom the collective agreement for the public sector applies.”

15. Even though a collective agreement for the public sector is concluded<sup>3</sup> only between the Government and the groups of trade unions defined in the first and the second paragraphs of Article 42 of the PSSSA, it is binding upon not only all civil servants, regardless of whether or not they are members of the trade unions that signed the collective agreement, but also all their employers. The PSSSA thus determined *erga omnes* applicability of the collective agreement for the public sector, as its normative provisions have a wider effect than only on the parties to the agreement or their members.<sup>4</sup> It is true that the PSSSA does not explicitly provide for such *erga omnes* effect of the collective agreement for the public sector. However, the *erga omnes* applicability of the collective agreement derives from the provisions, in which the PSSSA defines the content and scope of the collective agreement for the public sector; the prescribed majority required for its conclusion corroborates this. The collective agreement for the public sector namely regulates how benchmark positions are determined and how they are classified into pay grades,<sup>5</sup> how the criteria for job

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3 The same applies to the amendments to that collective agreement. That which applies to the conclusion of the collective agreement for the public sector also applies to its amendments, even though this is not always explicitly stated in this Decision of the Constitutional Court.

4 In this Constitutional Court Decision, the term “*erga omnes* applicability” (or *erga omnes* effect) is used in general to describe that the collective agreement is also binding upon persons and entities who are not members of the parties to the agreement, and not as synonym for the concept of *erga omnes* applicability of a collective agreement in accordance with Articles 12 and 13 of the CAA.

5 The fourth paragraph of Article 12 of the PSSSA thus provides that the collective agreement for the public sector determines the benchmark positions and the titles, and the first paragraph of Article 13 of the PSSSA provides that the same collective agreement determines how the evaluated benchmark positions and titles are graded. The basic salaries of civil servants are determined according to the grade into which their position or title is classified (the first paragraph of Article 9 of the PSSSA); the classification of concrete positions and titles is performed by taking into account how the benchmark positions and titles are classified (the first paragraph of Article 13 of the PSSSA).

performance are determined,<sup>6</sup> how the various allowance amounts are determined (e.g. for years of service, mentoring, specialisations, master's degrees, or doctorates),<sup>7</sup> etc. Together with the PSSSA, the collective agreement for the public sector therefore contributes significantly to determining the salaries of all civil servants. The effect of the collective agreement on the public sector regarding how the salaries for all civil servants are determined is unconditional and binding. More precisely, no agreement on a different (i.e. higher) payment from that which is agreed in the collective agreement for the public sector may be reached in a lower ranked collective agreement or an individual employment contract.<sup>8</sup>

### B – III

16. The first applicant alleges that the challenged regulation is inconsistent with Article 76 of the Constitution as it inadmissibly and disproportionately restricts the possibilities of trade unions to represent employees' interests in the areas for which they have acquired representative status.
17. Article 76 of the Constitution (freedom of trade unions) guarantees the freedom to establish, operate, and join trade unions. The freedom of trade unions is therefore a special form of freedom of association, which is guaranteed by the second paragraph of Article 42 of the Constitution.<sup>9</sup> This entails that the constitution framers explicitly underlined the constitutional importance of the free association of workers, i.e. an association established with the aim to set standards for workers' socio-economic rights, as well as to implement those standards and endeavour to raise them. Moreover, Article 76 of the Constitution does not form part of Chapter II, entitled "Human Rights and Fundamental Freedoms", but is instead included in Chapter III, which is entitled "Economic and Social Relations". However, with regard to the content and purpose of the mentioned provision, the freedom of trade unions also constitutes a human right protected by the Constitution that may only be interfered with if the conditions determined in the third paragraph of Article 15 of the Constitution have been met.<sup>10</sup>

6 See the second paragraph of Article 22a of the PSSSA.

7 See, for example, the second paragraph of Article 25 and Articles 26 and 27 of the PSSSA.

8 It follows from several provisions of the PSSSA that important criteria for determining the salaries of civil servants are specified by the collective agreement for the public sector (see notes 5 and 6), which entails that the same issues cannot be regulated by another (narrower) collective agreement. In addition, the third paragraph of Article 13 of the PSSSA provides that the employment contract, decision or resolution regarding a civil servant may not determine a salary that differs from that determined by statute, regulations or other acts issued on the basis of regulations, or collective agreements.

9 In the context of freedom of association, the first paragraph of Article 11 of the ECHR explicitly refers to trade unions: "Everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and join trade unions for the protection of their interests."

10 The Constitutional Court first indicated that the content of Article 76 of the Constitution entails a human right in Decision No. U-I-57/95, wherein it interpreted this right together with the human right to freedom of association enshrined in Article 11 of the ECHR. In Decisions No. U-I-61/06, dated 11 December 2008 (Offi-

18. The freedom of trade unions with regard to their activities, i.e. the freedom of action of trade unions, is of crucial importance in the case at issue. The Constitutional Court has already held that the right to collective bargaining that is based on the free and voluntary conclusion of collective agreements, and on the autonomy of the parties to the agreement, is one of the aspects of this freedom (Decision No. U-I-61/06 and No. U-I-159/07).<sup>11</sup> The value of collective bargaining is also protected as a fundamental right by international instruments that are binding upon Slovenia. Article 4 of ILO Convention No. 98 provides that measures shall be taken to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to regulating terms and conditions of employment by way of collective agreements. It does not regulate the position of public servants [the text refers to Article 6 of the English text of the Convention]<sup>12</sup>, and leaves it to the state to decide on the extent to which the Convention's guarantees shall apply to the armed forces and the police. The mentioned Convention is complemented by ILO Convention No. 154, which obligates the State Parties to adopt measures to promote collective bargaining, and specifies the objectives to be achieved by these measures. It applies to economic

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cial Gazette RS, No. 120/08, and OdlUS XVII, 72), and No. U-I-159/07, dated 10 June 2010 (Official Gazette RS, No. 51/10), however, the Constitutional Court clearly held that the content of this constitutional provision constituted a human right.

- 11 In support of the fact that collective bargaining is a constituent part of Article 76 of the Constitution also M. Blaha in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary to the Constitution of the Republic of Slovenia], Fakulteta za podiplomskedržavne in evropske študije, Ljubljana, 2002, p. 750. Similarly, in relation to the German constitutional order, the Federal Constitutional Court emphasises the premise of the constitution framers, according to which the parties to a collective agreement can better align their conflicting interests than the state because the subject of regulation is more familiar to them (BVerfGE 92, 26). The freedom of trade unions is conceptualised more narrowly by the ECtHR, which wrote in its Judgment in *Wilson, National Union of Journalists and others v. United Kingdom*, dated 2 July 2002, *inter alia*, that collective negotiations are not necessary for the effectiveness of the freedom of trade unions.
- 12 Scholars interpret this term, used by the Convention, as "officials employed by the authorities of state or local administration" (see K. Kresal Šoltes, *Oblastni posegi v kolektivna pogajanja* [Authoritative interference with the collective bargaining process], *Delavci in delodajalci*, Vol. X, No. 4 (2010), p. 580) or as "civil servants in state administration" (see P. Končar in: M. Novak, P. Končar, and A. Bubnov Škoberne (Eds.), *Konvencije Mednarodne organizacije dela s komentarjem* [International Labour Organization Conventions with Commentary], Inštitut za delo pri Pravni fakulteti Univerze v Ljubljani and GV Založba, Ljubljana 2006, p. 59). The same follows from the Report of the Committee on Freedom of Association of the International Labour Organization with regard to the scope of ILO Convention No. 98 (329<sup>th</sup> Report, Case No. 2177/2183, para. 644, adapted from: *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, International Labour Office, Geneva 2006, p. 179, para. 892). The report emphasises, *inter alia*, that the mere fact that civil servants are white-collar employees does not in itself suffice to consider them employees engaged in the administration of the state; if this were not the case, the scope of ILO Convention No. 98 would be significantly narrowed. However, in the opinion of the Committee, all employees in public service enjoy the rights of collective bargaining, with the sole possible exception of the armed forces, the police, and state officials that are directly engaged in the administration of the state.

activities and enables that special modalities of the application of this Convention may be fixed by national regulation as regards “public service” [the text refers to the third paragraph of Article 1 of the English text of the Convention], and leaves the regulation with regard to the armed forces and the police to the state. The International Labour Organization Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (Official Gazette RS, No. 55/10, MP, No. 10/10 – hereinafter referred to as ILO Convention No. 151) promotes, *inter alia*, the adoption of measures to encourage and promote procedures for negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organisations for all those employees to whom more favourable provisions in the other conventions do not apply. According to this Convention, it is possible to limit the extent to which the guarantees apply to the police, the armed forces, high-level employees, and those persons whose duties are of a highly confidential nature.

19. By signing the above-mentioned ILO Conventions, the state therefore undertook to recognise the right to collective bargaining in the private and public sectors. However, it may provide special modalities for the implementation of the guarantees referred to in ILO Convention No. 154 for the employees in “public service”. The state may determine the extent to which it will recognise the right of specific categories of civil servants (the police, the armed forces) to collective bargaining.
20. The second paragraph of Article 6 of the ESC obligates the Contracting States to ensure that the right to bargain collectively is exercised effectively and, *inter alia*, to promote, where necessary, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements. In the opinion of the European Committee of Social Rights, Article 6 of the ESC refers not only to employees in the private sector but also to public officials, taking into account the modifications that are clearly required for those who are not bound by contractual provisions, but by public-law regulations.<sup>13</sup> With regard to those persons (i.e. civil servants), the scope of the collective bargaining guarantees may therefore be limited. Those civil servants whose terms of employment are regulated to a certain extent by the law and not by an employment contract, and to whom the regular procedures of collective bargaining do not apply according to the national regulation, must have the right to participate in the adoption of the laws that regulate their position (this right derives from the first paragraph of Article 6 of the ESC).<sup>14</sup>
21. Similarly, Article 28 (Right of collective bargaining and action) of the Charter of Fundamental Rights of the European Union (OJ C 83, 30. 3. 2010, p. 389), which became legally binding when the Treaty of Lisbon entered into force, provides that

13 Conclusions III, p. 33, Federal Republic of Germany, adapted from L. Samuel, Fundamental social rights, Case law of the European Social Charter, Council of Europe Publishing, Strasbourg 2002, p. 137.

14 Conclusions III, p. 34, Federal Republic of Germany, and Conclusions IV, p. 45, Austria, adapted from L. Samuel, *ibid.*, p. 140.

workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels.

22. Therefore, the right of trade unions to voluntarily, autonomously, and collectively negotiate with the employers' representatives on behalf of their member workers and conclude collective agreements on social and economic issues in connection to labour relations arises from Article 76 of the Constitution, if this is construed also in relation to the provisions of the above-mentioned international instruments.<sup>15</sup> The regulation of the position of workers through collective bargaining mitigates the structurally subordinate position of each worker when concluding employment contracts and, in such manner, the negotiated rights and working conditions may become relatively balanced. Consequently, it acquires greater value as it contributes to securing social justice and social peace, which are embedded in the principle of a social state (Article 2 of the Constitution), and to enhancing the democratic character of social regulation. However, there is no requirement in Article 76 of the Constitution for the state to guarantee the conclusion of a collective agreement. Such obligation would result in denying its voluntary nature, which is an essential defining element of the freedom of trade unions determined in Article 76 of the Constitution.<sup>16</sup> However, the freedom of action of trade unions obliges the state to provide for a legal framework that facilitates an effective collective bargaining system.
23. The right of trade unions to collective bargaining, which derives from the freedom of action of trade unions, thus involves several aspects. The substantive aspect delineates the range of autonomy of the trade unions and the employers. It therefore defines the subject matter that falls under the autonomy of the social partners, and the employment relationship issues that may be regulated autonomously in a collective agreement by the parties thereto. The employment relationships of civil servants are marked significantly by the fact that the employers are state or other public entities. The state is, at the same time, a bearer of authority and is required to protect the public interest. In order to achieve this objective, it must determine terms and conditions for performing a public service, measures ensuring a reasonable fiscal policy, etc. It must ensure that its competences are exercised effectively, and that the entire public sector functions effectively. Therefore it must also ensure that the freedom of collective bargaining, which includes the possibility that no consensus for the conclusion of a collective agreement is reached, does not seriously threaten the exercise of the mentioned essential functions. In this context, the employment relationships of public sector employees are, in general, by their very nature subject to wide, uni-

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15 According to the fifth paragraph of Article 15 of the Constitution, no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that the Constitution does not recognise that right or freedom, or recognises it to a lesser extent.

16 In the same manner, the Constitutional Court emphasised in Decision No. U-I-57/95 that trade unions are not guaranteed the right to effectiveness as it would necessarily imply the obligation of employers to conclude a collective agreement. The European Commission of Human Rights also came to a similar conclusion in *Association A v. Federal Republic of Germany*, dated 14 July 1983.

lateral authoritative (heteronomous) regulation, and the substantive aspect of the autonomy of collective bargaining is accordingly limited. In particular, this applies to the employment relationships of certain categories of public sector employees (e.g. the military, police, and civil service) and for specific elements of the employment relationships (e.g. salaries). These particularities are also taken into account by the binding rules of international law. Despite such, through the PSSSA the legislature provided the possibility of autonomous collective bargaining regarding the elements of salaries for all civil servants uniformly. Therefore, in the case at issue, the Constitutional Court was not required to take a position on the question as to where the boundaries lie between the constitutionally guaranteed substantive autonomy for regulating socio-economic issues with regard to different categories of civil servants, on the one hand, and the authoritative regulation of these issues on the other.

24. The substantive aspect is not the only dimension of the right to collective bargaining guaranteed by Article 76 of the Constitution. It also protects the fundamental procedural elements of that process, such as freedom, the voluntary nature and fairness of collective bargaining. Even though the substantive aspect of the autonomy of collective bargaining, which is protected by Article 76 of the Constitution, does not necessarily require the possibility of collective bargaining on a specific subject, the legislature must, if it regulates the mechanism of collective bargaining with regard to that subject, take into account the procedural aspect of the freedom of action of trade union. Where the state envisages collective bargaining in the public sector and adopts the rules for such, the requirement of fairness in the negotiation procedure demands from the state, *inter alia*, that it advances its own interest as an employer in accordance with the determined rules of that process and without unjust recourse to its authoritative power. This guarantee would be infringed if the state, during a negotiation process in which it participated as a party on an equal footing with the other parties, authoritatively changed the rules governing that process in order to be able to achieve the implementation of its interests as an employer in the collective bargaining process. Such, however, does not prevent the legislature from interfering with the subject matter of the collective regulation in a time-limited manner if it assessed that this was appropriate, necessary, and proportionate, and based on constitutionally admissible grounds.<sup>17</sup>
25. An independent procedural element of the freedom of action of trade unions is the possibility of trade unions to voluntarily (i.e. in accordance with their own will) represent the interests of their members when concluding collective agreements, the substance of which may be – although perhaps not necessary from a constitutional law perspective – the subject of autonomous collective regulation. A regulation which allows for a collective agreement to be concluded, regardless of the opposition of a representative trade union which brings together civil servants whose position

17 With regard to the criteria for unilateral authoritative interference with collective bargaining autonomy, as specified by the bodies of the International Labour Organization and the Council of Europe, see K. Kresal Šoltes, *Vsebina kolektivne pogodbe: Pravni vidiki s prikazom sodne prakse in primerjalnopravnih ureditev* [The Content of Collective Agreements: Legal Aspects Illustrated by Case Law and Comparative Law Regulations], GV Založba, Ljubljana 2011, pp. 192–199.

is regulated by such collective agreement, therefore interferes with the voluntary nature of such as an element of the freedom of action of trade unions referred to in Article 76 of the Constitution.

26. A collective agreement may also apply to employees that have not formed a trade union, if the legislature so decides. Given the content of the requests and the fact that they were lodged by trade unions, this is not subject of this review. However, the premise of the first and the second applicants that the parties to the collective agreement, the effects of which also apply by law to non-members (third parties), may themselves determine the quorum for an amendment of the collective agreement therein is erroneous. In the event that a collective agreement is more than just an autonomous regulation of the position of the parties to the collective agreement and their members, as it also determines the rights and obligations of third parties, such effects and the preconditions for such effects may, according to Article 87 of the Constitution, only be determined by law.

#### **B – IV**

27. The first and second paragraphs of Article 42 of the PSSSA allow for the salaries of civil servants to be regulated by a collective agreement against the will of a representative trade union representing these civil servants. Therefore, both paragraphs interfere with the freedom of action of trade unions determined in Article 76 of the Constitution. The Constitutional Court subsequently reviewed whether such regulation of the conditions for the conclusion (or amendment) of a collective agreement pursue a constitutionally admissible aim (the third paragraph of Article 15 of the Constitution) and whether the limitation is consistent with the general principle of proportionality (Article 2 of the Constitution).
28. The legislature decided that specific elements of the public sector salary system shall be determined uniformly for all civil servants by way of a collective agreement for the public sector. It is possible to infer from the conclusion of the Government's opinion that the objective of the challenged regulation was to render this system effective. The effectiveness of the collective bargaining process, i.e. the creation of realistic opportunities for actually concluding (or amending) a collective agreement on the elements of the salaries of civil servants, is a constitutionally admissible aim. Social justice and social peace that are created and promoted by an operative social dialogue are undoubtedly in the public interest. The aim of the interference, i.e. to avoid demanding, ambitious conditions for the conclusion of the collective agreement that would obstruct the collective bargaining process and therefore reduce its effectiveness, is also in line with the assumed international obligations to encourage autonomous collective bargaining.
29. As the interference with the freedom of trade unions pursues a constitutionally admissible aim and is therefore not inadmissible in this respect, it is necessary to further review whether the challenged regulation is consistent with the general principle of proportionality, i.e. whether it is necessary, appropriate, and proportionate in the narrower sense.

30. The Constitutional Court deems that the interference is disproportionate in the narrower sense, without reviewing its appropriateness and necessity. When reviewing this element, the Constitutional Court assesses whether the gravity of the consequences of the interference under review with the affected human right is proportionate to the importance of the pursued aim or the benefits arising from the interference. The Constitutional Court based its assessment on the existing regulation and practice of concluding collective agreements for the public sector. It follows therefrom that representative trade unions for the public sector may participate in the conclusion of a collective agreement regardless of the level at which they are organised: as a trade union confederation, as sectoral trade unions (that are not identical to sectors within the meaning of Article 7 of the PSSSA) or even as occupational trade unions.<sup>18</sup> With regard to such, the Constitutional Court was not required to take a position in this case on whether, in the event of a different regulation of representativeness with regard to the conclusion of a collective agreement for the public sector, a trade union of a higher level were able to “outvote” the trade union of a lower level, and if so, under which conditions.
31. On the one hand, the opportunity for the representative trade unions to represent the interests of their members during the conclusion of a collective agreement that will apply to them is affected (which also affects the civil servants who have formed trade unions to represent their interests). It has to be taken into consideration that trade unions that oppose the conclusion of the collective agreement for the public sector are not allowed to participate in any further collective bargaining process in which they would attempt to negotiate for their members a different (in their opinion a more favourable) regulation of salaries from the one agreed upon in the collective agreement for the public sector. On the other hand, there is a public interest in not making the conclusion of a collective agreement on civil servants’ salaries excessively difficult. When searching for the constitutionally acceptable balance between the level of the impairment of the right of trade unions and the importance of the aim, it must be taken into account that by increasing the intensity of the interference (i.e. by increasing the number of civil servants who are represented by trade unions that oppose the conclusion of a collective agreement), the general benefit of the pursued aim diminishes (the benefit arising from the effectiveness of concluding such collective agreements). This is all the more true when a trade union that is the only one to represent a specific category of civil servants opposes the conclusion of a collective agreement. The challenged regulation therefore enables the representative trade unions, which represent a significant part of all civil servants, to conclude a collective agreement that is binding on all the civil servants, regardless of two essential circumstances. The conclusion of such an agreement is possible regardless of the fact that it is opposed by a representative trade union which is the only one uniting civil servants from a specific public sector category, to whom *inter alia* this collective agreement will apply. Furthermore, a collective agreement may also be concluded although it is opposed by representative trade unions which have a greater number

18 See, for example, the collective agreement and its annexes, published in the Official Gazette RS, Nos. 57/08, 23/09, 91/09, and 85/10.

of members who are civil servants from a specific category than representative trade unions which also represent this category and support the conclusion of the collective agreement. The right balance between limiting the possibilities of representative trade unions to represent the interests of their members when a collective agreement is being concluded and the effectiveness of the collective bargaining has thus been exceeded.

32. The first and second paragraphs of Article 42 of the PSSSA therefore entail an excessive interference with the right of representative trade unions to, according to their will, represent their members in the collective bargaining process, which is one of the dimensions of the freedom of action of trade unions determined in Article 76 of the Constitution. Consequently, they are inconsistent with this provision. All the other challenged provisions of Article 42 of the PSSSA which, in terms of content, are exclusively connected with the conclusion of a collective agreement for the public sector with the challenged majority, have therefore become irrelevant. The same applies to Article 2 of the PSSSA-O insofar as it refers to the mentioned provisions of Article 42 of the PSSSA. Therefore the Constitutional Court also established the unconstitutionality of these provisions (Point 1 of the operative provisions).
33. The Constitutional Court issued a declaratory decision as an abrogation is not possible due to the complexity of the issues regulated by the PSSSA and taking into account the premises outlined in Paragraph 30 of the reasoning of this Decision. For the same reason, it determined a longer, two-year deadline to remedy the established unconstitutionality (Point 2 of the operative provisions). During this period, the legislature will be required to establish a legal framework of collective bargaining on public sector salaries which will be consistent with the Constitution.
34. The Constitutional Court also determined the manner in which its decision was to be implemented (the second paragraph of Article 40 of the CCA). It determined that, until the unconstitutional situation is remedied, the first to tenth paragraphs of Article 42 of the PSSSA and the CAPS and its annexes continue to apply (Point 3 of the operative provisions). By doing so, it ensured that collective bargaining on civil servants' salaries will continue to be possible until the established unconstitutionality is remedied. Another reason why the Constitutional Court did not decide to establish unconstitutionality without determining the manner of the implementation of the Decision, which might have also resulted in the invalidity of the already concluded annexes to the CAPS, was that it could not foresee the financial consequences such might have had for the budget.<sup>19</sup> The manner of implementation therefore entails that the already concluded CAPS and its annexes, or any future annexes or a new collective agreement for the public sector, cannot be invalid only because of the unconstitutionality established in this Decision (Point 3 of the operative provisions).
35. As the Constitutional Court established the unconstitutionality of the challenged provisions already due to the above-mentioned reasons, it did not review other alleged unconstitutionality.

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19 Cf. Paragraph 151 of Constitutional Court Decision No. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006 (Official Gazette RS, No. 1/07, and OdlUS XV, 84).

36. The Constitutional Court adopted this Decision according to Article 48 and the second paragraph of Article 40 of the CCA, composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. It adopted the Decision by five votes against four. Judges Jadek Pensa, Klampfer, Pogačar, and Petrič voted against. Judge Pogačar submitted a dissenting opinion.

*Dr Ernest Petrič*  
*President*

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#### DISSENTING OPINION OF JUDGE JASNA POGAČAR

I voted against the Decision because I do not agree with the assessment, which is based on the findings that the first and second paragraphs of Article 42 of the Public Sector Salary System Act (hereinafter referred to as the PSSSA) excessively interfere with the right of representative trade unions to represent their members during the collective bargaining process when a collective agreement for the public sector may be concluded even though it is opposed by a representative trade union which is the only one uniting civil servants from a specific public sector category and even though it is opposed by representative trade unions which have a greater number of members who are civil servants in a specific category than representative trade unions which also represent such category and support the conclusion of the collective agreement. In this dissenting opinion, I would like to present my thoughts on the subject of exercising the freedom of trade unions in the public sector.

The freedom of trade unions is a fundamental freedom regarding which the Constitution does not explicitly require that the manner of its exercise be regulated by law, and it also does not provide for any possibility of limiting this freedom. According to the general rule determined in Article 15 of the Constitution, the manner in which the freedom is to be exercised may be determined by law if such is necessary due to its nature; limitations are only permitted in order to protect the rights of others or the public interest. This rule does not prevent the legislature from regulating the issues [the regulation of which is] required in order to allow trade unions to exercise their freedom effectively in all the environments in which it is exercised. It is not possible to deny the freedom to establish and join trade unions or the freedom of action of trade unions in the public sector. However, I wonder whether it is constitutionally admissible to introduce specificities related to exercising the right to collective bargaining in an environment that is, by its very nature, fundamentally different to the private sector. This refers to the public sector within the meaning of the Civil Servants Act (hereinafter referred to as the CSA) and the PSSSA.<sup>1</sup> Interna-

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<sup>1</sup> The public sector consists of state authorities and local community administrations, public agencies, public

tional labour standards allow for the exercise of the right to collective bargaining to be adapted to the way in which the public sector operates; this is demonstrated by the Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (hereinafter referred to as ILO Convention No. 151)<sup>2</sup> and the Convention concerning the Promotion of Collective Bargaining (hereinafter referred to as ILO Convention No. 154).<sup>3</sup> I believe that the scope of their application cannot depend on literal translations, as there is no definition of the public sector for the European area; there are only a basic framework identifying the characteristics of the public sector and standards that are applicable to its roles as an authority and service provider. The scope and the manner in which the public sector operates are, however, subject to national regulations. In this context, the public sector consists of entities that do not operate on the basis of the principles of free economic initiative, because they are required, e.g. when carrying out the responsibilities of the state, to continuously and without interruption provide public goods, as a result of which they receive public funding and are included in the fiscal system. It is evident from the reasons of the draft law on the ratification of ILO Convention No. 151 that the purpose of its ratification was its application to persons that are defined as civil servants in the CSA.<sup>4</sup> Therefore, the question arises

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funds, public institutions, public commercial institutions, and other entities governed by public law that are indirect users of the state budget or a local community budget. Civil servants are the persons employed by these entities governed by public law (with the exception of functionaries). Officials are civil servants in the state authorities and local community administrations.

- 2 It is evident from the Notification of the Entry into Force of the Convention concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (Official Gazette RS, No. 80/11, MP, No. 12/11) that the Convention entered into force in the Republic of Slovenia on 20 September 2011. The preamble to the Convention (the Act ratifying the Convention concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (ILO Convention 151), Official Gazette RS, No. 55/10, MP, No. 10/10) explains that the reasons for its adoption were in particular:
  - (1) considerable expansion of public-service activities in many countries and the need for sound labour relations between public authorities, acting as employers, and public employees' organisations,
  - (2) great diversity of political, social, and economic systems among member States (e.g. as to the respective functions of central and local government, of federal, state, and provincial authorities, and of state-owned undertakings and various types of autonomous or semi-autonomous public bodies, as well as to the nature of employment relationships),
  - (3) different interpretations of the content of international instruments and of the application of the Right to Organise and Collective Bargaining Convention, 1949, to the public sector, and the observations of the supervisory bodies of the ILO that some member states do not apply ILO Convention No. 98 to large groups of public employees.
- 3 As regards the public service, special modalities for the application of this Convention may be fixed by national laws or national practice (the third paragraph of Article 1 of ILO Convention No. 154).
- 4 See the Draft Act ratifying the Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (ILO Convention No. 151), Official Gazette of the National Assembly, No. 61/10.

as to whether the inclusion in the public sector as such dictates that specificities be introduced,<sup>5</sup> and whether the nature of a specific position in the civil service or the content of the responsibilities involved dictates that limitations be introduced.<sup>6</sup>

When reviewing whether the second paragraph of Article 7 of the PSSSA is consistent with the second paragraph of Article 120 of the Constitution, the Constitutional Court explained that the persons authorised to conclude collective agreements were limited by the PSSSA, i.e. by certain general principles or rules that must be taken into account when adopting the mentioned legal acts.<sup>7</sup> However, in case no. U-I-256/08, the Constitutional Court was not required to consider the relationship between collective bargaining and the regulation contained in the CSA and the PSSSA. In the case at issue, the applicants substantiate their allegations regarding the inconsistency with Article 76 of the Constitution with the explanation that the law should not determine the content of the collective agreement for the public sector, because the purpose of collective bargaining was to obtain more favourable rights than those determined as the statutory minimum. Such interpretation would not require an answer if the review of the Constitutional Court had remained within the boundaries of the challenged provisions of the Act Amending the Public Sector Salary System Act (hereinafter referred to as the PSSSA-O) and within the boundaries of the claims that, during the negotiations, the state authoritatively changed the rules agreed upon through social dialogue and secured a better position for itself as a social partner. By expanding the review to include the first paragraph of Article 42 of the PSSSA-O, the decision-making of the Constitutional Court departed from the review of the allegations and focused instead on the substantive issues with regard to exercising the right to collective bargaining in the public sector. However, the problem is that the initial findings and the positions that have followed these findings do not take into account the content of the CSA and the PSSSA, which determine the autonomy of collective bargaining; in fact, these findings and positions do not constitute a position on the question of whether the state excessively restricted the autonomy of collective bargaining in the public sector, but instead uncritically follow the premises and standards that have been established in the private sector. It is explained in the Decision of the Constitutional Court that the autonomy of collective bargaining is more restricted in the public sector; however, it is not explained

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- 5 Article 7 of ILO Convention No. 151 provides as follows: “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.” Article 9 provides as follows: “Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.”
- 6 [The second paragraph of] Article 1 of ILO Convention No. 151 provides as follows: “The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.”
- 7 Constitutional Court Decision No. U-I-256/08, dated 18 February 2010 (Official Gazette RS, No. 16/10).

how the regulation differs in the private sector. The wording of the second paragraph of Article 1 of the PSSSA<sup>8</sup> reveals that the purpose of adopting the PSSSA was to determine a common basis in order to ensure that the system is comparable and manageable. It is evident from the legislative materials<sup>9</sup> that the key aims of the PSSSA are:

- (1) to establish a universal salary system for all civil servants and officials;
- (2) to determine appropriate ratios between the salaries of civil servants and functionaries;
- (3) to establish a flexible salary system, linking salaries to effectiveness and work performance; and
- (4) to ensure that the salary system is transparent and manageable in fiscal terms.

The issues regarding the status of specific categories of civil servants are subject to negotiations leading to the conclusion of collective agreements for a specific sector or for a specific budget user (e.g. collective agreements for RTV [i.e. the national radio and television broadcasting network]) or occupation. A collective agreement for the public sector is an agreement *sui generis*, as it regulates the common characteristics of the salary system as a whole. The state delegated the power to regulate the common characteristics that will ensure the comparability of salaries in the salary system to the social partners and included all representative trade unions, regardless of how they are organised, in the decision-making process regarding these common characteristics. The PSSSA determines the content of the collective agreement<sup>10</sup> and each party to the agreement may propose that other common characteristics be regulated through negotiations. The collective agreement for the public sector does not determine salaries. The salaries were also not regulated in the context of determining benchmark positions and titles; benchmark positions and titles were used in order to provide an abstract comparison between and within pay groups, which facilitated the process of determining basic salaries through the classification of specific positions and titles. However, all this has already been implemented, i.e. through sectoral collective agreements, regulations, and general acts; the collective agreement for the public sector only determined the basic salaries of those ancillary posts that are not characteristic for the sector, the budget user, or the occupation in question.

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8 The first sentence of the second paragraph of Article 1 of the PSSSA reads as follows: "This act determines the common foundations of the public sector salary system, in order to enforce the principle of equal pay for comparable occupations, to ensure the transparency and comparability of pay and occupational groups, and for an incentivised reward system."

9 The draft law on the public sector salary system, which was prepared for the first reading (EPA 414), and the Information on Salaries in the Public Sector (Part II, March 2011) are published in the Official Gazette of the National Assembly, No. 9/02.

10 Pursuant to the PSSSA, the collective agreement for the public sector:- determines benchmark positions and titles, and classifies them into pay groups,- classifies positions in the J pay group into pay grades (ancillary posts for the whole public sector);- determines the amount [of funds] for rewarding job performance;- determines the criteria for determining the part of the salary based on job performance;- determines the allowance amounts to which everyone is entitled under the same conditions;- determines the adjustment of pay grade values.

In the private sector, there exists the rule that only rights which are more favourable to workers than the statutory minimum (the *in favorem* rule) may be determined in a collective agreement; the exceptions to this are explicitly determined. A representative trade union negotiates for the benefits of the workers it represents; the *erga omnes* effect of the concluded collective agreement is intended to ensure the same working conditions for all. If collective bargaining in the private sector fails, the level of rights already achieved or the statutory minimum applies. In the public sector, where according to the CSA and the PSSSA the salaries are regulated in more detail by authoritative acts and where there is considerable centralisation, there are no statutory minimum rights provided by law, and the collective agreement for the public sector replaces authoritative regulation. Representative trade unions negotiate on common characteristics regarding all civil servants to whom the collective agreement for the public sector applies,<sup>11</sup> meaning that in such negotiations it is not possible to enforce a position that does not follow the principle of comparability. In the event of unsuccessful collective bargaining, also in the public sector the existing regulation applies; however, the state is required to adopt an authoritative act in place of the missing regulation and may perhaps interfere with the existing salary regulation by means of an intervention measure.

In the public sector, the state has the role of a regulator and a social partner. I shall not consider the question of whether, in the case at issue, the state disturbed the balance between those two roles and inadmissibly interfered with the right to freedom of action of trade unions by changing the rules agreed upon through social dialogue. However, I believe that given the autonomy of collective bargaining, as regulated by the CSA and PSSSA, it is not possible to construe that the state excessively interfered with the rights of trade unions. It was agreed through social dialogue that all representative trade unions are parties to the collective agreement for the public sector. The rules to determine validity, which recognise a greater level of representativeness to those representative trade unions that jointly reach a predetermined limit of representation of civil servants to whom the collective agreement for the public sector applies, cannot in themselves restrict the activities of representative trade unions, provided they have the possibility of voluntarily and freely deciding whether to participate in the collective bargaining process and which interests, with regard to the interests of the members that they represent, they will attempt to further within the framework of the common characteristics. The absence of authoritative rules regarding the organisation of employees as parties to negotiations allows all the representative unions to participate in accordance with their will in establishing negotiating positions and in the work of the workers' negotiation group. The fact that representative trade unions act as one party to the agreement in the context of the regulation of the common characteristics requires them to act jointly, and the rules that empower specific representative trade unions or even require their members to be counted

11 The PSSSA determines a special regulation for functionaries, diplomats, soldiers, the police, school principals, directors, and others.

weaken their bargaining power and render social dialogue difficult. The content of the autonomy of collective bargaining, which given the applicable regulations has to be taken into account, prevents a specific representative trade union from negotiating different or better salary regulations for its members in negotiations on regulation of the common characteristics. I also wonder whether the right to freedom of action of trade unions precludes the introduction of such a social dialogue model between the employers' representatives and civil servants, the subject of which is the regulation of the common characteristics of the salary system.

*Jasna Pogačar*

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**PART II**

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Constitutional Foundations of the State



**DECISION**

At a session held on 11 December 2008 in proceedings to review constitutionality initiated upon the request of the Administrative Court of the Republic of Slovenia, the Constitutional Court

*decided as follows:*

1. The following provisions are inconsistent with the Constitution:
  - the fourth paragraph of Article 5 of the Salary System in the Public Sector Act (Official Gazette RS, Nos. 56/02, 72/03, 115/03 – official consolidated text, 126/03, 20/04 – official consolidated text, 70/04, 24/05 – official consolidated text, 53/05, 70/05 – official consolidated text, 14/06, 32/06 – official consolidated text, 68/06, and 110/06 – official consolidated text, 57/07, 95/07 – official consolidated text, 17/08, 58/08, and 80/08), inasmuch as it refers to judges;
  - the second paragraph of Article 10 with reference to Annex 3 to the Salary System in the Public Sector Act, inasmuch as it refers to judges;
  - the fourth paragraph of Article 44 of the Judicial Service Act (Official Gazette RS, Nos. 19/94, 8/96, 24/98, 48/01, 67/02, 71/04, 23/05 – official consolidated text, 17/06 and 41/06 – official consolidated text, 127/06, 27/07 – official consolidated text, 57/07, and 94/07 – official consolidated text).
2. The third paragraph of Article 25 of the Salary System in the Public Sector Act (Official Gazette RS, Nos. 56/02, 72/03, 115/03 – official consolidated text, 126/03, 20/04 – official consolidated text, 70/04, 24/05 – official consolidated text, 53/05, 70/05 – official consolidated text, 14/06, 32/06 – official consolidated text, 68/06 and 110/06 – official consolidated text, 57/07, 95/07 – official consolidated text, 17/08) was, inasmuch as it referred to judges, inconsistent with the Constitution.
3. The National Assembly must remedy the established inconsistencies within six months from the publication of this decision in the Official Gazette of the Republic of Slovenia.
4. The second and fourth paragraphs of Article 3, the fourth paragraph of Article 3a, the third paragraph of Article 23, the second paragraph of Article 48, and the second sentence of the fourth paragraph of Article 49c of the Salary System in the Public Sector Act, inasmuch as they refer to judges, as well as the third paragraph

of Article 22b and the fourth paragraph of Article 22f of this act are not inconsistent with the Constitution.

### *Reasoning*

#### **A**

#### **The Applicant's Allegations**

1. The applicant requests a review of the constitutionality of the second paragraph of Article 10 of the Salary System in the Public Sector Act (hereinafter referred to as the SSPSA). The applicant alleges that the challenged regulation is inconsistent with the principle of the separation of powers (the second paragraph of Article 3 of the Constitution), as it allegedly does not ensure judges remuneration which would be comparable with the remuneration of the officials of the other two branches of power. With reference to such, the applicant also refers to the principle of institutional balance as a principle of European Union (hereinafter referred to as the EU) law, which allegedly developmentally succeeded the classical principle of the separation of powers. In the opinion of the applicant, by placing the offices of senior local court, higher court, and Supreme Court judges one salary bracket higher, the disparities between the salaries of the officials of different branches of power, established by Constitutional Court Decision No. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006 (Official Gazette RS, No. 1/07, and OdlUS XV, 85 – hereinafter referred to as Decision No. U-I-60/06), were nevertheless not remedied. In addition, the legislature has allegedly still not stated convincing reasons for the disputable differences. In the opinion of the applicant, the manner of electing judges and the duration of their term of office, as necessary instruments for performing judicial office, cannot justify that salary brackets for judges be determined as essentially lower than the salary brackets in which the officials of the other two branches of power are placed. The application of a management criterion thereto is allegedly illogical in light of the nature of performing judicial office and the legislature's intention. Moreover, the Government's findings regarding salary relations are allegedly not consistent with Annex 3 to the SSPSA. The applicant provides a comparison between the difficult nature of performing such office and the responsibilities of local court judges and certain other offices determined in Annex 3 to the SSPSA (e.g. the offices of state secretary, secretary general of the National Council, state attorney, deputy of the National Assembly, member of the Commission for the Prevention of Corruption, the president of the National Audit Commission). This allegedly additionally substantiates the applicant's claims that the office of a local court judge is placed too low and consequently that the challenged regulation is inconsistent with the second paragraph of Article 3 and Article 125 of the Constitution.
2. The applicant draws attention to differences between the salary brackets of position-based and non-position-based offices within the judicial branch of power, which are allegedly too great. In the opinion of the applicant, also in this part the legislature

did not abide by Decision No. U-I-60/06. The legislature did indeed somewhat lessen the disputed differences, however, not sufficiently. The applicant alleges that the regulation is in this part inconsistent with Article 125 of the Constitution.

3. The applicant requests a review of the constitutionality of the fourth paragraph of Article 44 of the Judicial Service Act (hereinafter referred to as the JSA). The applicant claims that it is inconsistent with Article 125 of the Constitution, as it prohibits only the reduction of a judge's basic salary, whereas it allegedly follows from Decision No. U-I-60/06 that the prohibition against a reduction should not refer to only the basic salary. With reference to such, the applicant states that Article 52 of the SSPSA is inconsistent with Article 125 of the Constitution, if this statutory provision annulled the fourth paragraph of Article 44 of the JSA. In addition, in the applicant's opinion there exists a manifest inconsistency between the fourth paragraph of Article 44 of the JSA and the first paragraph of Article 49 of the SSPSA and thereby an inconsistency with Article 2 of the Constitution.
4. The third paragraph of Article 25 of the SSPSA which regulates the amount of the bonus for years of service, inasmuch as it refers to judges, is, in the opinion of the applicant, inconsistent with the principle of judicial independence determined in Article 125 of the Constitution, due to the fact that the reasons for the reduction are not consistent with the constitutional requirements for the reduction of judges' salaries. Furthermore, this statutory provision is allegedly also inconsistent with the principle of the protection of acquired rights determined in Article 2 with reference to the first paragraph of Article 50 of the Constitution. With reference to such, the applicant states that equalizing the bonus for years of service for civil servants and for officials does not entail the legitimate aim of reducing the bonus for judges, as the positions are not comparable. Moreover, in the opinion of the applicant, when weighing constitutionally protected values for the review of the admissibility of the interference within the meaning of Article 2 of the Constitution, as regards judges, not only the acquired rights of judges should be taken into consideration, on the one hand, and the legislature's aims, on the other, but also the principle of judicial independence determined in Article 125 of the Constitution. The applicant also alleges that on the basis of the challenged statutory provision a higher reduction in the fixed part of the salary of older judges in comparison with younger judges also took place, consequently entailing indirect discrimination against older judges for which there allegedly exist no sound reasons. Therefore, this provision is allegedly also inconsistent with the principle of equality determined in the second paragraph of Article 14 of the Constitution and with the third paragraph of Article 3a of the Constitution with reference to Council Directive No. 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000). With reference to such, the applicant also refers to the Implementation of the Principle of Equal Treatment Act (Official Gazette RS, No. 50/04 etc.) and claims that the disputable differentiation is not objectively and reasonably justified by the legitimate aim and draws attention to the significance of the knowledge and experience of the older judges with regard to the quality of the judiciary.

5. The applicant requests a review of the constitutionality of the third paragraph of Article 23 of the SSPSA, as it does not determine that judges are also entitled to an extra payment to compensate for the incompatibility of judicial office. The applicant alleges that the challenged provision is inconsistent with Article 125 of the Constitution, as the abolished extra payment which was intended to compensate for the incompatibility of judicial office was not replaced by any other fixed part of the judge's salary. Moreover, abolishing the extra payment compensating for the incompatibility of judicial office allegedly also entails an unconstitutional interference with such acquired rights. The applicant also states that the extra payment compensating for the incompatibility of judicial office is still mentioned in item c of the sixth paragraph of Article 49a and in the fifth paragraph of Article 49f of the SSPSA, which allegedly demonstrates the inconsistency of the statutory regulation with reference to this extra payment and thereby an inconsistency with Article 2 of the Constitution.
6. The applicant alleges that Article 5 of the SSPSA and the fourth paragraph of Article 44 of the JSA do not determine the harmonisation of judges' salaries with the average salary in the Republic of Slovenia or their adjustment for inflation, which is allegedly inconsistent with the principle of judicial independence (Article 125) and with the right to social security (the first paragraph of Article 50 of the Constitution). The applicant proposes that the Constitutional Court also take into consideration the systemic problem of vacant judicial positions and unsuccessful judicial recruitment processes.
7. The applicant requests a review of the third paragraph of Article 22b and the fourth paragraph of Article 22f of the SSPSA concerning regular work performance and concerning work performance due to an increased workload. In the opinion of the applicant, the criteria for the payment of part of the salary for work performance are not defined in enough detail, with regard to which the applicant also draws attention to the requirement that judges' salaries be regulated by law. The applicant alleges that the challenged provisions only pursue productivity objectives. With reference to such, the applicant claims that quality criteria for the assessment of judges' work performance are also not contained in the Criteria for an Increased Workload (Official Gazette RS, No. 3/08), which was adopted by the Judicial Council. The challenged provisions are allegedly inconsistent with Articles 2 and 125 of the Constitution, whereas the fourth paragraph of Article 22f of the SSPSA is allegedly also inconsistent with Article 23 of the Constitution, as it allegedly does not ensure that cases are decided solely according to the order of precedence of cases.
8. In the opinion of the applicant, individual provisions of the challenged regulation are inconsistent with Article 125 of the Constitution also because the procedure for adopting legislation on judges' salaries is unconstitutional. In the procedure for adopting the SSPSA the Government allegedly did not reply to the representatives of the judiciary regarding their observations concerning the necessity that judges' salaries be regulated in the JSA, the unconstitutional nature of the regulation on the harmonisation and adjustment of judges' salaries, the need that salary relations between position-based and non-position based judicial offices be determined differently, and observations with reference to the regulation of work performance. The explanation

of the Government concerning the proposal of the judiciary regarding the placement of judicial offices is allegedly inadequate, and the reply to the observations with reference to the regulation of a bonus for years of service for the period before the implementation of the salary system and to the observations regarding the regulation of the readjustment of salaries is allegedly contrary to the Constitutional Court decision.

9. In item E of the request the applicant states that the legislature did not comply with the standpoints of the Constitutional Court stated in Decision No. U-I-60/06, which refer to the provisions challenged under items B to D of the order granting a stay of proceedings. Therefore, there is allegedly an inconsistency with the principles of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (the second paragraph of Article 3 of the Constitution).
10. The applicant requests a review of the constitutionality of the second paragraph of Article 3, the fourth paragraph of Article 3, the fourth paragraph of Article 3a, the second paragraph of Article 48, and the second sentence of the fourth paragraph of Article 49c of the SSPSA. In the opinion of the applicant, it is not clear on the basis of the challenged provisions which authority or authorities decide on the individual elements of judges' salaries. Furthermore, also the regulation with reference to legal remedies against decisions on judges' salaries is allegedly not clear. The applicant alleges that the fourth paragraph of Article 3a of the SSPSA determines that a written request against a decision on the salary can be filed only after the salary has been paid, which allegedly entails that judges are not guaranteed effective judicial protection against interferences with their salaries. Moreover, the applicant states that, in accordance with this provision, only civil servants and not also officials are guaranteed judicial protection. The applicant alleges that the challenged regulation is also not clear regarding the question of the (non-)suspensive nature of legal remedies against decisions on judges' salaries. The applicant points out that the terminology of the challenged regulation lacks clarity allegedly because in the second paragraph of Article 3 of the SSPSA the legislature refers to an employment contract or an order, whereas in the fourth paragraph of Article 3 and in the second paragraph of Article 48 of the SSPSA it refers to a proposed annex to an employment contract or of an order. The applicant emphasizes that the principle of clarity is of essential importance also from the viewpoint of defining administrative tasks, thus regarding the competence to exercise administrative decisions when deciding on judges' salaries by individual acts. In the opinion of the applicant, the Judicial Council did not have a basis to assume this competence within the meaning of the first paragraph of Article 18 of the General Administrative Procedure Act (Official Gazette RS, No. 80/99 etc. – hereinafter referred to as the GAPA). A restrictive interpretation of the provisions concerning the possibility of the emergency assumption of competence is allegedly important also because it refers to the question of institutional (constitutional) balance between the three branches of power and the Judicial Council. The applicant proposes that the Meroni Doctrine be applied, which is allegedly well developed in the case law of the Court of Justice. The applicant alleges that the challenged provisions are inconsistent with Articles 2, 25, 23, and 50, the second paragraph of Article 120, and with Article 125 of the Constitution.

### **The National Assembly's Reply**

11. The National Assembly did not reply to the request.

### **The Government's Opinion**

12. The Government is of the opinion that it has already answered the majority of the disputable questions in its opinion provided in case No. U-I-60/06 and that the Constitutional Court should consider this opinion also in the case at issue. In this opinion the Government expressed its viewpoints only regarding certain allegations of the applicant. With reference to the allegations concerning the placement of judges in salary brackets, the Government is of the opinion that the currently valid placement of offices from different branches of power is appropriate and that this does not entail a violation of the principle of the balance of individual branches of power. The Government states that as the proposer of the law in the procedure for amending the SSPSA, in order to harmonise the law with Constitutional Court Decision No. U-I-60/06, it somewhat changed the placement of judicial offices in salary brackets and at the same time additionally justified why it did not propose greater adjustments. The Government states as an additional argument for the enacted placements that the element of management must also be taken into consideration in the placement of offices in salary brackets, and that offices in different branches of power which contain such an element and those which do not must be compared separately. The different placement of the office of a minister and a Supreme Court judge can, in the opinion of the Government, be substantiated by referring to the evaluation of management, to the limited duration of the relevant term of office, and to the demanding nature and responsibility of such offices, which can also result in a recall or early termination of office. Moreover, in the opinion of the Government, not all managing positions in different branches of power are comparable, but only positions at the same level. Only judicial office at the Supreme Court level is allegedly comparable with the placement of the offices of the legislative and executive branches of power performed at the national level. The Government draws attention to Paragraph 81 of the reasoning of Constitutional Court Decision No. U-I-60/06, in which the Constitutional Court allegedly already held that the organisation of courts at different levels, the manner of election, and the duration of the term of office, can influence the amount of officials' salaries. Thereby, the Government particularly emphasizes that it follows from Paragraph 80 of the reasoning of the above-mentioned decision that comparable remuneration must be ensured only to officials who have a comparable status.
13. With reference to the allegation regarding the inconsistency of the fourth paragraph of Article 44 of the JSA with Article 125 of the Constitution, the Government is of the opinion that the established unconstitutionality of this statutory provision, in accordance with which only judges' basic salary was protected against a reduction, has been remedied. It allegedly follows from the new second paragraph of Article 44 of the JSA that the legislature left the regulation of other payments judges are entitled to (in addition to a basic salary), including protection against a reduction of such payments, to the SSPSA, which, however, ensures judges protection of their nominal salary.

14. As regards the allegations of the applicant concerning the regulation of the harmonisation and adjustment of judges' salaries, the Government is of the opinion that judges' salaries in Slovenia have never been harmonised with the increase in the average salary. As a general rule, two mechanisms applied, i.e., one to the private and the other to the public sector, and judges' salaries and salaries in the legislative and executive branches of power have been harmonised with the latter. The same regulation, *mutatis mutandis*, allegedly also entails Article 5 of the SSPSA, which envisages the regular harmonisation of judges' salaries (once) annually in the amount agreed upon in the Collective Agreement for the Public Sector (Official Gazette RS, No. 57/08 – hereinafter referred to as the CAPS). In view of the fact that judges' salaries are a part of the unified salary system of the public sector, the unified and simultaneous harmonisation of all salaries, to which the SSPSA applies, is allegedly the only appropriate regulation.

### **The Applicant's Reply to the Government's Opinion**

15. In the reply to the Government's opinion concerning the Government's arguments regarding the placement of offices in salary brackets, the applicant states that the Government is now repeating the reasons stated in the Bulletin of the National Assembly of the Republic of Slovenia with regard to which the applicant has already taken a position in its request. With reference to the criterion of the organisation of the judiciary at different levels, the applicant states that the Government itself admits that this element does not justify such great differences in officials' salaries. In the opinion of the applicant, taking into consideration the criteria of the manner of the election of officials, the duration of their term of office, the element of management, and the organisation of an individual branch of power, would entail the replacement of the criteria of education, work experience, and the status of mutually comparable offices of different branches of power as the criteria already established by the Constitutional Court. Regarding the criterion of the organisation of individual branches of power at different levels, the applicant adds that placement in lower salary brackets with regard to lower courts are a consequence of the comparison of work experience and offices, which in the hierarchy of judicial offices are bound to judicial positions, and not a consequence of the fact whether a judge adjudicates in a narrower or broader territory. Thereby, the applicant draws attention to the fact that each judicial decision, regardless of the level at which it has been issued, entails an authoritative decision and that judicial decisions as a general rule become final and enforceable already at the level of higher courts. Moreover, the applicant adds that also judicial decisions issued by local courts have effects throughout the entire territory of Slovenia.
16. As regards the Government's opinion with reference to the allegation regarding the harmonisation of judges' salaries, the applicant states that the Government's claim regarding the unified and simultaneous harmonisation of salaries in the public sector is not consistent with the contents of the request in which the applicant drew attention to the unconstitutional nature of the regulation, as it does not ensure protection against a reduction in salaries in comparison with the average salary in Slovenia.

## **B – I**

### **Procedural Issues**

17. When the request was filed, the SSPSA with amendments up to and including the Act Amending the Salary System in the Public Sector Act (Official Gazette RS, No. 17/08 – the SSPSA-H) applied. After the request had been filed two additional amendments to the SSPSA were adopted, namely the Act Amending the Salary System in the Public Sector Act (Official Gazette RS, No. 58/08 – hereinafter referred to as the SSPSA-I) and the Act Amending the Salary System in the Public Sector Act (Official Gazette RS, No. 80/08 – the SSPSA-J). The amended SSPSA-I changed the regulation regarding the amount of the bonus for years of service, which the Constitutional Court took into consideration when reviewing the constitutionality of the third paragraph of Article 25 of the SSPSA.
18. First of all, attention must be drawn to the Government's opinion that it already answered the majority of the disputable questions in its opinion provided in case No. U-I-60/06 and that the Constitutional Court should take this opinion into consideration also in the case at issue. Such an over-general reference of the Government to its opinion given in a prior, albeit similar case, is not possible. In case No. U-I-60/06 numerous issues which are not connected to the case at issue were opened. Therefore, the Constitutional Court did not take the above-mentioned opinion into consideration when reviewing the case at issue.

## **B – II**

### **The Review of the Constitutionality of the Second Paragraph of Article 10 with Reference to Annex 3 to the SSPSA (the Placement of Judicial Offices in Salary Brackets)**

19. The applicant requests a review of the second paragraph of Article 10 of the SSPSA. It follows from the contents of the request that the applicant is opposed to the placement of judicial offices in salary brackets, which is not, however, regulated only by the above-mentioned provision. The second paragraph of Article 10 of the SSPSA namely only refers to Annex 3 to the SSPSA, which determines the placement of individual offices in salary brackets, whereas the salary brackets are determined in the above-mentioned Annex. With reference to such, the Constitutional Court deemed that the applicant in fact challenges the second paragraph of Article 10 with reference to Annex 3 to the SSPSA inasmuch as they refer to judicial offices.
20. The applicant claims that the regulation by which salary brackets for judicial offices are determined is unconstitutional. In the opinion of the applicant, there exist disproportional differences between the salary brackets for judicial offices in comparison with the salary brackets in which the legislature placed other offices. The core of the dispute refers to the question of comparability between the salary brackets of judges in comparison with the salary brackets of offices of the executive and legislative branches of power and especially in comparison with the offices of deputies and ministers.
21. A constitutional basis for a review of the allegations that the appropriate proportionality between the salary brackets of judges, deputies, and ministers is not estab-

lished is the principle of the separation of powers determined in the second paragraph of Article 3 of the Constitution and not the principle of institutional balance as a principle of EU law, which only refers to the distribution of competences between the institutions of the EU.

22. The second paragraph of Article 3 of the Constitution determines that in Slovenia power is vested in the people. Citizens exercise this power directly and through elections, consistent with the principle of the separation of legislative, executive, and judicial powers. The principle of the separation of powers <sup>1</sup> is a fundamental principle of the organisation of the state power. Due to the fact that this is one of the fundamental principles of the constitutional order, its full effect, especially from the viewpoint of the position and functions of the judicial power, must be understood in connection with other fundamental constitutional principles, such as the principle of democracy (Article 1) and the principle of a state governed by the rule of law (Article 2). In addition, we must at all time be aware that all fundamental constitutional principles and the constitutional order on the whole serve to protect individuals' freedom <sup>2</sup> in relation to the state power. The concept of power that is limited by law, i.e. the power which functions within the frameworks and on the basis of the Constitution and particularly respects constitutionally determined human rights and fundamental freedoms, is the highest constitutional and societal value, which must be the starting point of every review of the constitutional consistency of relations between the bearers of different offices of the state power. Nevertheless, the Preamble to the Constitution, alone, as the foundation of the state and its existence, determines fundamental human rights and freedoms.

1 The principle of the separation of powers started to develop in the Era of the Enlightenment in the 17<sup>th</sup> and 18<sup>th</sup> centuries, first in England, where John Locke developed the foundations of the doctrine of the separation of powers, which was intended above all to limit sovereign, unlimited power. The theory of the separation of powers was first articulated by Charles Montesquieu, who in *The Spirit of the Laws* (1748) for the first time clearly distinguished between the legislative, executive, and judicial functions of the state power. He set the requirement that these functions of power must be separated from each other, and distributed between different, mutually independent state authorities and performed by different persons. The principle of the separation of powers at the constitutional level was first established in the Constitution of the United States of America in 1787, and in Europe in the first French Constitution adopted in 1791. Already in 1789 the French Declaration of the Rights of Man and of the Citizen contained the provision (Article 16) that any society in which the separation of powers is not settled has no constitution.

On the origin and development of the principle of the separation of powers, see also L. Pitamic, *Država* [The State], Cankarjeva založba, Ljubljana 1996, pp. 99–105; F. Grad, I. Kaučič, C. Ribičič, I. Kristan, *Državna ureditev Slovenije* [The Organisation of the State of Slovenia], the third amended and supplemented edition, Uradni list Republike Slovenije, Ljubljana 1999, pp. 38–40; G. Burdeau, F. Hamon, N. Troper, *Droit Constitutionnel*, 23<sup>rd</sup> Edition, L. G. D. J., Paris 1993, pp. 105–113; S. Sokol, *Shvaćanja o organizaciji vlasti u građanskoj ustavnoj i političkoj misli*, in: S. Sokol, S. Smerdel, *Organizacija vlasti*, Narodne novine, Zagreb 1988, pp. 62–80; M. J. C. Vile, *Constitutionalism and the Separation of Powers*, Second Edition, Liberty Fund, Indianapolis 1998.

2 Constitutional Court Decision No. U-I-158/94, dated 9 March 1995 (Official Gazette RS, No. 18/95, and Od-IUS IV, 20).

23. The contemporary understanding of the principle of the separation of powers entails that authorities which perform fundamental functions of state power are in their functioning relatively independent and autonomous in relation to other authorities such that none of them prevails. There exists a sophisticated system of mutual supervision, constraints, control, intertwined dependence, and balance.<sup>3</sup> The Constitutional Court explained the principle of the separation of powers in the same manner in Decision No. U-I-83/94, dated 14 July 1994 (Official Gazette RS, No. 48/94, and OdlUS III, 89).<sup>4</sup>
24. The separation of state power into legislative, executive, and judicial branches of power does not entail a relation of superiority or subordination, but a relation of the constraint and cooperation of equal branches of power such that each functions within the frameworks of its own position and its own competence. A starting point of the regulation of mechanisms of checks and balances between branches of power must be the constitutional equality of legislative, executive, and judicial powers.<sup>5</sup> The relations between them must be set in a manner such that the relative independence and integrity of an individual branch of power in performing its function are not endangered.
25. A fundamental function of the judicial power is adjudication. This entails that the immanent competence of judges as bearers of judicial power is to interpret and apply the law in individual cases. A classic function of courts is to decide on individuals' rights and obligations arising from their private relations and to establish the responsibility and impose sentences for criminal offences committed. From the perspective of a functional separation of powers, the judicial power is completely independent in this, while other authorities must accept and respect judicial decisions and, when

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3 L. Šturm, *Omejitev oblasti: ustavna izhodišča javnega prava* [Limitations of State Power: Constitutional Starting Points of Public Law], Nova revija, Ljubljana 1998, p. 13.

4 The Constitutional Court emphasized that it contains two important elements, i.e. the separation of individual functions of such power and the existence of checks and balances between them. The first element requires that the legislative, executive, and judicial branches of power are separated, which also entails that authorities or bearers of these individual branches of power are separated, i.e. are not the same. Absolute implementation of the principle of the separation of powers does not exist, as this would entail not only that the bearers of an individual branch of power appoint themselves and are accountable only to themselves, that they themselves determine its competence, and that they may not interfere by their decisions with the field of competence of another branch of power. In view of the above-mentioned, in systems in which there exists the principle of the separation of powers as the second element of this principle, a maxim states that between the individual branches of power there must exist a system of control and balance (i.e. the system of checks and balances), according to which each of these branches of power influences and constrains the other two, however, to a certain extent there must also exist cooperation, as otherwise the functioning of the system of state power as a whole cannot be imagined.

5 See also, F. Grad, I. Kaučič, C. Ribičič, I. Kristan, *ibidem*, p. 38: "The principle of the separation of powers refers to horizontal relations between state authorities, i.e. to the relations between the authorities which perform various functions of the state power at the same level, and not to the relations between state authorities of a higher and lower level." Also the Supreme Court of the USA emphasized the equality of the three branches of power when in the case of *Touby v. United States* (500 U.S. 160, 168 [1991]) it wrote that the principle of the separation of powers focuses on the distribution of powers among the three coequal branches. See, L. H. Tribe, *American Constitutional Law, Third Edition – Volume 1*, The Foundation Press, New York 2000, p. 124.

necessary, also ensure their implementation. Furthermore, the judicial power has a special position in the system of the separation of powers, as established by the Constitution. This is foremost because it is clear from the numerous provisions of the Constitution, which entail the concrete implementation of the principle of the separation of powers, including the system of checks and balances, that the judiciary has a strongly emphasized role of supervision, especially over the executive branch of power. The fourth paragraph of Article 15 of the Constitution in general already determines that judicial protection of human rights and fundamental freedoms, and the right to obtain redress for the violation of such rights and freedoms, are guaranteed, whereas the first paragraph of Article 23 gives everyone the right to judicial protection before an independent and impartial court. An important competence of courts is that they may initiate the procedure for the review of the constitutionality of a law. In accordance with Article 156 of the Constitution, if a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. Concerning the relationship of the judiciary towards general acts of the executive branch of power, it can be established that the courts are, in accordance with the Constitution alone, bound only by the Constitution and laws (Article 125). This entails that they are not obliged to apply the regulations of the executive branch of power when deciding some matter if they deem such to be inconsistent with laws or the Constitution (i.e. *exceptio illegalis*). The judiciary also has jurisdiction to review the legality of individual acts and actions of administrative authorities (Article 157 of the Constitution). Finally, the judiciary also plays the role of an arbitrator in all disputes in which one of the parties is the state. Furthermore, the Constitutional Court also has an important position in relation to the legislative, executive, and judicial branches of power, and its position and powers are determined in the Constitution, whereas the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) explicitly defines it as the highest body of the judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms (Article 1 of the CCA).

26. The significance of the principle of the separation of powers in a contemporary democratic state is precisely in the independent role of the judicial power. Different from the legislative power, which adopts general decisions for the society (i.e. policies) and the executive branch, which in fact formulates and thereafter also implements such legislative decisions, the force of the judicial power is primarily embodied through its judicial decisions, which are supported by legal arguments that are also rational and convincing. In the system of the separation of powers, the judiciary is the legal power and therefore it is essential that judges are bound only by the Constitution and laws. Although all state authorities must respect the law when performing their functions, this is nevertheless especially the task of the judicial power, as it is precisely the judiciary that in individual cases declares what is law in a binding manner. Therefore, the functioning of the judicial power is of decisive importance for the implementation of the principles of a state governed by the rule of law determined in Article 2 of the

Constitution, which requires particular sensitivity when regulating the position of the judicial power as a whole and when regulating the position of judges as bearers of this power. Judges must be ensured such a position so that the best lawyers will stand as candidates for the offices of judicial power.

27. An exceptionally important position of the judicial power within the framework of the principle of the separation of powers must therefore follow from the fact that the judicial power plays the key role in implementing the principles of a state governed by the rule of law. <sup>6</sup>The principles of a state governed by the rule of law, as determined in Article 2 of the Constitution in the most general sense, entail that state power is limited by the law and that it is carried out in accordance with the law (i.e. the rule of law). The principle of the separation of powers, which is in itself based on the separation, control, and cooperation of the three branches of power, together with the principle of limited power, which stems from the principles of a state governed by the rule of law, emphasizes the special role of the judicial power. <sup>7</sup>The meaning of the rule of law is namely precisely in that it protects individuals' liberty and their dignity. In view of the fact that the function of the judiciary is that it definitely and in a binding manner interprets legal rules, which otherwise limit the state power, it is evident that the judicial power must not only be levelled with the legislative and executive powers, but that judges must also be ensured appropriate guarantees of their independence in the performance of judicial office. The judicial power is namely a guarantor for the effective limitation of state power, thus a guarantor that the state functions as a constitutional democracy. <sup>8</sup>
28. The constitutional equality of the judicial power in comparison with the legislative and executive powers, *inter alia*, requires that the position of the judicial power and judges as bearers of this power is treated and regulated in an appropriately compa-

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6 The principles of a state governed by the rule of law require that the functioning of the state power, of all state authorities, and other bearers of public authority is bound by law. Every authoritative act must be performed on the basis of the law and within its framework, including the Constitution as the highest legal act.

7 Cf., N. Mateucci, *Novoveška država* [The Modern State], Fakulteta za družbene vede, Ljubljana 1999, pp. 262–263, and M. Novak, *Delitev oblasti: medigra prava in politike* [Separation of Power: Interplay of the State and Politics], Cankarjeva založba, Ljubljana 2003, pp. 97–106.

8 In Decision No. U-I-111/04, dated 8 July 2004 (Official Gazette RS, No. 77/04, and OdlUS XIII, 54), the Constitutional Court emphasized that the essence of constitutional democracy is that the values which are protected by the Constitution, and among them especially fundamental human rights and freedoms, prevail over democratically adopted majority decisions. W. Hassemer, Vice President of the Constitutional Court of the Federal Republic of Germany, in the paper “Constitutional Democracy” (Pravnik, No. 4-5/2003, Year 58, p. 214), points out that “in the concept of constitutional democracy, the adjective “constitutional” is not only a decorative adjective or a mild change of nounal meaning of the word [...]. The adjective “constitutional” in the concept of constitutional democracy entails a real interference with a noun itself. It determines nothing less and nothing more than the boundary of the democratic principle; it expresses that the review whether majority decisions are correct is from now on subject to a fundamental reservation, namely the reservation whether such decisions are in accordance with the constitution.” For more on constitutional democracy, see also, A. Teršek, *Ustavna demokracija in konstitucionalizem: (evropska) izhodišča in onkraj njih* [Constitutional Democracy and Constitutionalism: (European) Starting Points and Beyond], X. dnevi javnega prava, Portorož, 14–16 June 2004, Ljubljana 2004, pp. 451–474.

able manner as the other two branches of power, such that judicial independence as well as the integrity and dignity of the judicial branch of power are ensured. The Constitutional Court has already stated in Decision No. U-I-60/06 <sup>9</sup> that the requirement of the equality of the individual branches of power, which follows from the principle of the separation of powers determined in the second paragraph of Article 3 of the Constitution, also presumes a comparable remuneration of the officials of the different branches of power whose statuses are comparable. The three branches of power must namely be equal also regarding the economic status of their officials.

29. By the challenged regulation, in comparison with the former regulation, the legislature placed the offices of senior Supreme Court judge, senior higher court judge, senior local court judge, higher court judge, and local court judge one salary bracket higher. The legislature did not change the placement of other judicial offices. Moreover, the salary brackets of deputies and ministers did not change either. The above-mentioned entails that differences between the lowest placed office of a local-court judge and the lowest placed office of a deputy or a minister are still 15 or 22 salary brackets. Such differences are still unacceptable from the viewpoint of the constitutional requirement that all three branches of power must be constitutionally equal, which must also be reflected in the relative comparability of the amount of the remuneration of their officials. Furthermore, it is not admissible from the viewpoint of the second paragraph of Article 3 of the Constitution that the salary bracket of the office of Supreme Court judge is (still) the same as the salary bracket of the office of the lowest classified deputy.
30. The decision of the Constitutional Court regarding the inconsistency of the challenged regulation with the principle of the separation of powers cannot be influenced even by the Government's reference to a management criterion, by which it attempted to additionally justify the disputable salary relations between the bearers of the individual branches of power. By referring to the element of management it is indeed possible to justify certain differences between the salary brackets of offices where such element is explicitly present and the salary brackets of those offices where such element is not present. Therefore, reference to such element can be considered only when comparing the offices of ministers and judges. What applies to the offices of deputies namely also applies to judicial offices, namely that management is not an essential element of such offices. However, the element of management cannot be attributed too great a significance also regarding the relation between the offices

<sup>9</sup> In Decision No. U-I-60/06, the Constitutional Court established the inconsistency of the Ordinance on Officials' Salaries (Official Gazette RS, No. 14/06) with the principle of the separation of powers determined in the second paragraph of Article 3 of the Constitution. The Constitutional Court established that a seeming comparability of the salary brackets of offices of the legislative and executive branches of power, on one hand, and the offices of the judicial branch of power, on the other hand, is caused by only a relative high placement of some of the highest officials of the judicial power, and that by referring to the organization of the judiciary at different levels and to the manner of election and the duration of the terms of office of the officials of different branches of power, the legislature at that time did not demonstrate convincing reasons for the existing salary disparities.

of ministers and judges. It must namely be taken into consideration that such a relation concerns the officials of different branches of power, with different, but equally important, competences in the system of the separation of powers. Therefore, by referring to the element of management, which is a distinct characteristic only for the performance of the office of minister and not also judicial office or the office of a deputy, such great differences in remuneration as determined by the challenged regulation cannot be justified.

31. For the above-mentioned reasons, also such great differences between judicial offices and the offices of president or vice president of the courts cannot be justified. The differences between the starting salary brackets of the judges of individual courts in comparison with the salary brackets of the presidents of these courts are between 10 and 15 salary brackets, whereas the differences between the starting salary brackets of judges in comparison with the salary brackets of the vice presidents of courts (except at the Supreme Court, where the vice president is placed five salary brackets higher than the starting salary bracket of a Supreme Court judge) are between 10 and 13 salary brackets. The actual differences between the above-mentioned offices are that the presidents and vice presidents of courts, in addition to adjudication, also perform certain other tasks connected to the management of courts and that they assume the responsibility for managing the work of the courts. The essential differences are thus based on the above-mentioned additional competences. While certain differences are therefore justified, it cannot, however, be justified that these tasks are valued so much more than adjudication, which is the fundamental task of judges and the essence of the judicial branch of power.
32. As regards the above-mentioned, the second paragraph of Article 10 with reference to Annex 3 to the SSPSA, inasmuch as it refers to judicial offices, is inconsistent with the second paragraph of Article 3 of the Constitution.

### **B – III**

#### **The Review of the Statutory Provisions concerning the Allegations on the Reduction of Judges' Salaries**

33. As the Constitutional Court has already decided in Decision No. U-I-60/06, one of the fundamental guarantees of judicial independence, protected by Article 125 of the Constitution, is also the protection of judges against a reduction of their salaries during their term of office. Only a judge whose economic status is protected to the greatest extent possible can act truly independently. In this sense the above-mentioned guarantee against the reduction of judges' salaries is primarily a measure which should prevent judges from being "forced" to also think about the political acceptability of their decisions when deciding. Furthermore, ensuring that judges have a stable economic status also allows them a high degree of independence in its broadest sense (e.g. protection against pressure from political parties and the public). The protection of judges against a reduction of their salaries is namely not absolute; it does entail, however, that the reduction of judges' salaries is justified only in truly exceptional instances, on the basis of a review of the con-

crete circumstances in each individual case. The Constitutional Court considered the above-mentioned starting points adopted in Decision No. U-I-60/06 also when reviewing the allegations on the constitutionally inadmissible reduction of judges' salaries in the case at issue.

*The Review of the Constitutionality of the Fourth Paragraph of Article 44 of the JSA (a General Provision on the Prohibition against a Reduction of Judges' Salaries)*

34. The applicant challenges the fourth paragraph of Article 44 of the JSA, which reads as follows: "The basic salary of a judge may not be reduced during his term of office except in cases determined by this act". The applicant alleges that the challenged provision is inconsistent with Article 125 of the Constitution, as it allegedly only prohibits a reduction of a judge's basic salary. Thereby, the applicant questions whether the fourth paragraph of Article 44 of the JSA is applicable and states that, if it no longer applies, Article 52 of the SSPSA, on the basis of which the fourth paragraph of Article 44 of the JSA was allegedly repealed, is inconsistent with Article 125 of the Constitution. In the opinion of the applicant, due to the manifest inconsistency between the fourth paragraph of Article 44 of the JSA and the first paragraph of Article 49 of the SSPSA, there is also an inconsistency with Article 2 of the Constitution.
35. These reservations of the applicant regarding the applicability of the fourth paragraph of Article 44 of the JSA are not substantiated. The reference to the first paragraph of Article 52 of the SSPSA, which determines that the regulations on the salaries of employees in the public sector ceased to be in force on the day of the implementation of the SSPSA, i.e. on 13 July 2002, is namely not relevant from the viewpoint of the current applicability of this statutory provision. The content of this statutory provision was last amended by the Act Amending the Judicial Service Act (Official Gazette RS, No. 57/07 – the JSA-H) in 2007, which entails that, at least from then on, its applicability cannot be disputable. Moreover, there is no manifest inconsistency between this provision and the second paragraph of Article 49 of the SSPSA, as upon the transition to the new salary system the latter provision ensured judges a salary in the same amount as they had received before the implementation of the new salary system. This is thus a provision which protects judges against a reduction of their salaries and it cannot be alleged that it entails the basis for a systemic reduction of judges' salaries.
36. The applicant's allegation that the fourth paragraph of Article 44 of the JSA is inconsistent with Article 125 of the Constitution is substantiated. The Constitutional Court reviewed this regulation, which prohibited an interference only with a judge's basic salary already in Decision No. U-I-60/06. It decided that in view of Article 125 of the Constitution, it is not only a judge's basic salary that is protected against a reduction. Protection against a reduction of the salary of an individual judge, if such is intended to ensure its stability and consequently the judge's independence, must namely be understood as protection against any interference which might cause a reduction of the judge's salary which the judge justifiably expected upon assuming office. The case thus concerns the protection of a judge's basic salary and the additional salary

payments which are a fixed part of the judge's salary.<sup>10</sup> The above-mentioned indeed does not entail that, in accordance with Article 125 of the Constitution, protection against a reduction of individual parts of a judge's salary as such is protected, but it entails the protection of the judge's salary as a sum of all its fixed parts (protection of the salary as a whole). Therefore, in cases involving a reduction of individual fixed parts of the salary, if the salary is increased for some other reason or if a judge is in some other manner ensured that their salary as a whole will not be reduced, there is no interference with Article 125 of the Constitution. However, if the judge's salary as a whole is reduced, this does interfere with Article 125 of the Constitution (which is admissible only in exceptional cases). A limitation of the protection against a reduction of a judge's salary to only one element of the judge's salary, as determined by the challenged fourth paragraph of Article 44 of the JSA, is therefore inconsistent with Article 125 of the Constitution.

37. The Government claims that regardless of the unaltered content of the fourth paragraph of Article 44 of the JSA, the unconstitutionality of this statutory provision was remedied, due to the fact that it follows from the second paragraph of Article 44 of the JSA that the legislature left the regulation of other parts of a judge's salary (except for the basic salary) to the SSPSA. In light of the fact that the SSPSA does not contain a provision which prohibits a reduction of other fixed parts of the judge's salary, i.e. the same prohibition as the fourth paragraph of Article 44 of the JSA determines for a basic salary, the above-mentioned allegations of the Government do not influence the decision on the unconstitutionality of this statutory provision.

*The Review of the Constitutionality of the Fourth Paragraph of Article 5 of the SSPSA (the Harmonisation and Adjustment of Judges' Salaries)*

38. The applicant requests the review of the constitutionality of Article 5 of the SSPSA and the fourth paragraph of Article 44 of the JSA, as they do not determine the harmonisation of judges' salaries with the average salary in the Republic of Slovenia or their adjustment for inflation. As regards the fact that the harmonisation and adjustment of salaries in accordance with the SSPSA are regulated by the fourth paragraph of Article 5 of the SSPSA, such allegations can be relevant only from the viewpoint of this statutory provision. Therefore, the Constitutional Court limited its review only to such.
39. The fourth paragraph of Article 5 of the SSPSA reads as follows: "The values of salary brackets shall be harmonised and adjusted as a general rule once a year. The amount of the harmonisation and adjustment shall be agreed on in the collective agreement

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10 Such protection against a reduction naturally does not include cases in which a judge receives a lower salary because he or she is no longer entitled to various additional salary payments which judges are entitled to because they perform certain tasks (e.g. an additional payment for mentorship, and position-based additional payment) or because they carry out tasks in certain circumstances or under certain conditions (e.g. additional payments for working in less favourable working conditions and at a less favourable working time) and payments to which they are entitled to only during a period when they in fact carry out such tasks or tasks under such conditions. The same applies to possible payments for work performance.

for the public sector. The negotiations shall begin no later than 1 May and shall as a general rule be completed no later than thirty days before the deadline set for the submission of the draft national budget to the National Assembly.”

40. In Decision No. U-I-60/06, the Constitutional Court already decided that not only the amount of judges’ salaries but also their relative stability play a key role in ensuring judicial independence (Paragraph 64 of the reasoning). In the above-mentioned decision the Constitutional Court also adopted the standpoint that the prohibition against a reduction of judges’ salaries and their regular harmonisation and adjustment are equally important (Paragraph 84 of the reasoning).<sup>11</sup> The reduction of judges’ salaries, prohibited by Article 125 of the Constitution, can namely also cause a fairly significant decline of their real value. Therefore, from Article 125 of the Constitution also follows the requirement in accordance with which the legislature must envisage appropriate mechanisms which will prevent such.
41. The challenged provision indeed determines that the values of salary brackets in accordance with the SSPSA are as a general rule harmonised and adjusted once a year. However, the fact that it leaves the determination of the concrete amount of the harmonisation to the collective agreement for the public sector in fact binds the harmonisation to the conclusion of such agreement between the parties to the collective agreement for the public sector. In view of the fact that the conclusion of such collective agreement depends on the agreement of the parties to the collective agreement, whose conclusion may also be uncertain, and the fact that the judges cannot take part when such agreement is being concluded, such regulation does not meet the requirements regarding the harmonisation and adjustment of judges’ salaries mentioned in the previous paragraph of this reasoning. Therefore, for this reason alone the challenged regulation is inconsistent with Article 125 of the Constitution. Moreover, this established unconstitutionality cannot be influenced by the fact that on the basis of the fifth paragraph of Article 5 of the SSPSA a possible agreed harmonisation and adjustment determined in the fourth paragraph of this article is transferred to the law.

*The Review of the Third Paragraph of Article 25 of the SSPSA (a Bonus for Years of Service)*

42. The applicant requests the review of the constitutionality of the third paragraph of Article 25 of the SSPSA, inasmuch as it refers to judges. In accordance with this statutory provision, for each concluded year of service an official is entitled to a bonus in the amount of 0.3% of their basic salary. This provision ceased to be in force upon the implementation of the amended SSPSA-I. The sixth paragraph of Article 23 of

11 The requirement for the regular harmonisation and adjustment of judges’ salaries also follows from paragraph 62 of Opinion No. 1 of the Consultative Council of European Judges (CCEJ), which reads as follows: “...it was generally important [...] to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living.” The CCEJ is a consultative body of the Council of Europe, whose acts were considered by the Constitutional Court already in Decision U-I-60/06, regardless of the fact that they are not internationally binding instruments, as an interpretative tool when determining the contents of Article 125 of the Constitution.

the SSPSA-I namely determined that on the day of the implementation of the collective agreement for the public sector, bonuses in the amount determined by this collective agreement apply for officials. The CAPS came into force at the same time as the amended SSPSA-I, i.e. on 11 June 2008 (Article 53 of the CAPS and Article 24 of the SSPSA-I). Article 35 of the CAPS determines a bonus for years of service in the amount of 0.33 % of the basic salary for each completed year of service, whereas for women such bonus is increased by an additional 0.10 % for each completed year of service over twenty-five years.<sup>12</sup> The Constitutional Court reviews regulations which have ceased to be in force in accordance with the conditions determined for such in Article 47 of the CCA. As regards the fact that the applicant filed a request which concerns pending proceedings, such conditions are fulfilled.

43. The applicant claims that on the basis of the third paragraph of Article 25 of the SSPSA judges' salaries were reduced, and such reduction is allegedly inconsistent with the principle of judicial independence, with the protection of acquired rights, and with the prohibition against discrimination on the basis of age. On the basis of the challenged provision, judges are entitled to a lower bonus for years of service than they were entitled to before the amendment of the regulation on judges' salaries in 2006. Before the above-mentioned amendment, the JSA namely determined that judges' salaries be increased by 0.5% for each year of service begun, however by no more than 20%, whereby for female judges with more than twenty-five years of service the percentage of 0.5% was increased by an additional 0.25% for each year over twenty-five years of service begun (the third paragraph of Article 46 of the Judicial Service Act, Official Gazette RS, No. 23/05 – official consolidated text). The amendment of the JSA in 2006 (the Act Amending the Judicial Service Act, Official Gazette RS, No. 17/06 – hereinafter referred to as the JSA-F) amended the regulation of the bonus for years of service so that for each completed year of service a bonus in the amount of 0.3% of the basic salary was determined (the first indent of Article 38 of the JSA-F).
44. In Decision No. U-I-60/06 the Constitutional Court substantively reviewed the same provision (the first indent of Article 38 of the JSA-F) as the third paragraph of Article 25 of the SSPSA and established that it is inconsistent with the Constitution. The Constitutional Court decided that the challenged regulation did not ensure that on its basis individual reductions in judges' salaries could not occur and that the reasons stated by the Government (i.e. the necessity to ensure funds for the remuneration of judges for their work performance and to ensure equality between civil servants and officials) cannot justify this only exceptionally constitutionally admissible reduction of judges' salaries (Paragraphs 93 to 97 of the reasoning of the above-stated decision).
45. The SSPSA was amended by the provisions of the first paragraph of Article 49 and the seventh paragraph of Article 49f. The first paragraph of Article 49 of the SSPSA

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12 If, in accordance with the legislation, the duration of the pension qualifying period for women and men is determined to be the same, the increased extra payment stemming from such can no longer be paid (the second sentence of the second paragraph of Article 35 of the CAPS).

determines that if a judge receives a lower salary pursuant to the determination of the salary in accordance with Article 49f of this act than the salary determined pursuant to the regulations which applied until the beginning of the calculation of salaries in accordance with this act, the difference up to the former amount of the salary shall be paid thereto until both sums are equal. In accordance with the seventh paragraph of Article 49f of the SSPSA, the amount of the judge's salary determined in accordance with the SSPSA is increased up to the amount of the salary determined in accordance with the former regulations if the amount of the judge's salary determined in accordance with the former regulation is higher than the amount of salary determined in accordance with the SSPSA. On the basis of the above-cited provisions, judges were thus ensured that the nominal value of their salaries (i.e. the fixed parts of judges' salaries) could not be reduced directly by the transition to the new salary system. In view of the fact that protection against a reduction of salaries in accordance with Article 125 of the Constitution does not refer to the protection of the individual parts of judges' salaries, but rather that this provision of the Constitution protects the judges' salaries as a whole, the Constitutional Court had to review, taking into consideration the above-mentioned provisions, whether the third paragraph of Article 25 of the SSPSA on the reduction of the bonus for years of service was still inconsistent with Article 125 of the Constitution.

46. From the above-mentioned provision of the Constitution also follows the prohibition against a reduction of judges' salaries which would be a consequence of a considerable decrease in their real value. In accordance with the fifth paragraph of Article 49f of the SSPSA, a comparable amount of the salary determined in accordance with the former regulation is considered to be the monthly salary paid before the first payment of the salaries determined in accordance with the SSPSA (i.e. the salary for December 2007), and the preservation of the real value of this amount was not ensured in any way. The above-mentioned entails that the statutory regulation protected only the nominal value of judges' salaries which judges were entitled to immediately before the implementation of the reform, whereas they were not ensured protection against a considerable reduction of their real value. Therefore, the third paragraph of Article 25 of the SSPSA, inasmuch as it refers to judges, was still inconsistent with Article 125 of the Constitution. The Constitutional Court did not separately review the sixth paragraph of Article 23 of the SSPSA-I, as it is not a subject of the request in the case at issue. However, the Constitutional Court draws the legislature's attention to the fact that the regulation determined by this provision is not essentially different than the regulation of the challenged provision which was established to be unconstitutional. This provision could be constitutionally disputable from the viewpoint of Article 125 of the Constitution already due to the fact that it leaves the regulation of judges' salaries to the collective agreement. The principle of judicial independence namely requires, as the Constitutional Court already established in Decision No. U-I-60/06, that the salary position of judges be regulated by law (Paragraphs 73 to 76 of Decision No. U-I-60/06).

**B – IV**  
**The Review of Other Statutory Provisions**

*The Review of the Third Paragraph of Article 23 of the SSPSA (with Reference to the Allegations on the Abolishment of an Extra Payment to Compensate for the Incompatibility of Office)*

47. The applicant also requests the review of the constitutionality of the third paragraph of Article 23 of the SSPSA, as it does not determine that judges are also entitled to an extra payment to compensate for the incompatibility of their office. The applicant alleges that the challenged provision is inconsistent with Article 125 of the Constitution and that it inadmissibly interferes with the acquired rights of judges. Moreover, there is allegedly an inconsistency with that principle of a state governed by the rule of law from which allegedly follows the requirement of the consistency and coherence of the legal order.
48. The applicant's allegations that the challenged regulation is inconsistent with Article 2 of the Constitution due to manifest contradictions within the legal order are not substantiated. This inconsistency allegedly arises from the fact that an extra payment to compensate for the incompatibility of office is still mentioned in item c of the sixth paragraph of Article 49a and in the fifth paragraph of Article 49f of the SSPSA. On the basis of Article 23 of the SSPSA, it is clear that the new statutory regulation no longer provides for a special extra payment to compensate for the incompatibility of office, whereas in the above-mentioned provisions such extra payment is mentioned only in connection with the former statutory regulation.
49. Furthermore, also the allegations on the inconsistency of the challenged regulation with Article 125 of the Constitution are not substantiated. As already follows from Decision No. U-I-60/06, in order for the legislature to determine judges' salaries consistently with Article 125 of the Constitution, it must take into consideration that a salary must protect a judge against pressures which could influence his or her deciding (Paragraph 80 of the reasoning). Thereby, the legislature may not overlook the limitations for judges which stem from the incompatibility of their office with performing other offices or activities, and must appropriately take this fact into consideration when determining the amount of judges' salaries. However, it does not follow from Article 125 of the Constitution that the remuneration of judges which encompasses compensation for the above-mentioned limitations, should be expressed as a special part of the judges' salaries.
50. With reference to such, the applicant's allegations that the abolishment of the extra payment to compensate for the incompatibility of office entails an interference with the acquired rights of judges are also not substantiated. As follows from the transitional provisions of the SSPSA, an extra payment to compensate for the incompatibility of office was namely taken into account as a basis for the readjustment of the basic salaries of judges or judicial offices in salary brackets in accordance with the new regulations (the first paragraph of Article 49a with reference to item a of Article 49b and item c of the sixth paragraph of Article 49a of the SSPSA). This entails that judges were in fact not deprived of the extra payment to compen-

sate for the incompatibility of their office with performing other offices or activities. As regards the above-mentioned, the challenged provision is not inconsistent with the Constitution.

*The Review of the Third Paragraph of Article 22b of the SSPSA (Regular Work Performance)*

51. The applicant requests the review of the constitutionality of the third paragraph of Article 22b of the SSPSA, inasmuch as it refers to judges. This statutory provision reads as follows: “The president of the court evaluates the work results of judges by applying, *mutatis mutandis*, the criteria determined in Article 29 of the Judicial Service Act.” This is a provision on the criteria for deciding whether a judge is entitled to the part of the salary for regular work performance which is also regulated by other provisions of Article 22b of the SSPSA.
52. The applicant alleges that the challenged regulation determines the criteria for the remuneration of judges for work performance which are not determined in the law or which are not determined precisely enough, whereby the applicant is especially disturbed by the fact that the provisions refer, *mutatis mutandis*, to the application of the criteria determined in Article 29 of the JSA. In the applicant’s opinion, this does not meet the requirement determined in Article 125 of the Constitution, in accordance with which judges’ salaries must be determined by law, as allegedly follows from Decision No. U-I-60/06. With reference to such, it must be explained to the applicant that the case at issue is not the same as was case No. U-I-60/06, in which the legislature left the regulation of the criteria for the remuneration of judges for work performance to executive regulations or collective agreements and to which the Constitutional Court referred in the conclusion of the above-mentioned case, wherein it stated that judges’ salaries must be determined by law. The challenged regulation namely does not determine that the criteria for the remuneration of regular work performance be regulated by an executive act, but it determines that the criteria determined in Article 29 of the JSA be applied *mutatis mutandis*, hence it determines the application of another law which determines such criteria. The applicant’s allegations that because of this (merely) *mutatis mutandis* application there were various applications of the criteria in practice, could be important from the viewpoint of Article 2 of the Constitution, from which follows the requirement that statutory provisions must be clear and defined. However, such allegations are not substantiated. The instruction for *mutatis mutandis* application namely does not entail anything other than the requirement that the regulations must be interpreted, which is not inconsistent with this constitutional provision. With reference to such, also the applicant’s allegations that such criteria will be applied by different authorities is not substantiated. The uniform interpretation of the regulations is namely ensured in proceeding with legal remedies, which entails that the allegations on the unconstitutional nature of the challenged regulation cannot be substantiated by using this argument. From the viewpoint of the consistency of the challenged regulation with the Constitution, also the applicant’s allegations that the legislature should authorise the Judicial

Council to determine the disputable criteria are not substantiated due to the fact that this concerns a question of the appropriateness of the regulation, which is not a constitutional matter.

53. The applicant's allegations that there are no quality criteria among the criteria for the remuneration of judges for work performance could be considered from the viewpoint of Article 125 of the Constitution. As the Constitutional Court has already reasoned in Decision No. U-I-60/06, the remuneration of judges for work performance which was only directed towards greater productivity, would not be consistent with this provision of the Constitution. However, the applicant's allegations that Article 29 of the JSA contains merely quantitative criteria are not true. Among the criteria for evaluating judges' performance, Article 29 of the JSA namely also determines professional knowledge, the ability to resolve questions of law, the protection of the judge's and court's reputation, and abilities with regard to oral and written expression. When applying the above-mentioned criteria, the evaluation of the judge's work cannot be directed only towards the evaluation of the number of concluded cases, but also the quality of the judge's work must be taken into consideration.
54. As regards the above-mentioned, the third paragraph of Article 22b of the SSPSA is not inconsistent with Articles 2 and 125 of the Constitution.

*The Review of the Fourth Paragraph of Article 22f of the SSPSA (Work Performance with Regard to an Increased Workload)*

55. The applicant requests a review of the constitutionality of the fourth paragraph of Article 22f of the SSPSA. It is a provision which refers to remuneration for the work performance of judges due to them having an increased workload, which in the challenged part reads as follows: "The Judicial Council shall determine in detail the conditions, criteria, and the scope of the remuneration for work performance with regard to an increased workload, whereas such must be determined so that in addition to the number of concluded cases, also the nature of the case, how long it has been pending, and the type of case, as well as the level of knowledge and experience needed for deciding, are taken into consideration."
56. The applicant alleges that the challenged provision is inconsistent with Articles 125 and 2 of the Constitution, due to the fact that it does not define the criteria for the remuneration of judges for work performance by a law, nor does it determine such in sufficient detail, that it does not bind the remuneration for having an increased workload to qualitative criteria (in the sense of being entitled to remuneration depending on the share of abrogated, upheld, and modified judicial decisions), and that, taking into account the agreed time-limit for terminating the assumed work, it does not protect judges against excessive pressures with reference to expectations regarding the anticipated workload. The applicant furthermore alleges that the challenged provision does not ensure that cases are dealt with in accordance with the order of precedence of cases, which is allegedly inconsistent with the constitutional requirements of an independent, impartial, and natural judge, which allegedly stem

from Articles 23 and 125 of the Constitution. The applicant states that also the Criteria for the Increased Workload, which were adopted by the Judicial Council, are inconsistent with the Constitution.

57. The criteria in the challenged regulation for the remuneration of work performance for having an increased workload are determined in sufficient detail in order to enable a more detailed analysis of the statutory regulation in the executive act. Therefore, the allegations on the inconsistency of the challenged regulation with Article 2 of the Constitution are not substantiated. Also the allegation that the challenged provision is inconsistent with Article 125 of the Constitution, as such regulation allegedly entails the mere encouragement of the productivity of judges, is not substantiated. When determining the criteria for remuneration due to an increased workload, other criteria in addition to the number of concluded cases must as well be taken into consideration (i.e. the nature of the case, how long it has been pending, the type of case, and the demonstrated level of knowledge and experience of the judge). From these criteria there follows the clear intention of the legislature that when such remuneration is determined due to an increased workload, not only the mere number of concluded cases may be taken into consideration, but also their significance and the quality of the judge's work. Within the framework of the above-mentioned criteria, also the portion of abrogated, upheld, and modified judicial decisions can be taken into consideration, which should, in the opinion of the applicant, be one of the criteria for the evaluation of a judge's work performance. In addition, it does not follow from the statutory regulation of the remuneration for work performance for having an increased workload that judges bind themselves in the agreement on an increased workload that they will decide cases assigned to them on such a basis within a certain period of time. The above-mentioned thus entails that the applicant's allegations on the inconsistency of the fourth paragraph of Article 22f of the SSPSA with Article 125 of the Constitution are not substantiated. The possible unconstitutionality of the Criteria for the Increased Workload, as an executive regulation by which the Judicial Council analysed the statutory regulation in more detail, is not a subject of constitutional review in the case at issue.
58. Furthermore, the applicant's allegation on the inconsistency of the challenged provision with Articles 23 and 125 of the Constitution is also not substantiated; the applicant alleges that such does not ensure that cases are dealt with in accordance with the order of precedence of cases, which is allegedly inconsistent with the constitutional requirements for an independent, impartial, and natural judge. Although this is not particularly determined by the challenged provision, it is nevertheless clear that the application of the institution of the remuneration of judges for an increased workload cannot result in the order of precedence when considering cases being abused. The possible violations of these rules, which might take place in practice, cannot substantiate the allegations on the unconstitutionality of the challenged regulation. As regards the above-mentioned, the challenged provision is not inconsistent with Articles 2, 23, and 125 of the Constitution.

## **B – V**

### **The Review of the Allegations that the Constitutional Court Decision has not been Respected**

59. In item E of the request, the applicant states that the legislature has not respected the standpoints of the Constitutional Court expressed in Decision No. U-I-60/06, which refer to provisions challenged under items B to D of the order granting a stay of proceedings or the request. Therefore, there is an inconsistency with the principles of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (the second paragraph of Article 3 of the Constitution).
60. In Decision No. U-I-60/06 the Constitutional Court established the unconstitutionality of certain statutory provisions, and, in accordance with the second paragraph of Article 48 of the CCA, determined a period of time within which the legislature must remedy such. The principles of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (the second paragraph of Article 3 of the Constitution) require, *inter alia*, that each of the branches of power performs their powers and can be held to account for the (non)performance of such. If the legislature does not respond to the Constitutional Court decision, which is binding on the legislature (the third paragraph of Article 1 of the CCA), within the period of time determined by the Constitutional Court for it to remedy the established inconsistencies and does not try to remedy the inconsistencies, the legislature thereby violates Article 2 and the second paragraph of Article 3 of the Constitution.<sup>13</sup> The legislature responded to the Constitutional Court decision by adopting a new statutory regulation. Therefore, such does not evidence a violation of the above-mentioned constitutional provisions merely from this point of view. The new statutory regulation is the subject of the constitutional review at issue – i.e. the review of its consistency with the Constitution. However, it is evident that also this time the legislature regulated individual issues inconsistently with the Constitution, which the Constitutional Court is hereby establishing by this decision.

## **B – VI**

### **The Review of the Allegations on the Unconstitutionality of the Regulation of the Procedure for Issuing Individual Decisions on Salaries**

61. The applicant also requests the review of the constitutionality of the second paragraph of Article 3, the fourth paragraph of Article 3, the fourth paragraph of Article 3a, the second paragraph of Article 48, and the second sentence of the fourth paragraph of Article 49c, as provisions by which the procedure for issuing individual decisions on determining judges' salaries upon the transition to the new salary system is allegedly determined. The applicant alleges that the challenged provisions are not clear and thereby they are inconsistent with Article 2 and the second paragraph of Article 120 of the Constitution, and consequently they are also inconsistent with Articles 23 and

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13 Cf., Constitutional Court Decision No. U-I-114/95, dated 7 December 1995 (Official Gazette RS, No. 8/96, and OdlUS IV, 120).

- 25, with the first paragraph of Article 50, and Article 125 of the Constitution. The applicant also refers to the violation of the principle of institutional balance in EU law.
- 62.** The foremost allegation of the applicant with reference to the challenged provisions is that they are not clear. Upon reviewing these allegations, the Constitutional Court did not particularly consider the question of which of the above-mentioned constitutional provisions could be relevant regarding such allegations. A prerequisite for considering the unconstitutionality of the regulation due to its unclear nature from the perspective of any of the above-mentioned constitutional provisions is that the regulation cannot be interpreted with the established methods of interpretation, which, as will be explained below, the applicant did not demonstrate regarding the challenged provisions.
- 63.** In the opinion of the applicant it is not clear on the basis of the challenged provisions which authority or authorities decide on the individual elements of judges' salaries. The applicant states that it can be established by means of the methods of interpretation that the Judicial Council must, upon the readjustment of salaries, first issue to individual judges a decision on the their placement in salary brackets, whereas all other elements of the salary must be decided by some other authority, however, it is not clear which authority. With reference to such, the applicant states that it follows from the second paragraph of Article 48 of the SSPSA that the employer must determine the judge's salary and that this is not the Judicial Council. It follows from the above-mentioned that by interpreting the regulations, the applicant clearly came to the conclusion that the Judicial Council is competent to issue a decision on the readjustment of the judges' salaries and on the placement of judges into new salary brackets, whereas the other elements of judges' salaries in accordance with the SSPSA should be decided by the employer or by an agent exercising rights and obligations in relation to judges on the employer's behalf. As regards the above-mentioned, what is not at issue here is the unclear nature of regulations which cannot be resolved by means of interpretation. The applicant's allegations on the inappropriate nature of the challenged regulation are not relevant from the viewpoint of the review of its consistency with the Constitution.
- 64.** The same applies for the applicant's allegations on the unclear nature of the regulation with reference to the legal remedies which are available to judges against decisions by which their salaries are determined. As regards the applicant's allegations that legal remedies against the Judicial Council's decisions are determined in Article 25 of the JSA, whereas legal remedies against decisions on salaries issued on the basis of the SSPSA are regulated in Article 3a of the SSPSA, it is evident that the applicant did succeed in giving grounds for the regulation also in this part. As follows from the applicant's further allegations, the essence of the applicant's allegations with reference to the challenged regulation is that the applicant does not agree with such regulation of legal remedies. In the opinion of the applicant, judges do not have an appeal against a decision on their salary, but if they do not agree with such decision they may, taking into consideration the fourth paragraph of Article 3a of the SSPSA and only after the salary has been paid, require in writing that

the employer establish the unlawfulness of the decision and proceed in accordance with the law (so that that the employer pays the difference between the already paid salary and the salary which is determined by law). This allegedly entails that judges do not have effective judicial protection in order to prevent an unlawful and unconstitutional interference with their statutory right to a salary. The applicant's allegation on the ineffective nature of such judicial protection could indeed be relevant from the viewpoint of the first paragraph of Article 23 of the Constitution, however, the allegation is in and of itself too general and the Constitutional Court could not review it as such. With reference to the allegation connected with the applicant's statements that on the basis of the fourth paragraph of Article 3a of the SSPSA judicial protection is ensured to civil servants, it can be established that the possibility to file a claim in the second sentence of this provision is indeed mentioned only with reference to civil servants, however, the applicant does not explain why it is of the opinion that this legal remedy could not be recognised also to officials by applying this analogously.

65. Furthermore, the applicant's allegations that the regulation regarding the question whether the appeal of a judge against a decision on his or her salary suspends its enforcement is not clear, are also not substantiated. With reference to such, the applicant namely refers to several statutory provisions whereby the applicant does not explain why the discussed issue could not be decided on their basis. However, the request can be understood such that the applicant is of the opinion that appeals against salary decisions upon the transition to the new salary system did not have suspensive effects, while, in the applicant's opinion, they should have such effects. In view of the fact that subsequently the applicant points out this problem only regarding the effects of such legal remedies in the future, the Constitutional Court did not particularly review such allegations in the case at issue, in which the applicant filed a request with reference to a claim against a salary decision issued upon the transition to the new salary system.
66. As regards the above mentioned, the alleged inconsistency of the challenged provisions with the Constitution could not be established. The applicant's reference to the principle of institutional balance is, as already stated above, not relevant within the framework of the review of the constitutionality of the challenged provisions.

## **B – VII**

### **The Constitutional Court's Decision**

67. The Constitutional Court established that the second paragraph of Article 10 with reference to Annex 3 to the SSPSA and the fourth paragraph of Article 5 of the SSPSA, inasmuch as they refer to judges, and the fourth paragraph of Article 44 of the JSA are inconsistent with the Constitution (Point 1 of the operative provisions). As regards the third paragraph of Article 25 of the SSPSA, inasmuch as it refers to judges, the Constitutional Court established on the basis of Article 47 of the CCA that it was inconsistent with the Constitution (Point 2 of the operative provisions). In view of the fact that the unconstitutionality of these provisions has already been established for

the reasons stipulated in the statement of reasons of this decision, the Constitutional Court did not review the other alleged inconsistencies of these provisions.

68. The Constitutional Court may in whole or in part abrogate a law which is not in conformity with the Constitution (Article 43 of the CCA). If the Constitutional Court deems a law, other regulation, or general act issued for the exercise of public authority unconstitutional or unlawful as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, a declaratory decision is adopted on such (the first paragraph of Article 48 of the CCA). In the case at issue, the Constitutional Court issued a declaratory decision (Point 1 of the operative provisions) by which judges' basic salaries as well as the harmonisation and adjustment of judges' salaries are regulated [...] would namely entail that such would no longer be regulated by law, due to which their abrogation is not possible.
69. The Constitutional Court decision in the case at issue entails that the challenged salary regulation is to be applied until the new salary regulation is issued, by which the legislature will have to remedy the established inconsistencies. Determining the manner of the implementation in accordance with the second paragraph of Article 40 of the CCA in the manner the Constitutional Court determined in Decision No. U-I-60/06, when it extended the period of the application of the former salary regulation, is namely not possible in the case at issue, as the new regulation has already been implemented. It is also not possible that until the established inconsistencies are remedied the Constitutional Court itself regulate the issues with reference to the regulation of the judges' salaries to which the findings regarding the unconstitutionality refer.
70. In order for the established unconstitutional situation to continue for as little time as possible, the Constitutional Court determined the shortest possible period of time in which the legislature can definitely, in the opinion of the Constitutional Court, remedy the established unconstitutionality. The Constitutional Court decided that the legislature must remedy the established unconstitutionality within six months (Point 3 of the operative provisions). The Constitutional Court took into account that the discussed topic will be the subject of legislative regulation for a third time within a short period and that therefore less time will be needed to draft and adopt a new regulation. With reference to such, the Constitutional Court points out that in the legislative procedure the proposer of the draft law and the legislature will have to ensure the participation of the judges in order to remedy the established inconsistencies, in view of the fact that such concerns the statutory regulation which regulates their position (Paragraph 71 of the reasoning of Decision No. U-I-60/06).
71. As regards the second and fourth paragraphs of Article 3, the fourth paragraph of Article 3a, the third paragraph of Article 23, the second paragraph of Article 48, and the second sentence of the fourth paragraph of Article 49c of the SSPSA, inasmuch as they refer to judges, and the third paragraph of Article 22b and the fourth paragraph of Article 22f of this act, the Constitutional Court decided that they are not inconsistent with the Constitution (Point 4 of the operative provisions).

## C

72. The Constitutional Court reached this decision on the basis of Articles 21, 47, and 48 of the CCA and the third indent of the third paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of: Jože Tratnik, President, and Judges Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Dr Ciril Ribičič, and Jan Zobec. The decision was reached unanimously, except regarding the first indent of the first paragraph of the operative provisions, which was adopted by seven votes against one. Judge Mozetič voted against and submitted a dissenting opinion. Judge Klampfer submitted a concurring opinion.

*Jože Tratnik*  
*President*

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### DISSENTING OPINION OF JUDGE MAG. MIROSLAV MOZETIČ

1. I have written this opinion because I wish to explain the reasons which led me to not vote entirely in favour of Decision No. U-I-159/08, and thereby prevent possible speculation regarding such.
2. Let me say at the outset that I mainly and, in my opinion, in the most important part did agree with the decision and its reasons. This is a decision which is in essence based on the standpoint adopted in Decision No. U-I-60/06, dated 7 December 2006, which requires that the salaries of judges, as bearers of the judicial branch of power, must be appropriate to their office and role within the system of the separation of powers.  
This position must be primarily reflected in their basic salary, which entails the “value” of their work and which is expressed in salary brackets. It must be comparable with the other two branches of power, i.e. the legislative and the executive. It is not appropriate that Supreme Court judges and especially Constitutional Court judges are placed in lower salary brackets than all the ministers. This implies that “in terms of value” the judicial branch of power is placed below the executive branch of power. However, if we compare the judiciary as a whole it is undisputable that there exist great disparities between the judicial branch of power and the legislative and executive branches of power.
3. I could not agree with the majority opinion that the fourth paragraph of Article 5 of the Salary System in the Public Sector Act (hereinafter referred to as the SSPSA) is inconsistent with the Constitution. In my opinion, the reasons for the majority decision are not convincing enough, whereas the decision itself, in my opinion, might even convey the wrong message.
4. Article 5 of the SSPSA has five paragraphs. The first paragraph defines a salary. In the second and third paragraphs it is determined that the amount (value) of the basic salary is determined by placement in an individual salary bracket from the salary scale which

is an annex to the act. The fourth paragraph, which was challenged, provides for the annual harmonisation and adjustment of the values of salary brackets with the collective agreement for the public sector, which must be completed before the submission of the draft national budget to the National Assembly. Finally, the fifth paragraph determines that the harmonised and adjusted value of the salary brackets be determined by law. The value of a salary bracket that is harmonised and adjusted in such a manner and determined by law applies to all civil servants as well as to all officials. After all, the value of the salary brackets was determined in the same manner already after the implementation of the regulation of salaries in accordance with the SSPSA.

5. As mentioned above, only the fourth paragraph of Article 5 of the SSPSA was challenged. In the request, the applicant states that this provision is inconsistent with the Constitution “from the viewpoint of the prohibition against the reduction of a salary (Article 125 of the Constitution), as it does not regulate the adjustment of judges’ salaries for inflation, which amounts to 5.7% annually (this was probably true at the time when the request was filed).” With reference to such, the applicant refers to Constitutional Court Decision No. U-I-60/06, in which the Court had allegedly explicitly set the requirement that judges’ salaries must be regularly harmonised and adjusted. In the opinion of the applicant, the standard of “regular harmonisation and adjustment” requires the adjustment of judges’ salaries for inflation or (more correctly) harmonisation with the value of the average salary in Slovenia.
6. In Decision No. U-I-60/06 the Constitutional Court indeed held that “not only the amount of judges’ salaries but also their relative stability play a key role in ensuring judicial independence” (Paragraph 64 of the reasoning) and “that the prohibition against a reduction of judges’ salaries and their regular harmonisation and adjustment are equally important” (Paragraph 84 of the reasoning). I entirely agree with the above-mentioned positions. However, contrary to the majority of the judges, I am of the opinion that the above-mentioned principles (requirements) regarding the stability and regular harmonisation and adjustment of judges’ salaries are taken into account in Article 5 of the SSPSA and that therefore the challenged provision is not inconsistent with the Constitution.
7. Most likely not even the applicant believes that the standard of “regular harmonisation and adjustment” entails an automatic adjustment for inflation or harmonisation with the average salary in Slovenia and that such requirement follows from Article 125 of the Constitution. It is certain, however, that from the standpoint of the Constitutional Court (Decision No. U-I-60/06) regarding the constitutional requirement of the “relative stability” of judges’ salaries and from the standpoint regarding the constitutional “prohibition against a reduction” of judges’ salaries, also an indirect reduction which is a consequence of the absence of their “regular harmonisation and adjustment”, there follows the obligation to ensure the harmonisation and adjustment of the value of judges’ salaries (the value of a salary bracket, which determines the basic salary). The legislature pursues precisely this in Article 5 of the SSPSA, naturally not only for judges, but for all employees in the public sector, including officials – and among them also judges. The fact that the manner of the

harmonisation and adjustment of the value of salary brackets is determined in the SSPSA and that it is the same for all, thus also for judges, is not inconsistent with the Constitution. The constitutionally defined position of judicial office requires that the position of judges, including their salaries, be determined by law, however, not by a special law. It also does not require that the harmonisation and adjustment of salaries should be regulated differently for judges. The SSPSA follows from the principle of the uniform regulation of salaries in the public sector. It determines the classification of all offices and employment positions in salary brackets. The classification of an individual office in a salary bracket is of essential importance and reflects its “value”. The constitutionally determined role of the judicial branch of power must be respected when placing judges in salary brackets. The value of salary brackets is the same for all. Therefore, a special reason, and certainly not a constitutional reason, for determining a different method and different criteria for the annual harmonisation and adjustment of the value of salary brackets cannot be seen. A different treatment would lead to a different annual harmonisation and adjustment of the value of salary brackets and to them having a different value. However, this seems unacceptable in relatively stable economic and social circumstances, as it could also entail a violation of the second, perhaps even the first paragraph of Article 14 of the Constitution.

8. The majority decision avoided, at least partially, the above-mentioned issues. In particular, it avoided a clear answer to the applicant’s claim that the standard of “regular harmonisation and adjustment” entails adjustment for inflation or harmonisation with the average salary in Slovenia. It only stated that the fourth paragraph of Article 5 of the SSPSA does provide for the harmonisation and adjustment of the values of salary brackets. However, as it envisages harmonisation with the collective agreement for the public sector, while the judges cannot participate when such agreement is being concluded, such regulation does not meet the requirements regarding the harmonisation of judges’ salaries. Harmonisation and adjustment determined in such manner as applies to judges’ salaries allegedly do not ensure that “a considerable decrease in their real value” would not occur. In addition, the regulation is allegedly also inconsistent with the Constitution as “the principle of judicial independence namely requires that the salary position of judges be regulated by law”. The fact that the fifth paragraph of Article 5 of the SSPSA determines that the final value of a salary bracket be determined by law, is allegedly not enough. The application of the standard “a considerable decrease in the real value” probably indirectly indicates that the applicant is not right when in claiming that judges’ salaries should be adjusted for inflation or harmonised with the average salary in Slovenia. However, it is not clear what is a considerable decrease in salaries and what is the real value of the salaries. Both will certainly be established in dialogues (negotiations) regarding the annual harmonisation and adjustment of the value of salary brackets. It can be said with great probability that the Constitutional Court does not consider that every decrease in the real value of salary brackets must be taken into consideration, but only a considerable decrease. With reference to such, a new question is raised - who should

evaluate such? Will the Constitutional Court be an arbiter in each individual case, if there is no answer? I am also afraid that by establishing the unconstitutionality of the prescribed manner of the harmonisation and adjustment of the value of the salary brackets of judges, the Constitutional Court probably involuntarily, but nevertheless, albeit unclearly, conveys the message that the uniform harmonisation and adjustment of the value of salary brackets and consequently of the uniform salary system, at least as far as judges are concerned, is inconsistent with the Constitution.

*Mag. Miroslav Mozetič*

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**CONCURRING OPINION OF JUDGE MAG. MARTA KLAMPFER,  
JOINED BY JUDGE DR CIRIL RIBIČIČ**

1. I voted in favour of the adopted decision, however, with reservations as to the reasoning of the decision concerning the unconstitutionality of the third paragraph of Article 25 of the Salary System in the Public Sector Act (Official Gazette RS, Nos. 110/06 – official consolidated text, 57/07, 95/07 - official consolidated text, 17/08, 58/08, and 80/08 – hereinafter referred to as SSPSA), on the basis of which judges were entitled to a lower bonus for years of service than they were entitled to before the amendment of the regulation of judges' salaries in 2006. By the amended SSPSA-G (Official Gazette RS, No. 57/07), the third paragraph of the above-mentioned article was amended so that the bonus for years of service was determined in the amount of "0.3% of the basic salary for each completed year of service", which is also the subject of the present constitutional review, whereas from 11 June 2008, in accordance with the transitional provision of the amended SSPSA-I (Official Gazette RS, No. 58/08), also judges and other officials receive a bonus for years of service in the amount determined by the Collective Agreement for the Public Sector (Official Gazette RS, No. 57/08) (i.e. in the amount of 0.33%). I will proceed to explain the different reasons for my concurring opinion. I am aware that I could have much more easily and with more convincing arguments reasoned my position regarding the issues of the constitutional admissibility of a reduction of the bonus for years of service as one of the elements of a judge's salary when the constitutionality of the regulation of judges' salaries was reviewed for the first time; however, also taking into consideration the reasons provided in Constitutional Court Decision No. U-I-66/06, adopted in December 2006, I am of the opinion that a narrowing of the scope of this statutory right should be reviewed from the viewpoint of its consistency with the principle of trust in the law determined in Article 2 of the Constitution.
2. When writing this concurring opinion I proceeded from the earlier constitutional review in which, by referring to Article 125 of the Constitution, the Constitutional Court clearly adopted the standpoint that it is not only a judge's basic salary that is protected against a reduction, but all payments to which judges are entitled due to performing judicial office, as only such protection against a reduction of the

salary of an individual judge can ensure its stability and consequently the judge's independence. This is thus protection against any interference which might cause a reduction of the judge's salary which the judge justifiably expected upon assuming office. The Constitutional Court also adopted a standpoint regarding the issue of which cases do not involve a reduction of the salary. The Constitutional Court held that such protection against a reduction naturally does not include cases in which judges receive a lower salary because they are no longer entitled to various additional payments which judges are entitled to for performing certain tasks (e.g. an additional payment for mentorship and position-based additional payment) or because they carry out tasks in certain circumstances or under certain conditions (e.g. additional payments for working in less favourable working conditions and at a less favourable working time). Furthermore, there is no reduction of the salary also in cases involving possible payments for work performance, which is also not a fixed part of judges' salaries (Paragraph 89 of the reasoning). Regardless of the fact that the Constitutional Court did not explicitly decide whether such also applies with regard to the reduction or termination of the payment of a bonus for years of service, it is evident that the Constitutional Court placed the bonus for years of service, which is a fixed part of a judge's salary, amongst the aspects of the salary protected against a reduction of the basic salary. This now clearly follows from the new constitutional review of the fourth paragraph of Article 44 of the Judicial Service Act (hereinafter referred to as JSA) (Paragraph 36 of the reasoning of Decision No. U-I-159/08). In the first review of this matter the Constitutional Court adopted the clear standpoint (it adopted the same standpoint also in the decision at issue) that in accordance with Article 125 of the Constitution the bonus for years of service cannot be protected as an independent element of a salary but only in combination with the judge's basic salary, which in fact entailed that the reduction of the bonus for years of service could be compensated for by an increase in the basic salary. Therefore, when reviewing the constitutionality of the first indent of Article 38 of the amended JSA-F (Official Gazette RS, No. 17/06), which entered into force on 18 February 2006, the Constitutional Court held in Paragraph 95 of the reasoning that the legislature may introduce a bonus for years of service or not, due to the fact that a bonus for years of service is not a constitutional category. Therefore, its reduction or possible abolishment would not in and of itself be disputable from a constitutional point of view. However, such reduction could be disputable only if it caused a factual reduction in judges' salaries. Judges must be ensured such protection only inasmuch as their salaries would not be increased for some other reason which would entail a fixed part of their salary, and which could compensate for the reduction in salaries related to the bonus for years of service. Due to the fact that the Constitutional Court held that the prohibition against a reduction in judges' salaries as a whole entails that judges' salaries must be maintained in the amount which judges were entitled to before the implementation of the new salary system, it established that the provision which allowed a reduction of the amount of the bonus for years of service was inconsistent with Article 125 of the Constitution.

3. In the earlier constitutional review of the new salary system, the Constitutional Court already took a position also regarding the reasons which allegedly led the legislature to reduce the bonus for years of service, which in my opinion is a very important starting point for the constitutional review of the reduction of the bonus for years of service within the meaning of Article 2 of the Constitution, which I put forward in this concurring opinion. In Paragraph 97 of the reasoning, indeed when reviewing the issue in terms of Article 125 of the Constitution, the Constitutional Court explicitly stated that the reasons by which the Government tried to justify the reduction of the bonus for years of service cannot justify such reduction. The reasons, such as the necessity to ensure funds for the remuneration of judges for their work performance and to ensure equality between civil servants and officials<sup>1</sup> and the need to implement a new salary reform of the entire public sector, are, in the opinion of the Constitutional Court, not sound reasons for such interference with judges' salaries. The Constitutional Court held that also the desire of the legislature to acquire funds for other purposes did not sufficiently justify the reduction of judges' salaries.
4. In order to remedy the established unconstitutionality of the law, the legislature provided for the possibility to protect judges' salaries by ensuring a nominal amount of the salary received. Article 49f of the SSPSA enacted a so-called additional payment for the readjustment of salaries, which ensured judges payment of the difference between the comparable amount of the salary and their salary determined in accordance with the former regulations. In the fifth paragraph of the cited article it was explicitly determined that when calculating a comparable amount of the salary for officials determined in accordance with the SSPSA a coefficient for determining a judge's salary, an extra payment to compensate for the incompatibility of office, an extra payment for management, and the bonus for years of service (i.e. the fixed parts of judges' salaries) must be taken into account. Thus, the nominal amount of a judge's salary could not be reduced when it was readjusted such that it amounted to a new salary. An additional payment for the readjustment of salaries thus protected the nominal salaries which judges received in December 2007, i.e. the last month before the implementation of the new salary system, which, in accordance with the adopted constitutional review, the legislature adopted in the amended SSPSA-G (Official Gazette RS, No. 57/07), which entered into force on 30 June 2007 and is a subject of the review at issue.
5. The Constitutional Court also held that the new statutory regulation of the salary system is inconsistent with Article 125 of the Constitution, as it does not ensure judges the real value of their salaries which they were entitled to before the reform. The statutory regulation protected only the nominal value of judges' salaries which they were entitled to immediately before the implementation of the reform, whereas they were not ensured protection against a considerable reduction of their real value, and therefore the Constitutional Court held that also the third paragraph of Article

<sup>1</sup> The Government referred to the circumstance that in accordance with the new regulation also civil servants will be paid a bonus for years of service in the amount of 0.3%.

25 of the SSPSA, inasmuch as it refers to judges, was still inconsistent with Article 125 of the Constitution. However, the Constitutional Court drew the legislature's attention to the fact that the regulation determined in the sixth paragraph of Article 23 of the SSPSA-I (the provision which repealed the third paragraph of Article 25 of the SSPSA, as it determined that extra payments determined by the collective agreement for the public sector also apply for officials) could be constitutionally disputable, which the Constitutional Court did not separately review, as it was not a subject of the request in the case at issue, due to the fact that it leaves the regulation of judges' salaries (the amount of extra payments) to the collective agreement.

6. I agree with the review regarding the established unconstitutionality of the challenged provisions of the SSPSA from the viewpoint of Article 125 of the Constitution, however, I am of the opinion that the Constitutional Court should review the regulation of the reduction of the bonus for years of service also from the viewpoint of the consistency with Article 2 of the Constitution. The Constitutional Court has held numerous times that the Constitution explicitly protects acquired rights only against statutory interferences with retroactive effect (the second paragraph of Article 155 of the Constitution). However, this does not entail that the protection of already acquired rights against statutory interferences for the time after the implementation of a law, which is also defined as irregular retroactivity, is not guaranteed in our system. This is ensured within the framework of the principles of a state governed by the rule of law determined in Article 2 of the Constitution. Within the framework of the broader concept of legal certainty, the principle of trust in the law, which ensures individuals that the state will not worsen their legal position arbitrarily, i.e. without a sound reason that is justified in the prevailing and legitimate public interest, must also be regarded among such principles. Due to the fact that this is a general principle of law and not directly one of the constitutional rights which are, in accordance with the third paragraph of Article 15 of the Constitution, ensured stricter protection against possible limitations and interferences, this principle is not absolutely applicable and may be subject to limitations to a greater extent than individual constitutional rights. Namely, in cases of a conflict or collision between this and other constitutional principles or benefits, it must be reviewed by weighing which constitutionally protected benefits must be given priority in the individual disputed case (Decision U-I-141/01, dated 20 May 2004, Official Gazette RS, No. 62/04). On the one hand, such weighing entails the principle of trust in the law, whereby it is particularly important whether the changes in the concerned field of law are relatively predictable such that the affected individuals could take into account beforehand that their position would change and what the weight and significance of such change are, as well as the significance of the existing legal situation of the individual, and on the other hand, the public interest in the implementation of a different regulation than the existing one.
7. The protection of acquired rights in cases in which a law amends the regulation only *ex nunc* is thus ensured within the framework of the general principles of a state governed by the rule of law, which ensure individuals that the state will not worsen their legal position arbitrarily, i.e. without a sound reason justified in the prevailing and

legitimate public interest. The amendment is in accordance with the principle of trust in the law if it is in reasonable proportion to the pursued constitutionally admissible aim (Decision U-I-260/98, dated 9 November 2000). A bonus for years of service is a statutory right and one of the essential elements of a salary. Judges have been entitled to this bonus as a statutory right since the adoption of the JSA in 1994.<sup>2</sup> With the new labour-law legislation which entered into force on 1 January 2003,<sup>3</sup> a bonus for years of service as one of the obligatory elements of the salary was determined to be a statutory right. In Article 129 of the Employment Relations Act, a bonus for years of service is determined as a right stemming from employment; the legislature left the determination of the amount of such bonuses to the branch collective agreements. The fact is that in accordance with the labour-law legislation in force in Slovenia, in addition to a basic salary, employees are also entitled to various additional payments. Even though the use of the term *additional payment* developed over time and is not consistent, it can nevertheless not be disputable that additional payments are payments which employees are entitled to on the basis of their employment.<sup>4</sup> In the procedure for adopting the new labour-law legislation, the question of whether to retain the bonus for years of service had been discussed, arguments against being that it is an outdated institution which is no longer appropriate due to the fact that the socially-owned property had been converted into the property of known owners and that contractual employment relations had been established. In addition, such bonus allegedly also had negative effects with regard to including older workers in the labour market. However, the representatives of the trade unions insisted that this bonus be provided for in the law. Precisely because of the fact that the legislature left the determination of the amount of the bonus for years of service to the social partners and because of the fear that this right would be revoked by collective agreements, in the transitional provision of Article 238 of the Employment Relations Act the legislature determined that all employees who at the time of the enforcement of this Act received a bonus for years of service in the amount of 0.5% of the basic salary for each completed year of service, shall keep this bonus regardless of the amount of the bonus defined by the branch collective agreement unless this Act or the employment contract stipulated a higher amount. It is a special safeguarding provision of employees because of the implementation of the conceptually modified labour-law legislation.<sup>5</sup>

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- 2 Before that, judges were entitled to the above-mentioned additional payment on the basis of the second paragraph of Article 3 of the Judges' Salaries and Other Income Act (Official Gazette RS, No. 10/93), and before that on the basis of the third paragraph of Article 6 of the Officials in State Administration Bodies Act (Official Gazette RS, Nos. 30/90, 18/91, 22/91, 2/91-I).
- 3 The Employment Relations Act (Official Gazette RS, No. 42/02).
- 4 Dr Barbara Kresal, *Pravna ureditev plače* [Legal Regulation of Salary], Založba Bonex, 2001.
- 5 Considering Article 4a of the JSA, which explicitly determines that with regard to the rights and duties arising from judicial office which are not regulated in the Act, the provisions of the law which regulates employment relations apply *mutatis mutandis*, and which was included in the JSA after the implementation of Article 238 of the Employment Relations Act (by the amended JSA-F, Official Gazette RS, No. 17/06), the standpoint could be defended that this provision protects against a reduction of the 0.5% bonus for years of service also for judges.

The SSPSA, differently than general labour-law legislation, in the first paragraph of Article 25 also provided a definition of the bonus for years of service. In accordance with this definition, the bonus for years of service is a part of the salary through which the work experience acquired over the entire years of service of individual civil servants or officials is valued. A characteristic of the bonus for years of service is that it is determined as a certain percentage for each concluded year of service.

8. As regards the above-mentioned nature of the bonus for years of service as a statutory right and as one of the obligatory elements of a salary, I am of the opinion that the constitutionality of the discussed reduction should be reviewed from the viewpoint of consistency with the principle of trust in the law. The protection of acquired rights, in cases in which a law modifies the regulation only *ex nunc*, is ensured within the framework of the general principles of a state governed by the rule of law (Article 2 of the Constitution). By the challenged regulation the legislature did not abolish this right, however, it did substantially interfere with its amount. By reducing the bonus for years of service from 0.5% to 0.3%, the legislature undoubtedly interfered with the legal position of all judges who had been employed when the new labour-law legislation was implemented and whose bonus was determined in the amount of 0.5%. This was an interference which had immediate and negative effects at the individual level. It must particularly be emphasized that the bonus was reduced also for the years of service which included an individual judge's work in the previous years and decades, which exceeds an interference with the judge's expectations regarding receiving a salary which the judge justifiably expected upon assuming office. Due to the fact that the case concerns a regulation which narrows or reduces the scope of already implemented rights, which are also retained by the new labour-law legislation, the question is raised whether the legislature interfered with the principle of trust in the law.
9. In my opinion, in the case at issue the reduction of the bonus for years of service with reference to the regulation which was hitherto in force entails an interference by the legislature, however, the question is whether the legislature did so for reasons justified in the prevailing public interest or whether the proposed amendment is in reasonable proportion to the pursued constitutionally admissible aim. In the constitutional review of the Act Abolishing the Right to Pay for Annual Leave for 1998 (Official Gazette RS, No. 87/97), the Constitutional Court held that the money-saving measures which are a part of the economic policy of the state (i.e. reducing the scope of public finance or their harmonisation with feasible possibilities) undoubtedly entail a constitutionally admissible aim (Decision U-I-260/98, dated 9 November 2000). However, the reduction of the bonus for years of service was not a money-saving measure which was a part of the economic policy of the state, but rather the Government substantiated the above-mentioned reduction by stating the necessity to ensure funds for the remuneration of judges for their work performance and to ensure equality between civil servants and officials, due to the fact that in the future also the bonus for the years of service of civil servants will be reduced to 0.3%. Furthermore, the legislature's reasons for the adoption of such decision also did not follow from the legislative materials of the JSA-F and the SSPSA. The reasons by which the reduc-

tion of the bonus for years of service was justified, in my opinion, cannot justify the disputable interference. The Constitutional Court has, although from the viewpoint of Article 125 and not Article 2 of the Constitution, already explicitly addressed these reasons (Paragraph 97 of the reasoning).

10. In view of the above-mentioned, the reduction of the bonus for years of service interfered with the principle of legal certainty and the principle of trust in the law, thus judges' bonus for years of service could be reduced to 0.3% only for the time after the implementation of the new statutory regulation, whereas the amount of this bonus acquired on the basis of the former legislation in force should be retained.

*Mag. Marta Klampfer*

A dispute between judges and bearers of the executive and legislative branches of power, which even led to something as incomprehensible as a judicial strike, exceeds the issue of the inappropriate payment of judges. It namely touches upon the very core of constitutionally determined mutual relations between the bearers of the different branches of power. Therefore, this is also a good opportunity to underline the special role of the Constitutional Court with reference to the protection of human rights and fundamental constitutional values. The allegations that in resolving the dispute at issue, the Constitutional Court judges decided on their own salaries and position are not only politically incorrect and indecent, but also ignore the constitutionally determined role of the Constitutional Court. This entails ignorance and a lack of understanding of the role of the Constitutional Court within the framework of a constitutional democracy, a democracy in which the Constitution is the origin, the foundation, and above all the limiting instrument regarding the actions of everyone, also regarding the parliamentary majority and a majority expressed at a referendum. The special mission of the Constitutional Court, which is separated from the role of regular courts, is particularly emphasized in cases in which the Constitutional Court reviews competence disputes and other disputes between the bearers of the judicial, legislative, and executive branches of power. When resolving such disputes, the Constitutional Court may not and cannot act as a part of the judicial branch of power, but as a supreme guardian of the Constitution. Thus, as the body which has the final word in the interpretation of the Constitution.

The protection of human rights and concern for fundamental constitutional values cannot depend on checks and balances between the bearers of the three branches of power, and even less so can they be victims of prominent struggles for dominance between them. Nevertheless, the Constitutional Court did not comply with and it was not allowed to comply with the demands of whisperers that the Constitutional Court, instead of the competent authorities, regulate the amount of judges' salaries (i.e. salary brackets, amounts, additional payments, pay raises). It had to limit itself to its constitutional function. It limited itself to the review of whether, in which cases, and to what extent the constitutional principles, as interpreted by the Constitutional

Court in a significantly different composition already two years ago, were violated with regard to the payment of judges. It is not excluded that this principled approach of the Constitutional Court will be met with disappointment by all branches of power and bearers of authoritative offices, not only those prior to but also those following the last parliamentary elections. If it had acted differently, the Constitutional Court might have contributed to a more rapid harmonisation of the salary system of judges with the Constitution and consequently to the resolution of a dispute which is seriously paralysing the functioning of Slovenia. However, in such a case it could not avoid justified reproaches regarding partiality in deciding this dispute between equal branches of power and with regard to interfering with political issues whose resolution falls within the competence of the elected representatives of the people or the people themselves at a referendum.

Nevertheless, there can be no disappointment regarding the principled positions which were adopted by the Constitutional Court. It is particularly important that the Constitutional Court once again emphasized the significance of the equal constitutional position of the judiciary, as the least dangerous branch of power as compared to the other two branches of power. Furthermore, the Constitutional Court emphasized the significance of the implementation of the independence of the courts and judges as a condition for their successful functioning. In addition, it emphasized the importance of such evaluation of judges' work which ensures their social security at a level which does not deter them from adjudicating and does not endanger their independence and autonomy. And last but not least, the Constitutional Court resisted the inappropriate underestimation of adjudication as an activity which is intellectually the most demanding and, for the position of the people, of fatal importance.

These are some of the positive aspects of the adopted decision, whereas regarding its negative aspect, I joined the concurring opinion of Judge Mag. Marta Klampfer.

*Dr Ciril Ribičič*

**DECISION**

At a session held on 10 October 2007 in proceedings to examine the petition and in proceedings to review constitutionality initiated upon the petition of Aleš Zalar, Ljubljana, and in proceedings to examine the constitutional complaint and in proceedings to decide upon the constitutional complaint of Aleš Zalar, Ljubljana, the Constitutional Court

*decided as follows:*

1. The second paragraph of Article 62 of the Courts Act (Official Gazette RS, Nos. 19/94, 45/95, 38/99, 28/2000, 73/04, 23/05 – official consolidated text, 72/05, 100/05 – official consolidated text, 127/06, 27/07 – official consolidated text, and 67/07) is not inconsistent with the Constitution.
2. The petition for the initiation of proceedings to review the constitutionality of the second sentence of the third paragraph of Article 321 of the Civil Procedure Act (Official Gazette RS, Nos. 26/99, 96/02, 12/03 – official consolidated text, 2/04, 36/04 – official consolidated text, 52/07, and 73/07 – official consolidated text) is dismissed.
3. By Supreme Court Judgment No. I Up 143/2006, dated 29 March 2006, the complainant's right to an impartial trial determined by the first paragraph of Article 23 of the Constitution was violated.
4. The constitutional complaint against the Judgment referred to in the preceding Point is rejected in the part relating to the violation of the right to a trial without undue delay.
5. The constitutional complaint against Supreme Court Order No. VII Ips 1/2006, dated 14 November 2006, in relation to Supreme Court Order No. VI Ips 4/2006, dated 17 May 2006, is rejected.

**A**

1. The Judicial Council proposed to the Minister of Justice (hereinafter referred to as the Minister) that the complainant, as the only candidate, be appointed to the office of the president of the Ljubljana District Court. The Minister rejected the Judicial Council's proposal and decided not to appoint the complainant to that office. In the proceedings for the judicial review of administrative acts, the court of first instance granted the action of the complainant, annulled the decision of the Minister, and remanded the case to the Minister for a new procedure. Both the complainant and the Minister appealed against the mentioned decision of the Administrative Court. By the challenged Judgment, No. I Up 143/2006, dated 29 March 2006, the Supreme Court dismissed the complainant's appeal and granted the Minister's appeal, and modified the Administrative Court Judgment so as to dismiss the complainant's action against the decision of the Minister. It adopted the position that in conformity with the second paragraph of Article 62 of the Courts Act (hereinafter referred to as the CtsA), in the procedure for appointing the president of a district court the Minister has the right to select a candidate even when the Judicial Council proposes only one candidate to the Minister (regardless of how many candidates responded to the call for applications); i.e. that in such an event the Minister can reject the proposal of the Judicial Council and not select the proposed candidate and thereby not appoint such candidate president of a court.
2. The complainant filed a constitutional complaint against Supreme Court Judgment No. I Up 143/2006 and proposed that until its final decision is adopted the Constitutional Court suspend the legal consequences of the challenged Judgment. In the complaint he alleges a violation of the right to equality before the law determined by the second paragraph of Article 14 of the Constitution and the right to the equal protection of rights determined by Article 22 of the Constitution, the right to an impartial court determined by the first paragraph of Article 23 of the Constitution, the right to the public pronouncement of a judgment determined by Article 24 of the Constitution, the right to a trial without undue delay determined by the first paragraph of Article 23 of the Constitution, the right to an effective legal remedy determined by Article 25 of the Constitution, and the right to equal access to every position of employment under equal conditions determined by the third paragraph of Article 49 of the Constitution. According to the complainant, the interpretation of the provision of the second paragraph of Article 62 of the CtsA adopted by the Supreme Court in Judgment No. I Up 143/2006 is manifestly erroneous in view of the established methods of interpretation of legal regulations. The complainant substantiates in great detail why on the basis of linguistic, systematic, teleological, and historical interpretations the only possible interpretation that is in conformity with the Constitution is the one that he supports. Furthermore, he challenges the Supreme Court Judgment for its alleged lack of sound reasoning. The [Supreme] Court allegedly did not state arguments for the adopted position,

and the reference to Decision of the Constitutional Court No. U-I-224/96, dated 22 May 1997 (Official Gazette RS, No. 36/97, and OdlUS VI, 65), was allegedly too general. The challenged Judgment was allegedly also contrary to the established case law of the Supreme Court and the Administrative Court in comparable cases regarding the application of the provision on the appointment of presidents of courts. The complainant refers to Supreme Court Judgments No. I Uv 39/95, dated 11 September 1997; No. U 28/98, dated 28 May 1999; and No. U 36/99, dated 22 October 1999. He alleges that these cases are essentially similar to the case at issue and that the Supreme Court did not state reasons for its departure from the established case law. In addition, the complainant is of the opinion that the Supreme Court should have publicly pronounced the Judgment. Since it did not do so, it allegedly interfered with his constitutionally guaranteed right to a publicly pronounced judgment. Moreover, the complainant alleges that a judge participated in the decision-making of the Supreme Court who, in his opinion, should have been disqualified, as allegedly there existed circumstances that raised doubt regarding his impartiality. He alleges that he requested his disqualification, however the President of the Supreme Court rejected his request by reasoning that the matter had already been decided on at the panel session held on 29 March 2006. The complainant emphasises that judges are qualified to request their own recusal when circumstances exist that could raise doubt regarding their impartiality. Since on 3 May 2006 the decision of the [Supreme] Court became known, the complainant filed, with respect to the violation of the right to an impartial court determined by the first paragraph of Article 23 of the Constitution, a request for a retrial against the Supreme Court Judgment in conformity with point 4 of the first paragraph of Article 85 of the Act on the Judicial Review of Administrative Acts (Official Gazette RS, No. 50/97, etc. – hereinafter referred to as the AJRAA).

3. During the procedure for examining the constitutional complaint against Supreme Court Judgment No. I Up 143/2006, by Order No. VII 1/2006, dated 14 November 2006, the Supreme Court dismissed the appeal and upheld the first instance Supreme Court order by which the complainant's request to reopen the proceedings that had been concluded by Supreme Court Judgment No. I Up 143/2006 was rejected. On 29 November 2006 the complainant filed a constitutional complaint also against the mentioned two orders of the Supreme Court. In that constitutional complaint he claims the violation of Article 22, the first and second paragraphs of Article 23, and Article 25 of the Constitution. He alleges that the Supreme Court did not adopt a position with regard to his statements concerning the interpretation of the first paragraph of Article 86 and the third paragraph of Article 85 of the AJRAA, the duty of the court to ensure its own impartiality, his reference to the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), and motions for evidence for establishing circumstances when grounds for disqualification can be invoked. From the viewpoint of the constitutional right to an impartial court determined by the first paragraph of Article 23 of the Constitution, the reasoning of the Supreme Court is allegedly manifestly erroneous.

4. The complainant also filed (already in the framework of the first constitutional complaint) a petition for the review of the constitutionality of the second paragraph of Article 62 of the CtsA and the second sentence of the third paragraph of Article 321 of the Civil Procedure Act (hereinafter referred to as the CPA). In the petition he alleges that due to the nature and content of the second paragraph of Article 62 of the CtsA, competent authorities can assign different meanings to the wording of that provision. He states that in the case at issue the Minister, the Administrative Court, and the Supreme Court adopted different interpretations of the mentioned provision. He advocates the fourth interpretation (which allegedly was also predominantly adopted by the Administrative Court), which at the same time in his opinion is the only one that on the basis of the established methods of interpretation is constitutionally admissible. He proposes that the Constitutional Court adopt a so-called interpretative decision by which it should establish that the second paragraph of Article 62 of the CtsA is not inconsistent with the Constitution if it is interpreted (applied) in a manner such that the Minister may not reject the proposal of the Judicial Council regarding the appointment of the president of a court when the Judicial Council proposes only one candidate for appointment. From the petitioner's extensive statements it follows that in his opinion only such interpretation of the second paragraph of Article 62 of the CtsA enables the Judicial Council to be in a constitutional position that is equivalent to the Minister's and ensures that only objective criteria are taken into account in the appointment of a candidate for the president of a court, and thereby the independence of judges in the performance of judicial office is ensured (the second paragraph of Article 3 and Article 125 of the Constitution). In his petition he refers to various international acts, the recommendation of the Committee of Ministers of the Council of Europe, the position of the Commission for Democracy through Law (the Venice Commission), and encloses with the file the conclusions of the First Study Commission of the International Association of Judges on the appointment and role of presidents of courts, as well as two judgments of the Constitutional Court of Italy. The petitioner emphasises that his petition primarily relies on the argument that the challenged provision is unconstitutional from the viewpoint of the principle of legal foreseeability (the rule of law) determined by Article 2 of the Constitution and the right to an effective legal remedy (Article 25 of the Constitution) in relation to the right determined by the third paragraph of Article 49 of the Constitution as a special provision regarding the right to the equal protection of rights determined by Article 22 of the Constitution.
5. In the opinion of the petitioner, the legislature expressly conferred on the Judicial Council the power to select a candidate only when a number of candidates who fulfil the conditions for appointment have applied. If, however, only one candidate responds to a call for applications and the Judicial Council finds that he or she fulfils the conditions for appointment, in the opinion of the petitioner, the Judicial Council does not have the option to make a selection but must propose that the Minister appoint such candidate. In the petitioner's opinion, the constitutional right determined by the third paragraph of Article 49 of the Constitution is guaranteed only if

in a candidature procedure an effective legal remedy is available to the party in order to ensure that in proceedings for the judicial review of administrative acts the legality and correctness of the application of substantive (statutory conditions and those of the call for applications) and procedural rules are examined. The interpretation provided by the Supreme Court allegedly does not ensure equal conditions of access to a position of employment, as in accordance with such interpretation the Minister can determine in each case which criterion will be decisive in appointing the president of a court. The complainant is convinced that, in the case at issue, the act on the appointment of the president of a court can only have so-called notarial effect. This allegedly entails that the Minister only examines the legality of the proposal of the Judicial Council, which includes an assessment whether the Judicial Council used its discretion in the selection without manifest errors, whereas he or she does not have the power of discretion regarding the assessment of the appropriateness of the candidate. In the complainant's assessment, the Minister would only have such power if the matter concerned an appointment to a predominantly political position. The petitioner draws attention to the fact that candidates who fulfil formal conditions are only ensured judicial protection against the appointment act issued by the Minister (the eighth paragraph of Article 62 of the CtsA). Since supervision over the legality of decision-making begins only at that stage, it is allegedly logical that also during the appointment the Minister is obliged to assess the formal and substantive criteria for the selection of candidates, which had to be fulfilled during the entire candidature procedure, and not that at that level the Minister carries out the selection or appointment on the basis of a criterion that prior to that phase had not been applicable in the candidature procedure. In such an event, the candidate is not familiar in advance with the criteria decisive for the selection, therefore an action initiating a judicial review of administrative acts cannot entail an effective legal remedy (Article 25 of the Constitution). In addition, according to the petitioner, a legitimate goal of candidature procedures must also be the filling of vacant judicial posts, i.e. the continuity of the presidency of Slovene courts. The petitioner refers to the position of the Constitutional Court in a similar case,<sup>1</sup> according to which the duty of the Judicial Council to propose for election to the position of judge the only candidate who fulfils all the statutory conditions is in conformity with the public interest that all judicial posts be filled. In the petitioner's opinion, if the Minister had such autonomy in comparison to the role of the Judicial Council, the objective of filling judicial posts and ensuring the continuity of the leadership of Slovene courts could not be achieved, as there is no safeguard against arbitrary decision-making by the Minister.

6. On 1 June 2007, the petitioner supplemented his petition and submitted to the Constitutional Court also the texts of two international documents that refer to the manner of and procedure for appointing judges and to the implementation of the principle of the independence of the judiciary. He adds to his allegations regarding the unconstitutionality of the second paragraph of Article 62 of the CtsA that, in

<sup>1</sup> Decision of the Constitutional Court No. Up-134/96, dated 14 March 1996 (OdIUS V, 62).

view of Article 3 of the Act on the Judicial Review of Administrative Acts (Official Gazette RS, No. 105/06 – hereinafter referred to as the AJRAA-1), it follows from Order of the Constitutional Court No. Up-1679/07, dated 29 March 2007,<sup>2</sup> that in deciding whether to appoint a proposed candidate the Minister cannot be entirely autonomous and that such issue is thus not a matter left to his political discretion.

7. The petitioner also challenges the second sentence of the third paragraph of Article 321 of the CPA, which is allegedly inconsistent with Article 24 of the Constitution insofar as it relates to the judicial review of administrative acts. In the judicial review of administrative acts all cases that interest the public are, as a general rule, more complex, therefore the mentioned provision allegedly not only entails an interference with the right determined by Article 24 of the Constitution and its limitations, but actually a complete revocation of this right in all of the most important disputes between bearers of public authority and private entities, and those cases in which the public is interested.
8. By Order No. Up-679/06, dated 25 May 2006, the Constitutional Court accepted for consideration the constitutional complaint against Supreme Court Judgment No. I Up 143/2006, dated 29 March 2006, and suspended, until the adoption and finality of the decision of the Supreme Court on the request to reopen the proceedings concluded by Supreme Court Judgment No. I Up 143/2006, dated 29 March 2006, the procedure for appointing the president of the Ljubljana District Court, initiated on the basis of the Order of the Judicial Council dated 24 November 2005 (Official Gazette RS, No. 109/05). After the finality of the decision of the Supreme Court on the request for a retrial (Order No. VII 1/2006, dated 14 November 2006), the Constitutional Court dismissed, by Order No. Up-679/06, U-I-20/07, the (repeated) proposal of the complainant to suspend, until the final decision is adopted, the legal consequences of Supreme Court Judgment No. I Up 143/2006 and the implementation of the second paragraph of Article 62 of the CtsA. Due to the concrete circumstances of the case, the Constitutional Court also assessed in that Order whether it would be necessary to determine a new manner of the implementation of the Order on the acceptance of the constitutional complaint dated 25 May 2006. It decided that it was no longer possible to substantiate the continuation of the temporary suspension of the procedure for appointing the president of the Ljubljana District Court. It namely established that the harmful consequences that could occur if the largest district court in the state was to remain without a president (given the fact that such an unacceptable state of affairs had already existed for more than one year) would be far greater than those that might occur to the complainant if a person other than him was appointed president of the Court.
9. In conformity with Article 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94), the Constitutional Court sent the accepted constitutional complaint to

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2 By this Order the Constitutional Court rejected as too early the complainant's constitutional complaint against Decision of the Minister of Justice No. 700-22/2005, dated 25 April 2007, by which in the new procedure the Minister again rejected the proposal of the Judicial Council to appoint the complainant to the office of the president of the Ljubljana District Court.

the Supreme Court and, pursuant to Article 22 of the Constitution, also to the Minister, and enabled the two of them to reply thereto. The Minister responded to the call of the Constitutional Court. In his reply, he rejects the complainant's allegations as unfounded. According to the Minister, the challenged Judgment cannot be considered to be "manifestly erroneous" or "without sound reasoning", because the reasoning and interpretation of the second paragraph of Article 62 of the CtsA originate from constitutional and statutory provisions (i.e. of the CtsA), which is stated in a detailed manner in the reasoning. If the complainant understands this Act differently, this does not entail that the decision lacks sound reasoning, therefore the allegations regarding a violation of Article 22 of the Constitution are allegedly unfounded. The Minister was not able to discern from the constitutional complaint the reason why Article 25 of the Constitution was allegedly violated. Furthermore, the allegations of the complainant regarding the departure of the Supreme Court from the established case law is also allegedly unfounded. Namely, from the cases cited by the complainant it allegedly follows that the Supreme Court had not yet adopted a position on the interpretation of the second paragraph of Article 62 of the CtsA, as the cited cases refer to procedures before the Judicial Council. Similarly, the allegations regarding the violation of the third paragraph of Article 49 of the Constitution are also allegedly unfounded. In the opinion of the Minister, the interpretation in accordance with which the term "appointment" also includes the right to choose cannot be inconsistent, already by the nature of the matter, with the mentioned constitutional right, which only guarantees the right to equal access and equal treatment, but not the right to be selected. The reply of the Minister was sent to the complainant, who responded that the reply did not necessitate additional argumentation of the constitutional complaint.

10. The petition was sent to the National Assembly for a reply thereto. In its reply the National Assembly dismisses the allegations regarding the unconstitutionality of the second paragraph of Article 62 of the CtsA and of the second sentence of the third paragraph of Article 321 of the CPA. According to the National Assembly, the mere fact that the Supreme Court attributed to the term "appointment" a clear meaning despite the perhaps ambiguous character of the challenged provision proves that the allegation of the violation of Article 2 of the Constitution is unfounded. Likewise, the content of the challenged provision as follows from the interpretation of the Supreme Court is not inconsistent with the third paragraph of Article 49 of the Constitution, as the latter only guarantees equal treatment, and not the right to a position of employment. According to the National Assembly, the challenged provision does not by itself enable unequal treatment. Any possible violation of access under equal conditions to any position of employment is subject to judicial protection that is expressly ensured the eighth paragraph of Article 62 of the CtsA, therefore, in the opinion of the National Assembly, the challenged provision cannot be inconsistent with Article 25 of the Constitution. With regard to the allegations of the petitioner concerning the inconsistency with Articles 3 and 125 of the Constitution, the National Assembly draws attention to Decision of the Constitutional

Court No. U-I-224/96, in which the Constitutional Court adopted the position that the statutory provision that envisages the participation of the Minister in the procedure for appointing the president of a court is not inconsistent with the principle of the separation of powers. In the opinion of the National Assembly, the interpretation advocated by the petitioner would exclude the Minister from the appointment procedure and would entail that the Judicial Council alone appoints the president. According to the National Assembly, such procedure would be inconsistent with the principle of the separation of powers. In the opinion of the National Assembly, the content of the challenged provision as follows from the interpretation of the Supreme Court also does not interfere with the principle of the independence of a judge. The National Assembly enclosed the opinion of the Government and stated that it agrees therewith in its entirety.

11. In its opinion on the allegations in the petition, the Government emphasises that an essential element in the interpretation of the second paragraph of Article 62 of the CtsA is the principle of the separation of powers determined by the second paragraph of Article 3 of the Constitution. In the procedure determined by the second paragraph of Article 62 of the CtsA, in accordance with which the appointment of a holder of a judicial-administrative office within the judicial branch of power is decided upon, the Minister, as part of the executive branch of power, and the Judicial Council, as a *sui generis* constitutional authority, cooperate. In the opinion of the Government, the circumstance that the manner of the appointment of presidents of courts is not determined by the Constitution points to the fact that the manner of the appointment of presidents of courts leaves the legislature a wide margin of appreciation, provided, of course, that the fundamental constitutional values and the specificities of judicial office are taken into account, which also include the protection of the personal and substantive independence of judges. With respect to the provisions of the Constitution (the second paragraph of Article 3 and Articles 23, 125, and 129), the Government assesses that the condition of an “independent court” is fulfilled if a judge with life tenure is appointed president of a court. From the fact that in accordance with Article 7 of the CtsA the president of a court manages the operations of the court, i.e. directs court management, it follows that what is at issue is a typical administrative-executive office. Therefore, in the Government’s opinion, it is in conformity with the Constitution that the executive branch of power has a greater degree of influence in relation to the manner of or procedure for the appointment of the president of a court. The regulation allowing the Minister to decide independently whether to appoint the proposed candidate president or not is, in the opinion of the Government, in conformity with the Constitution also due to the fact that, on the basis of the principle of the separation of powers, the Minister and the Government (the executive branch of power), and not the president of a court, are accountable for the functioning of the judiciary as a whole to the National Assembly (the legislative branch of power). Undoubtedly, selection among several candidates (independent judges) proposed by the Judicial Council also includes the possibility to refuse the appointment of the only candidate. From the viewpoint of the system

of checks and balances, the second paragraph of Article 62 of the CtsA provides an appropriate guarantee of the protection of the independence of judges, as the Minister may not appoint a president of a court without the formal proposal of such by the Judicial Council. Concerning such, the Government draws attention to the fact that this function of the Judicial Council is not stated in the Constitution, therefore the legislature could also have selected some other autonomous and independent authority to propose candidates (e.g. the plenary session of the Supreme Court), and the judicial and executive branches of power would still be appropriately balanced. With respect to the challenged provision of the second sentence of the third paragraph of Article 321 of the CPA, the Government is of the opinion that this provision determines an exception from the public pronouncement of judgments, in conformity with the authorisation determined by the third sentence of Article 24 of the Constitution. In the Government's opinion, the challenged exception concerning the public pronouncement of judgments (when deciding in a complex case, courts may decide to issue the judgment in writing) already due to the nature of the matter applies to an even greater degree to the Supreme Court, which, in accordance with Article 127 of the Constitution, decides, as the highest court in the state, in particular on complex legal issues raised on the basis of filed extraordinary or ordinary legal remedies, with regard to which the principle of public proceedings does not apply to internal sessions. According to the Government, the regulation determined by the second sentence of the third paragraph of Article 321 of the CPA is not disproportionate from the viewpoint of the position of the Supreme Court, as it applies to the highest court in the state.

12. The Judicial Council also submitted its position regarding the allegations in the petition. In its opinion it states that the CtsA does not contain special provisions on the criteria that the president of a court must fulfil (except that he or she must be a judge), therefore the Judicial Council and the Minister are relatively free in making appointments; however, the cooperation of both the executive branch of power and the Judicial Council is necessary for an appointment. It stated that the Judicial Council as a specific intermediary authority in the system of the separation of powers carries out the first evaluation of a candidate's professional work, his or her organisational experience, and his or her submitted work programme, while the final selection rests with the Minister, who is not bound by the opinion of the Judicial Council. According to the position of the Judicial Council, in the event that the Judicial Council proposes only one candidate to the Minister, the Minister primarily assesses the elements stated in the law, as well as whether the Judicial Council's decision is well founded and acceptable. Thus, the Minister may also reject the candidate if he or she assesses that the candidate is not suitable.
13. In connection with the Government's position, the petitioner emphasises that the office of the president of a court is not administrative-executive but judicial-administrative in nature. Within the framework of such office, the conditions for the regular exercise of judicial power, and not executive-administrative power, are ensured. It is also due to this significant difference that, in the petitioner's opinion, each attempt

by the executive power to exert influence on the appointment of presidents of courts must be expressly based on law. He draws attention to the fact that matters of justice administration are determined by Article 74 of the CtsA and are distinguished from matters of court management, which are determined in a general manner by Article 60. The only area where the matters of justice administration and court administration overlap is allegedly connected with the Minister's competence to supervise the performance of matters of court administration, with regard to which the Minister is allegedly not the only supervisory authority. Therefore, the Government allegedly refers in an unsubstantiated manner to the argument that the Minister is responsible for matters falling within the justice administration, due to which the Minister allegedly has the competence to reject the only proposed candidate.

14. The petitioner also does not agree with the position of the Judicial Council that the CtsA does not determine the criteria for the selection of presidents of courts. In connection with the position of the Judicial Council that the Minister and the Judicial Council interpret the content of the term "professional work" differently, the petitioner draws attention to the fact that the term "professional work" entails a statutory category determined by Article 29 of the Judicial Office Act (Official Gazette RS, Nos. 19/94, etc. – hereinafter referred to as the JOA). He alleges that in the case at issue he enclosed with his candidature application the evaluation of his work performance in judicial office that was adopted with finality, from which it followed that he fulfilled the conditions for faster promotion. He stresses that the reason for the fact that in the procedure for appointment the Judicial Council is included as the authority that carries out the selection is precisely that it is entrusted with the task of evaluating the professional qualifications of candidates. In such a manner, the legislature allegedly wished to prevent political criteria from being applied during recruitments. In the petitioner's opinion, the position of the Judicial Council that both the Judicial Council and the Minister allegedly have equal possibilities to select from among the candidates is not based on any constitutional provision, nor is it based on any established legal method of the interpretation of regulations.

#### **B – I**

15. The Constitutional Court accepted the petition for the initiation of proceedings to review the constitutionality of the second paragraph of Article 62 of the CtsA. As the conditions determined by the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) were fulfilled, it proceeded to decide on the merits of the case. During the preliminary procedure, the question was raised whether the eighth paragraph of Article 62 of the CtsA, which regulates judicial protection in the procedure for the appointment of the president of a court, was in such mutual connection with the challenged provision that a review of the constitutionality of this paragraph was necessary to resolve the case. The Constitutional Court assessed that the review of the constitutionality of the eighth paragraph of Article 62 of the CtsA was not necessary to resolve the case, therefore it did not initiate proceedings to review its constitutionality.

### The Second Paragraph of Article 62 of the CtsA

16. Article 62 of the CtsA regulates the appointment of presidents of courts. The second paragraph of this Article reads as follows:

“(2) The presidents of other courts are appointed by the Minister of Justice on the proposal of the Judicial Council for a term of six years with the possibility of reappointment.”

### The Review of Conformity with Article 2 of the Constitution

17. One of the principles of a state governed by the rule of law (Article 2 of the Constitution) requires that regulations be clear and precise so that the content and purpose of a norm can be determined with certainty. The requirement of the clarity and precision of regulations does not mean that regulations must be such that they would not need to be interpreted. From the viewpoint of legal certainty, which is one of the principles of a state governed by the rule of law, as determined by Article 2 of the Constitution, a regulation becomes disputable when by means of the rules of the interpretation of legal norms the clear content of the regulation cannot be established (Decision No. U-I-32/00, dated 10 July 2003, Official Gazette RS, No. 73/03, and OdlUS XII, 71).
18. The petitioner alleges that the linguistic framework of the challenged second paragraph of Article 62 of the CtsA allows for different interpretations. However, in accordance with the linguistic interpretation and considering also other methods of interpretation (the teleological, historical, and logical methods),<sup>3</sup> the second paragraph of Article 62 of the CtsA can only be interpreted in a manner such that the power of the Minister to appoint the president of a court also encompasses the right to select [a candidate], and at the same time entails that the Minister has the right to not appoint a proposed candidate. The meaning of linguistic expressions must namely be interpreted above all in accordance with the purpose that a certain provision has. From the legislative material entitled The Proposal for Adopting the Courts Act<sup>4</sup> it follows that the purpose of the adoption of such a regulation under which the president of a court is appointed by the Minister of Justice on the proposal of the Judicial Council was to ensure that the executive branch of power is given a certain influence on the organisation of court operations.
19. The Minister is competent for matters of justice administration, which include ensuring general conditions for the successful exercise of judicial power, in particular the preparation of laws and other regulations from the field of the organisation and operations of courts, providing education and professional training for judges and other personnel, the publication of professional literature, ensuring the necessary personnel, material, technical, and spatial conditions, international legal aid activities, the enforcement of criminal sanctions, statistical and other research on the oper-

3 For more on the methods of interpretation, see M. Pavčnik, *Argumentacija v pravu* [Argumentation in Law], 2<sup>nd</sup> revised edition, Cankarjeva založba, Ljubljana 2004, pp. 57 *et seq.*

4 Gazette of the National Assembly, No. 18/93, p. 19.

ations of courts, and other administrative tasks determined by law (Article 74 of the CtsA). The Minister cannot carry out such function without successfully cooperating with the presidents of courts. The presidents manage the operations of courts (Article 7 of the CtsA). Their competence extends to matters of court management (the first paragraph of Article 61 of the CtsA), which include decision-making and other tasks by which the conditions for the regular exercise of judicial power are ensured on the basis of law, judicial order, and other regulations. The successful provision of the conditions for the functioning of courts is thus only possible if the presidents of courts and the competent Minister cooperate appropriately.

20. If the purpose of the challenged provision is to enable the Minister to have an influence on the appointment of presidents of courts, then it is logical that the Minister is ensured influence only if his or her competence also includes the possibility that he or she does not appoint any of the candidates (independently of whether only one candidate or several candidates were proposed for appointment). Otherwise the inclusion of the Minister in the procedure for appointing presidents of courts would have no meaning.
21. It follows from the above that the allegation of the petitioner regarding the inconsistency of the challenged provision with Article 2 of the Constitution is unfounded.
22. Next, the petitioner proposes that, after reviewing the conformity with Article 2 of the Constitution, the Constitutional Court first review the conformity of the challenged provision with the third paragraph of Article 49 of the Constitution in conjunction with Article 25 of the Constitution. However, in view of the content of the challenged statutory provision, it was first necessary to review its constitutionality from the viewpoint of conformity with the principle of the separation of powers (the second paragraph of Article 3 of the Constitution) and with the principle of the independence of judges (Article 125 of the Constitution).

### **The Review of Conformity with the Second Paragraph of Article 3 of the Constitution**

23. The second paragraph of Article 3 of the Constitution reads as follows: “In Slovenia power is vested in the people. Citizens exercise this power directly and through elections, consistent with the principle of the separation of legislative, executive, and judicial powers.” In its decisions, the Constitutional Court has a number of times defined the content of the principle of the separation of powers.<sup>5</sup> In Decision No. U-I-224/96, upon the request of the Supreme Court, it reviewed precisely Article 62 of the CtsA.<sup>6</sup>

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5 Its key positions were adopted in Decisions No. U-I-83/94, dated 14 July 1994 (Official Gazette RS, No. 48/94, and OdlUS III, 89), No. U-I-158/94, dated 9 March 1995 (Official Gazette RS, No. 18/95, and OdlUS IV, 20), and No. U-I-224/96, dated 22 May 1997 (Official Gazette RS, No. 36/97, and OdlUS VI, 65).

6 The Supreme Court claimed that the competence of the Judicial Council to select and propose candidates for the offices of presidents of courts in comparison with the competences of the Minister of Justice in the procedure for the appointment of the president of a court, as determined by the then Article 62 of the CtsA, did not ensure implementation of the principle of the separation of powers. In conformity with the role of the Judicial Council emphasised in the Constitution, in the opinion of the Supreme Court, the appointment

The provision of Article 62 of the CtsA has been amended several times since the mentioned Decision of the Constitutional Court was adopted; however, the matter now regulated by the second paragraph of Article 62 of the CtsA was at the time of the adoption of Decision No. U-I-224/06 regulated by the first paragraph of that Article.<sup>7</sup> In the mentioned Decision, the Constitutional Court established that the regulation in accordance with which the presidents of courts are appointed by the Minister on the proposal of the Judicial Council was not inconsistent with the principle of the separation of powers determined by the second paragraph of Article 3 of the Constitution. It emphasised that this principle does not allow for the autonomy of individual branches of power but establishes mutual dependency between them, and ensures that each of them exercises functions that are executive, legislative, and judicial in nature, and that the system of checks and balances is an essential component of the principle of the separation of powers from both the functional and organisational points of view. Therefore, from the organisational point of view of this principle, it holds true that, as a general rule, office holders in individual branches of power are not appointed to such positions by the branches themselves, but are appointed to such positions directly (deputies, for instance, through elections) or indirectly by the people (representatives from other branches of power with various competences participate in the procedure for appointing individuals to positions of power). The judicial branch of power is functionally much more independent than the other two branches of power, although even this independence is not absolute (namely, the judiciary does not determine its competences by itself, and judges are bound by law). However, such independence can be lesser in scope when the organisational aspect of the separation of powers is concerned. Since judges are bearers of power regarding whom direct responsibility to voters is not established, it is in conformity with the requirement of the mutual dependency of holders of different offices of state power that the legislative and executive branches cooperate in the appointment of judges and presidents of courts.

24. By Decision No. U-I-224/96, the Constitutional Court also explained that the concrete implementation of the principle of the separation of powers in individual states differs to such an extent that no general rule can be determined with regard to questions such as the regulation of the appointment of judges or presidents of courts. There are no generally valid patterns for establishing the balance between individual branches of power. This depends on every individual state and its specific constitutional regulation, which is created and exists in specific historical and social circumstances. Therefore, various organisational layouts are possible and indeed also exist regarding how the principle of the horizontal, vertical, and functional separation of powers is carried out in accordance with the specific historical and cultural cir-

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of presidents of lower courts should be entrusted to the Judicial Council.

- 7 By Decision No. U-I-224/96, the Constitutional Court assessed the first paragraph of Article 62 of the Courts Act (Official Gazette RS, Nos. 19/94 and 45/95), which then read as follows: "The president of a court is appointed by the Minister of Justice from among three candidates that are proposed by the Judicial Council, for a term of six years with the possibility of reappointment."

cumstances of a concrete adaptable and active constitutional regulation. Therefore, the petitioner cannot substantiate the alleged inconsistency by referring to various international documents and two judgments of the Constitutional Court of Italy.

25. The challenged second paragraph of Article 62 of the CtsA only determines that presidents of courts are appointed by the Minister on the proposal of the Judicial Council for a term of six years with the possibility of reappointment. The selection procedure and the conditions for holding the position of president of a court are not determined in detail in the CtsA. The only express condition determined by the Act is that only a judge of a court of equal or higher rank may be appointed president of a court (the third paragraph of Article 62 of the CtsA). In addition to this condition, it also determines that the candidates must enclose with their application their *curriculum vitae* with a description of their professional work and organisational experience after election to judicial office, and the [proposed] work programme of the court (the fifth paragraph of Article 62 of the CtsA). From the seventh paragraph of Article 62 of the CtsA, which regulates the procedure relating to the proposal of the Judicial Council, it follows that if more than one candidate applies for a vacant position, the Judicial Council selects from among the candidates that fulfil the conditions the candidate(s) whom it will propose to the Minister for appointment. The proposal must be reasoned (such that each candidate can understand on the basis of which information and criteria the Judicial Council established whether he or she fulfils the conditions), whereas the Judicial Council may state to which candidate it gives priority and reason such preference. The criteria are not determined in more detail in the Act.
26. The Judicial Council is not only an authority intended to implement the independence of the judicial branch of power,<sup>8</sup> but it is also, with respect to its power to make proposals, the authority that directs personnel policies in filling both vacancies in judicial offices as well as vacancies regarding the office of presidents of courts. Therefore, in the event that only one candidate who fulfils the conditions responds to a call for applications, the Judicial Council is not obliged to propose him or her to the Minister for appointment if it assesses that despite fulfilling the formal conditions, the candidate is not appropriate for performing the office of president of a court. Otherwise this power of selection by the Judicial Council would be hollowed out. The wording of the seventh paragraph of Article 62 of the CtsA does allow for such (literal) interpretation. Systematic interpretation supports this. The JOA, which determines the procedure for the election or appointment of judges in more detail, namely expressly determines that the Judicial Council is not obliged to select a candidate who fulfils the formal conditions for the occupation of a vacant judicial post (the fifth paragraph of Article 18 the JOA). It is not apparent why in the event of the appointment and proposal of the president of a court this would be any different.<sup>9</sup>

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<sup>8</sup> For more details, see Decision No. U-I-224/96, Paragraphs 10 and 11 of the reasoning.

<sup>9</sup> The petitioner refers to the position of the Constitutional Court in Decision No. Up134/96, in which it decided on the constitutional complaint of (the only) candidate for a judicial office whom the Judicial Council had not proposed to the National Assembly for election. In Decision No. Up-134/96, the Constitutional Court indeed adopted the position that “if there are several candidates that fulfil all the conditions, the Judicial

Therefore, the competence to make a substantive selection among the candidates is reserved for the Judicial Council as the proposer of (a) candidate(s) for president of a court. The Minister may namely only appoint as president one of the candidates proposed by the Judicial Council. A constitutionally consistent balance is thereby established that prevents excessive influence by the executive branch of power on the appointment of the presidents of courts.

27. Hence, in conformity with the second paragraph of Article 3 of the Constitution, the challenged regulation only enables the appointment of the president of a court if both authorities concur on the appropriateness of the candidate, with regard to which the challenged regulation assumes that each of them will act responsibly. Therefore, the petitioner's position that if the Minister has the right to reject a proposed candidate, the Minister is superior to the Judicial Council, is erroneous. As the Constitutional Court already stated in Decision No. U-I-224/96, what is at issue is not a relation of superiority or inferiority, but a relation of mutual restriction. Each of the two authorities namely acts within the framework of its own position and competences. It is exclusively within the competence of the Judicial Council to establish which candidates fulfil both formal and substantive conditions, and which from among several candidates are, in its assessment, from the viewpoint of professional qualifications, organisational capacities, and their ability to perform the leadership tasks, more appropriate to manage a court. The Minister cannot assess the qualification of candidates to perform the office of president of a court from the aspects that fall within the exclusive competence of the Judicial Council, and even less may he or she assess their "political appropriateness" for performing such office. The Minister<sup>10</sup> has the right to select the candidate from either only one or several candidates proposed by the Judicial Council, or to not appoint any of the proposed candidates. The responsible conduct of the Minister in the exercise of this right presupposes that – in the event he or she does not appoint any of the candidates whom the Judicial Council established are professionally qualified to perform the office of president of a court – the Minister will explain the reasons for such decision. Only in such a manner can the Minister demonstrate that in adopting (any of) the proposed candidate(s) he or she was led by reasons in the public interest. In the reasoning of his or her decision, the Minister must strictly limit the reasons to those that fall within his or her competences, and must not address aspects that fall within the powers of the Judicial Council.

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Council may select from among them – on the other hand, if there is only one candidate, in accordance with the provisions of the first paragraph of Article 19 and Article 33 of the JOA, it must propose that candidate for election, which is also in conformity with the public interest that all judicial posts be filled." However, it must be taken into consideration that the mentioned decision was adopted on the basis of the then in force special transitional regulation of the procedure for the election and appointment of judges with limited tenure to the office of judge with life tenure.

- 10 On the basis of Article 110 and the first paragraph of Article 114 of the Constitution, the Minister is responsible for the work of the Ministry, within the broader framework of which different activities related to the performance of judicial office fall, including the justice administration. The Minister is politically accountable to the National Assembly for the state of affairs in the judiciary.

28. It follows from the above that the second paragraph of Article 62 of the CtsA is not inconsistent with the second paragraph of Article 3 of the Constitution. With respect thereto, the Constitutional Court stresses that in order to adopt a decision in the case at issue, in reviewing the challenged provision it did not have to address the question of whether, in the event of a disagreement between the Judicial Council and the Minister, the regulation ensures the appointment of the president of a court in the shortest time possible. Irrespective of the fact that the Constitutional Court cannot review the appropriateness of the regulation, it does call upon the legislature to assess whether a situation in which, due to a disagreement between the Judicial Council and the Minister, the president of a court is not appointed for a longer period of time calls for legislative regulation. The Constitutional Court already drew attention to the role of the president of a court in the uninterrupted exercise of judicial power, and thereby in ensuring effective judicial protection, in its Order dated 18 January 2007, by which it decided on the proposal of the petitioner to suspend, until the adoption of the final decision in the case at issue, the new procedure for the appointment of the president of the court. Precisely in order to ensure effective exercise of power, such regulation is, for instance, determined already by the Constitution itself in the second paragraph of Article 165<sup>11</sup> relating to the exercise of the office of a Constitutional Court judge.

#### **The Review of Conformity with Article 125 of the Constitution**

29. By Decision No. U-I-224/96, the Constitutional Court also decided that the regulation according to which the president of a court is appointed by the executive branch of power is not inconsistent with the principle of the independence of judges determined by Article 125 of the Constitution. Due to the fact that the CtsA and the JOA have been amended a number of times since the mentioned Decision was adopted, the Constitutional Court assessed anew whether the challenged regulation enables the Minister to indirectly interfere with the independent position of judges due to his or her power to appoint the presidents of courts. In comparison with the regulation in force at the time,<sup>12</sup> under the regulation currently in force in the CtsA and the JOA, the powers and competences of the president of a court relating to the operation of courts are indeed significantly more extensive; however, the president's role is still predominantly limited to making proposals and giving opinions. In those cases, however, where the president's powers refer to decision-making that could affect the position of judges and thereby indirectly their independence,<sup>13</sup> the Act contains safe-

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11 The second paragraph of Article 165 of the Constitution reads as follows: "Upon the expiry of the term for which a Constitutional Court judge has been elected, he continues to perform his office until the election of a new judge."

12 The CtsA (Official Gazette RS, Nos. 19/94 and 45/95) and the JOA (Official Gazette RS, Nos. 19/94 and 8/96).

13 For instance: decision-making on regular advancement to a higher salary grade and promotion to the rank of a senior judge (the third paragraph of Article 24 of the CtsA), decision-making on the assignment of judges [to other courts] (Article 69 of the JOA), the determination of an annual list assigning judges to certain legal fields (the first paragraph of Article 71 of the CtsA), the appointment of the head of an organisational unit

guards that ensure the independence of judges.<sup>14</sup> The Act expressly determines that within the framework of matters relating to court management and supervision over such, interfering with the independent position of a judge in deciding on cases that were assigned to such judge is not allowed (the second paragraph of Article 60 of the CtsA). In accordance with point 2 of the first paragraph of Article 64 of the CtsA, all such attempts by the president of a court are also sanctioned by dismissing him or her from the office. Deciding on essential matters concerning the position of a judge is still reserved for the Judicial Council.<sup>15</sup> Therefore, in the assessment of the Constitutional Court, under the regulation in force at the time of this review, the president of a court does not have such powers that by exercising them he or she could possibly interfere with the independent position of judges. However, in reviewing the possible inconsistency of the challenged regulation from the viewpoint of Article 125 of the Constitution, in addition to the above, it is also and in particular necessary to take into consideration the fact that no one but a judge of a court of an equal or

(Article 69 of the CtsA), decision-making on granting leave of absence (the third paragraph of Article 59 of the JOA), deciding on approving a leave due to educational training (the fifth paragraph of Article 63 of the JOA), requesting information and the inspection of a file also in cases not yet concluded with finality (the third paragraph of Article 12 of the CtsA and Article 6 of the Protection of the Right to a Trial Without Undue Delay Act, Official Gazette RS, No. 49/06).

- 14 If a judge assigned to a certain legal field by a decision of the president of a court appeals against such decision, the personnel council of the next higher court decides on the appeal (the second paragraph of Article 71 of the CtsA). If a judge appeals against a decision on assignment, the Judicial Council decides on the appeal (the fourth paragraph of Article 69 of the JOA). If a judge believes that his or her statutory rights, his or her independent position, or the independence of the judiciary have been violated in any manner, he or she may file an appeal before the Judicial Council (the sixth indent of Article 28 of the CtsA).
- 15 The Judicial Council is the authority empowered to select from among several candidates and to propose a candidate for election to a judicial office, as well as to propose that the National Assembly dismiss a judge. In accordance with Article 28 of the CtsA, the Judicial Council is empowered to decide on the incompatibility of judicial office with other offices; to give its opinion on a budget proposal for courts, and to provide the National Assembly with an opinion on laws regulating the status, rights, and duties of judges, as well as judicial personnel; to adopt the criteria for the minimum expected quantity of work for judges and the criteria for evaluating the quality of work performed by judges in office, and to decide whether an appeal of a judge who claims that his or her statutory rights, his or her independent position, or the independence of the judiciary were violated is well founded. In accordance with the JOA, the Judicial Council decides on the cessation of a judicial office (Article 33) by upholding the negative evaluation of the performance of judicial office; on promotion to a higher judicial rank, on faster advancement to a higher salary grade, on faster promotion to the rank of a senior judge or to a higher judicial post; and on extraordinary promotion to a higher judicial post (the third paragraph of Article 24); it decides on the transfer and allocation of judges to other courts (Articles 66, 68, 69, and 71); it decides on the incompatibility of judicial office with other offices and with the performance of other work (the third paragraph of Article 43); it decides on the granting of judicial scholarships (the second paragraph of Article 63); at the request of the president of a court, it adopts the final decision on whether a proposal for professional supervision is well founded (Article 79b); it submits proposals for the initiation of disciplinary procedures (the second paragraph of Article 91); it enforces certain disciplinary sanctions (the sixth paragraph of Article 83); and decides on the suspension of the president of the Supreme Court, as well as on appeals against decisions of the president of the Supreme Court on the suspension of other judges (the third paragraph of Article 95 and the first paragraph of Article 96).

higher rank can be appointed president of a court (the third paragraph of Article 62 of the CtsA). Hence, the Minister only makes a selection from among the already elected judges, who, in accordance with the Constitution, are ensured life tenure and who in the performance of their judicial office must be independent and bound only by the Constitution and laws. Therefore, the challenged regulation is not inconsistent with Article 125 of the Constitution.

30. However, as regards the independence of the president of a court as a judge, already in Decision No. U-I-224/96 the Constitutional Court adopted the position that the president of a court must enjoy such independence as pertains to a judge. The Act has certain safeguards that ensure this. In accordance with Article 65 of the CtsA, the dismissal of the president of a court does not affect the position, rights, duties, and responsibilities that pertain to the dismissed president as a judge. If his or her judicial position is protected even in the event of early dismissal, then, in accordance with Article 63 of the CtsA, it is even more protected in the event of the termination of office of the president of a court due to the expiry of the term of office to which he or she has been appointed. In view of the above, the judicial position of the president of a court is not violated by the challenged regulation, and thereby also the principle of judicial independence determined by Article 125 of the Constitution is not violated.

**The Review of Conformity with the Third Paragraph  
of Article 49 of the Constitution in Conjunction with the First Paragraph  
of Article 23 of the Constitution**

31. The petitioner links the exercise of the right of a candidate for the office of president of a court to compete with other candidates under equal conditions with Article 25 of the Constitution, which ensures the right to appeal or to any other legal remedy against the decisions of courts and other state authorities. The focal point of this human right is to ensure appellate decision-making concerning the deciding of state authorities. Therefore, in the case at issue the matter does not concern the question of a possible inconsistency with Article 25 of the Constitution, but of a possible inconsistency with the first paragraph of Article 23 of the Constitution,<sup>16</sup> which ensures candidates effective judicial protection. The Constitutional Court emphasises that it only carried out the review in the framework of the petitioner's legal interest, i.e. only from the viewpoint of whether a candidate proposed by the Judicial Council to the Minister for appointment who is not selected by the Minister is ensured effective judicial protection.
32. The third paragraph of Article 49 of the Constitution ensures that everyone has access under equal conditions to any position or employment.<sup>17</sup> In Decision No. U-I-

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16 The first paragraph of Article 23 of the Constitution reads as follows: "Everyone has the right to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent, impartial court constituted by law."

17 Concerning the right determined by the third paragraph of Article 49 of the Constitution, see Decision No. Up-134/96, dated 14 March 1996 (OdlUS V, 62); Decision No. U-I-321/96, dated 10 October 1996 (Official Gazette RS, No. 61/96, and OdlUS V, 133); Decision No. U-I-344/94, dated 1 June 1995 (Official Gazette RS, No.

198/03, dated 14 April 2005 (Official Gazette RS, No. 47/05, and OdlUS XIV, 22), the Constitutional Court stressed in particular “that in the event of applying for office in state authorities, including judicial office, individuals do not have a statutorily or even constitutionally protected right to occupy such a position. Such persons only have the right to compete for such position with others under equal conditions.” With respect to the above, also as regards applying for the office of president of a court, the candidates cannot be entitled to anything more than the right to compete for such position with others under equal conditions. Consequently, the regulation in accordance with which the Minister is free to not appoint a candidate proposed by the Judicial Council president of a court cannot in itself be inconsistent with the third paragraph of Article 49 of the Constitution in conjunction with the first paragraph of Article 23 of the Constitution.

33. With regard to the above, the Constitutional Court decided that the second paragraph of Article 62 of the CtsA is not inconsistent with Article 2, the second paragraph of Article 3, Article 125, or the third paragraph of Article 49 of the Constitution in conjunction with the first paragraph of Article 23 of the Constitution (Point 1 of the operative provisions).

## B – II

### The Second Sentence of the Third Paragraph of Article 321 of the CPA

34. The petitioner alleges that the second sentence of the third paragraph of Article 321 of the CPA is inconsistent with Article 24 of the Constitution insofar as it refers to proceedings for the judicial review of administrative acts, as all the cases subject to these proceedings in which the public is interested are allegedly, as a general rule, more complex. Therefore, the mentioned provision allegedly entails the withdrawal of the right determined by Article 24 of the Constitution in all of the most important disputes, as well as in those interesting to the public, between bearers of public authority and private entities.
35. The AJRAA, which was in force at the time of the filing of the petition, and the AJRAA-1 do not contain special provisions on the public pronouncement of judgments. Therefore, in conformity with Article 16 of the AJRAA and Article 22 of the AJRAA-1,<sup>18</sup> the provisions of the CPA apply appropriately (*mutatis mutandis*) with regard to the public pronouncement of judgments in proceedings for the judicial review of administrative acts. Article 321 thereof regulates the issuance and pronouncement of judgments. It determines that judgments are issued and pronounced in the name of the people (the first paragraph of Article 321) and that in the event a main hearing is held before a panel, the panel immediately issues a judgment upon the

41/95, and OdlUS IV, 54); Decision U-I-371/98, dated 24 May 2001 (Official Gazette RS, No. 48/01, and OdlUS X, 104); and Decision No. U-I-202/99, dated 21 November 2002 (Official Gazette RS, No. 105/02, and OdlUS XI, 236).

18 The first paragraph of Article 22 of the AJRAA-1 reads as follows: “The provisions of the Civil Procedure Act apply *mutatis mutandis* to procedural issues that are not regulated by this Act (Official Gazette RS, 36/04 – official consolidated text).”

conclusion of the main hearing, which is pronounced by the president of the panel (the second paragraph of Article 321). The third paragraph of Article 321 of the CPA then determines that: “In more complex cases, courts may decide to issue the judgment in writing. In such event, the judgment is not pronounced but is served on the parties within thirty days from the day when the main hearing was concluded.” This provision also applies *mutatis mutandis* to the question of the pronouncement of judgments before the Supreme Court.

36. Article 24 of the Constitution (Public Nature of Court Proceedings) determines: “Court hearings shall be public. Judgments shall be pronounced publicly. Exceptions shall be provided by law.” The cited constitutional provision, which regulates the right to a public trial as a human right, includes a statutory reservation. It gives the legislature the authorisation to regulate exceptions, i.e. to limit the mentioned human right. In addition, by the second paragraph of Article 15 of the Constitution, the legislature is authorised to regulate by law the manner in which human rights are exercised also in cases where this is not already envisaged by the Constitution itself, but is necessary due to the nature of an individual right or freedom.
37. The right to the public pronouncement of judgments is primarily intended for the exercise of the right to a fair trial, which is, as a human right, also protected by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>19</sup> It is necessary to concur with the petitioner that the public pronouncement of judgments is an integral part of the right to a fair trial, an instrument of democratic public oversight regarding the functioning of courts, and an instrument for creating trust in the law. However, the right to the public pronouncement of judgments determined by Article 24 of the Constitution is one of the human rights that cannot be exercised directly on the basis of the Constitution. This means that the legislature must prescribe the manner of the exercise of this right, i.e. it must determine the form or manner of the public pronouncement of judgments with respect to the nature and requirements of different judicial proceedings. In the assessment of the Constitutional Court, the challenged provision, in accordance with which in more complex cases courts may decide to issue a judgment in writing, without orally pronouncing such, is part of the statutory regulation of the manner of the exercise of the right to the public pronouncement of judgments. A constitutional review of a statutory regulation that in terms of substance does not limit an individual human right, but only determines the manner of its exercise (the second paragraph of Article 15) must necessarily be self-restrained.<sup>20</sup> In such framework, as a general rule, the Constitutional Court only assesses whether the legislature had reasonable grounds for determining the manner of the exercise of that right. According to the Constitutional Court, the provision in accordance with which in more complex cases courts decide to issue the judgment in writing, which entails that in such cases the judgment is

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19 Official Gazette RS, Nos. 33/94, MP, and No. 7/94 – hereinafter referred to as the ECHR.

20 See Decision of the Constitutional Court No. U-I-240/04, dated 8 December 2005, Official Gazette RS, No. 117/05, and OdlUS XIV, 90.

not pronounced, cannot be viewed as unreasonable. This in particular applies to the decision-making of the Supreme Court, which as the highest court in the state (Article 127 of the Constitution) decides on ordinary and extraordinary legal remedies (as a general rule) at non-public sessions, at which it resolves (generally) more complex legal issues. The petitioner proceeds from the erroneous supposition that the public pronouncement of judgments is only ensured by the oral pronouncement of judgments. Conversely, the right to the public pronouncement of judgments guarantees the public nature of the operative provisions of judgments, but not necessarily also the oral pronouncement of judgments. The requirement that the pronouncement of judgments be public is ensured already by enabling the public to consult the operative provisions. If, however, a judgment is pronounced orally, its operative provisions must always be read in public, even if the presence of the public is partially or entirely excluded during the oral statement of the reasons of the judgment.

38. It follows from the above that the petitioner's allegation regarding the inconsistency of the second sentence of the third paragraph of Article 321 of the CPA insofar as it refers to proceedings for the judicial review of administrative acts with the right to the public pronouncement of judgments determined by Article 24 of the Constitution is unfounded.
39. Consequently, in this part the Constitutional Court dismissed the petition (Point 2 of the operative provisions).

### B – III

#### The Constitutional Complaint against Supreme Court Judgment

##### No. I Up 143/2006, dated 29 March 2006

40. The subject of decision-making in the constitutional complaint at issue is whether the complainant's human rights were violated by the challenged Supreme Court Judgment. The complainant alleges, *inter alia*, that the Supreme Court Judgment violated his right to an impartial court determined by the first paragraph of Article 23 of the Constitution. Regarding such, he alleges that in the decision-making of the Supreme Court a judge participated who should have been disqualified, as there were circumstances raising doubt regarding his impartiality.
41. From the right to an impartial trial there follows, *inter alia*, the requirement that a judge must not be connected to a party or a subject of dispute in such a manner that could possibly cause or at least raise a justified suspicion that, concerning the dispute, the judge can no longer decide objectively, impartially, and by considering exclusively legal criteria. As the statutory provisions on the disqualification of a judge are directly intended to ensure the exercise of the human right to an impartial trial, on the basis of a constitutional complaint possible violations related thereto can also be reviewed by the Constitutional Court (this is stated in, e.g., Decision No. Up-52/99, dated 21 November 2002, Official Gazette RS, No. 105/02, and OdlUS XI, 285).
42. In accordance with the position of the ECtHR, for the existence of an impartial trial both subjective and objective criteria are important; the former concerns a determination of the personal beliefs of a judge who is deciding in a concrete case, while the

latter concerns a review of whether in the proceedings the judge ensured the implementation of procedural safeguards in such a manner that any justified doubt concerning his or her impartiality is excluded.<sup>21</sup> In the exercise of the right to an impartial trial it is not only important that the impartiality of the trial is in fact ensured, but also that such is expressed outwardly. This refers to the so-called appearance of an impartial trial.<sup>22</sup> Hence, what is important is that in proceedings in a concrete case courts create and preserve the appearance of impartiality. Otherwise, both the trust of the public in the impartiality of courts in general and the trust of the parties in the impartiality of a trial in a concrete case can be jeopardised.<sup>23</sup> The ECtHR reiterated the mentioned positions also in *Švarc and Kavnik v. Slovenia*, dated 8 February 2007.

43. One of the most important procedural statutory institutes that serve to guarantee the human right to an impartial trial is the institute of the disqualification of a judge under civil procedure (Article 70 of the CPA). Since the AJRAA does not determine the reasons for disqualification, concerning this issue, in proceedings for the judicial review of administrative acts, the provisions of the CPA apply appropriately, in conformity with Article 16 of the AJRAA. The reasons due to which a judge cannot participate in deciding in a concrete dispute can be classified into two core groups: the disqualifying reasons (*judex inhabilis*) determined by points 1 through 5 of Article 70 of the CPA, and the reasons for suspicion of partiality (*judex suspectus*) determined by point 6 of Article 70 of the CPA. The latter are not exhaustively enumerated in the Act but are defined by a general clause, i.e. if other circumstances exist due to which doubt arises regarding a judge's impartiality. A party must require the disqualification of a judge as soon as he or she learns that there exists a reason for disqualification, however at the latest by the end of the main hearing before the competent court, or, if no main hearing was held, by the issuance of the decision (the second paragraph of Article 72 of the CPA). A party can request the disqualification of a judge of a higher court until the issuance of the appellate decision, which means until the moment when the court sends a written copy of the judgment to a party. It is the president of the court who decides on the request of a party for the disqualification of a judge. When the concerned judge learns that his or her disqualification has been requested, he or she must immediately cease to perform any activity related to that case, unless the matter concerns disqualification under the sixth paragraph of Article 70 of the CPA, in accordance with which he or she may perform further activities (Article 74 of the CPA). If a judge is disqualified for the reason determined by the sixth paragraph of Article 70 of the CPA, the activities related to civil proceedings that he or she performed after the party filed the request for his or her disqualification for the mentioned disqualifying reason do not have legal effects (as stated by the Constitutional Court in Decision No. Up-365/05, dated 6 July 2006, Official Gazette RS, No. 76/06, and OdlUS XV, 93).

21 Cf. the Judgment of the ECtHR in *Saraiva de Carvalho v. Portugal*, dated 22 April 1994, Para. 33.

22 This requirement is best illustrated by the English legal saying "justice must not only be done, it must also be seen to be done." Cited according to A. Galič, *Ustavno civilno procesno pravo* [Constitutional Civil Procedural Law], GV Založba, Ljubljana 2004, p. 413.

23 Cf. the Judgment of the ECtHR in *Coeme et al. v. Belgium*, dated 22 June 2000, Para. 121.

44. In that specific case, on 5 April 2006, after having learnt from a newspaper that Supreme Court Judge Vasilij Polič, with whom he had been in a dispute concerning a fundamental question regarding judicial ethics, had participated in the adjudication of the specific case, the complainant submitted to the Supreme Court a motion for his disqualification. It follows from the allegations in the constitutional complaint that the mentioned Supreme Court Judge had promoted a book he had authored in the hall of the court without the permission of the President of the Ljubljana District Court (i.e. the complainant). Since, in the opinion of the complainant, the graphic image of the posters involved was extremely inappropriate from the viewpoint of the protection of the dignity and reputation of the court, the complainant criticised his actions severely. The complainant encloses a letter, dated 26 August 2005, in which he suggested to the Slovene Judges Association that it adopt a position on whether by posting such posters and by his statements made in an interview for the *Mladina* weekly, the Supreme Court Judge had observed the Code of Judicial Ethics and acted in conformity with the rules of the Judges Association. He also sent a copy of the mentioned letter to the President of the Supreme Court. The Supreme Court Judge allegedly publicly declared in the interview for the mentioned weekly that he and the complainant had been in a dispute concerning a fundamental question regarding judicial ethics in relation to the concrete out-of-court activity of the Supreme Court Judge. According to the complainant, the mentioned circumstances objectively justify doubt regarding the Judge's impartiality. The objectively justified conviction regarding the partiality of the mentioned Supreme Court Judge is allegedly additionally substantiated by the fact that the same Supreme Court Judge is deciding in case No. I Up 537/2003, in which the complainant is a party to proceedings, and that the Judge had not submitted the case for resolution when it was due. The complainant alleges that already on 15 December 2004 he proposed priority consideration of that case, but never received a reply to his proposal. When filing the constitutional complaint, his case had not yet been resolved, despite the fact that, according to the information given by the President of the Supreme Court, the time for the resolution of cases by the Administrative Division is considerably shorter than three years.
45. By Order No. Su 29/2006, dated 18 April 2006, the President of the Supreme Court rejected the complainant's request for the disqualification of the Judge (as being too late) by reasoning that the case had already been decided on at the panel session held on 29 March 2006. He then called on the complainant, by a special letter dated 18 April 2006, to make a statement whether his submission dated 4 April 2006 was to be considered as a request for a retrial even prior to the decision of the court becoming known. As on 3 May 2006 the challenged Judgment was served on the complainant, the complainant proposed that the Supreme Court decide on the request for a retrial. Contrary to the position of the Constitutional Court in Decision No. Up-365/05, the President of the Supreme Court deemed that the appellate proceedings concluded with the decision of the appellate panel dated 29 March 2006, and not with the issuance of the appellate decision. However, in his constitutional complaint the com-

plainant does not challenge the Order of the President of the Supreme Court. By emphasising that judges are qualified to recuse themselves from adjudication when circumstances exist that could raise doubt regarding their impartiality, the complainant alleges that the Supreme Court Judge and the members of the appellate panel violated the first paragraph of Article 23 of the Constitution.

46. In the event that circumstances exist that could raise doubt regarding a judge's impartiality (the rejecting reason determined by the sixth paragraph of Article 70 of the CPA), the second paragraph of Article 71 of the CPA imposes on the concerned judge the duty to notify the president of the court thereof, who then decides on his or her disqualification. However, when a panel decides on a case, the members of the panel are also obliged to consider any disqualifying reasons concerning the other members of the panel. The duty determined by the second paragraph of Article 71 as an individual judge's duty, which only concerns the reasons that are related to the individual judge personally, is, in the event of panel decision-making, a somewhat "collective" duty of the members of the panel, each of whom must individually also have regard to disqualifying reasons that refer to the other members of the panel. In the considered case, the mentioned circumstances were undoubtedly known to the Supreme Court Judge even before the appellate panel issued its decision. Furthermore, prior to the final decision on the case (i.e. even before the court sent a written copy of the judgment to the parties to proceedings) also at least two members of the appellate panel had been aware of these circumstances. From the Order of the President of the Supreme Court on the rejection of the request for the disqualification of the Judge, it namely follows that on the same day when the request was filed (i.e. on 5 April 2006), the President of the Supreme Court informed the head of the Administrative Division of the Supreme Court and the president and a member of the appellate panel thereof.
47. In the case at issue, the decision of the Constitutional Court does not depend on answering the question of whether the Supreme Court Judge was in fact partial, but on the question of whether as regards the Supreme Court Judge there are any circumstances that would arouse justified doubt regarding his impartiality in a reasonable person rationally considering all the circumstances of the case. As was already mentioned, from the right to an impartial trial there also follows the requirement that in proceedings in a concrete case the court creates and maintains the appearance of impartiality. According to the Constitutional Court, the circumstances of the concrete case stated in Paragraph 44 of the reasoning are such that in a reasonable person they arouse serious doubt regarding the impartiality of the Supreme Court Judge, and such that they allow for doubt concerning the impartiality of the Court, not only in the eyes of the complainant but also objectively.<sup>24</sup> The Supreme Court Judge and the members of the appellate panel who knew of the mentioned circumstances could have proposed his disqualification, by which in the concrete case they could have ensured the appearance of the impartiality of

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24 Cf. the Judgment of the ECtHR in *Švarc and Kavnik v. Slovenia*.

the trial, however they did not do so. It follows from the above that the Court did not ensure the appearance of the impartiality of the trial, which means that in the concrete case the Court did not fulfil the requirements regarding such that follow from the right to an impartial trial. With regard to the above, the complainant's right determined by the first paragraph of Article 23 of the Constitution was violated by the challenged Judgment.

48. During the proceedings for deciding on this constitutional complaint, on the basis of a new procedure to appoint the president of the Ljubljana District Court, initiated on the basis of the Judicial Council Order dated 26 April 2007 (Official Gazette RS, No. 41/07), by Decision of the Minister of Justice No. 700-22/2005, dated 30 June 2007, a different person was appointed to the office of the president of the Ljubljana District Court. Legal interest is one of the procedural prerequisites for any proceedings, including constitutional complaint proceedings. As a general rule, the Constitutional Court deems that in constitutional complaint proceedings legal interest is demonstrated if the complainant demonstrates with a sufficient degree of probability that the granting of his constitutional complaint would entail a certain benefit for him or her (the improvement of his or her legal position) that he or she could not achieve without such. Legal interest must be demonstrated when the constitutional complaint is filed and the Constitutional Court must *ex officio* monitor whether this condition remains fulfilled throughout the proceedings. Although the office of the president of the Ljubljana District Court is occupied at the time of the adoption of this Decision, due to the specific circumstances of the case at issue the Constitutional Court did not decide to reject the constitutional complaint, *inter alia* also because in its Order dated 18 January 2007, by which it decided on the motion for suspension, due to the function of the president of the court it gave priority to the uninterrupted exercise of judicial power, whereby it enabled the appointment of the new president of the Court. Therefore, the Constitutional Court decided to assess whether in the proceedings before the Supreme Court the complainant's human rights and freedoms were violated. By taking into consideration the specific circumstances of the case and by applying the provisions of Article 47 in conjunction with Article 49 of the CCA, in its decision-making the Constitutional Court limited itself to establishing that there was a violation of the human right determined by the first paragraph of Article 23 of the Constitution (Point 3 of the operative provisions).
49. From the statements made in the constitutional complaint there also follows the allegation that the trial was unreasonably lengthy (the first paragraph of Article 23 of the Constitution). The Constitutional Court does not have jurisdiction to review possible violations of human rights that directly result from the conduct of a court or the failure of a court to perform due conduct. From 1 January 2007, the protection of the right to a trial without undue delay has been regulated by the Protection of the Right to a Trial without Undue Delay Act (Official Gazette RS, No. 49/06). With regard to the above, the constitutional complaint had to be rejected in this part (Point 4 of the operative provisions).

## **B – IV**

### **The Constitutional Complaint against Supreme Court Order No. VII Ips 1/2006, dated 14 November 2006, in Conjunction with Supreme Court Order No. VI Ips 4/2006, dated 17 May 2006**

50. In relation to the violation of the right to an impartial court determined by the first paragraph of Article 23 of the Constitution, in addition to the above-considered constitutional complaint, the complainant also filed a motion for a retrial against Supreme Court Judgment No. I Up 143/2006 on the basis of point 4 of the first paragraph of Article 85 of the AJRAA. Since the Supreme Court had dismissed his appeal by Order No. VII 1/2006, dated 14 November 2006, and upheld the first instance Supreme Court order that had rejected the complainant's motion for a retrial, the complainant also filed a constitutional complaint against the mentioned Supreme Court Orders.
51. In accordance with the first paragraph of Article 50 of the CCA, under the conditions determined by this Act, any person may file a constitutional complaint before the Constitutional Court if he or she considers that one of his or her human rights or fundamental freedoms was violated by an individual act of a state authority, local community authority, or a bearer of public authority. Anyone who requests judicial protection of his or her rights and legal interests must demonstrate a legal interest. He or she must demonstrate with a sufficient degree of probability that the granting of his or her request would entail for him or her a certain legal benefit that he or she could not otherwise gain. A legal interest must also be demonstrated in order to file a constitutional complaint. The Constitutional Court must *ex officio* monitor whether legal interest exists throughout the proceedings.
52. Since the Constitutional Court established a violation of the first paragraph of Article 23 of the Constitution already when assessing the constitutional complaint against Judgment No. I Up 143/2006, according to the Constitutional Court the complainant no longer demonstrates a legal interest for the continuation of these constitutional complaint proceedings. Therefore, the Constitutional Court rejected it (Point 5 of the operative provisions).

## **C**

53. The Constitutional Court adopted this Decision on the basis of Article 21, the second paragraph of Article 26, Article 47 in conjunction with the first paragraph of Article 49, and the first and second indents of the first paragraph of Article 55b of the CCA, and the second indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of: Dr Janez Čebulj, President, and Judges Dr Zvonko Fišer, Dr Franc Grad, Lojze Janko, Mag. Marija Krisper Kramberger, Milojka Modrijan, Dr Ciril Ribičič, and Jože Tratnik. Point 1 of the operative provisions was reached by seven votes against one. Judge Fišer voted against and submitted a dissenting opinion. Points 2 through 5 of the operative provisions were reached unanimously.

*Dr Janez Čebulj*  
*President*

1. This dissenting opinion refers to Point 1 of the operative provisions of the Decision, by which the Constitutional Court decided that the second paragraph of Article 62 of the Courts Act is not inconsistent with the Constitution. I voted against the majority decision as I, conversely, am of the opinion that the challenged provision is not in conformity with the Constitution, and in this separate opinion I would like to explain my position.
2. This occasion was not the first time the Constitutional Court decided on the constitutionality of the provisions of the CtsA that regulate the appointment of the presidents of courts. The suspicion that something was wrong with this regulation from the constitutional viewpoint arose already in 1996, i.e. very soon after the new judicial legislation entered into force. The amendment was challenged at that time, together with numerous other provisions, by the Judicial Council and the Supreme Court, i.e. the constitutionally determined judicial self-government authority and the highest court in the state, both of them thus being exceptionally exposed authorities in the judicial field. In the part that also interests us this time, i.e. concerning the appointment of the presidents of courts, the Judicial Council emphasised that the law puts it in a subordinate position in relation to the executive branch of power. The latter is allegedly given the possibility to interfere through “its presidents” with the independent position of judges, and to politically control the judicial power. The Supreme Court was similarly of the opinion that the disputed provision puts the Minister in a superior position in relation to the Judicial Council, as the Minister is not obliged to follow the Judicial Council’s opinions with respect to the selection of candidates.

At that time, the Constitutional Court decided by a tight majority that Article 62 of the CtsA, as it read at the time of decision-making, was not inconsistent with either the principle of the separation of powers or the principle of the independence of judges, and that it was also not unclear. Therefore, it decided that it was not inconsistent with the Constitution (see also Decision No. U-I-224/96, dated 22 May 1997, which is cited a number of times in that Decision).

Judge Krivic submitted a dissenting opinion to that Decision. He underlined that the accentuated role of the Minister of Justice in appointing presidents of courts was inconsistent in particular with the principle of the separation of powers. “In the existing circumstances in which the independence of the judicial power is only now being gradually and slowly established after long decades of its subordination to politics, I view it as too dangerous to give the executive branch of power such a strong influence on the judicial power as is included in the possibility to appoint the presidents of courts,” stated Krivic in the middle of 1997. He further stated that a proper solution to this would be that presidents of courts are appointed by the Judicial Council, although not one composed as it was at the time, but by a strengthened Judicial Council modelled on the Italian example.

3. I have always been in favour of the idea that the position of the judicial power should in general be strengthened in society, both due to its manifest deficiencies in the past

and, even more so, because the judicial power is very specific and not easily comparable in all aspects with the two other branches of power. It is in particular necessary to be aware of the fact that it is substantially more sensitive and vulnerable than the other two are. Gaining the self-confidence necessary for deciding is a lengthy process that can be crucially affected already by an apparently unimportant move or event that perhaps has no connection with the concrete matter. Furthermore, it is difficult to imagine that judicial power would by itself exceed its institutional framework and become vampiric in a manner such as sometimes occurs in the other branches of power. In the vast majority of instances, the abuses of judicial power were abuses caused by others who used the judiciary primarily as a tool. If anything, it would be possible to allege, on a purely principled level, that the judiciary has not been successful in defending itself against its abusers, i.e. that it has not resisted enough. But the danger of the instrumental use, i.e. abuse, of the judiciary is unending. I do not know of any society or any state in which the other branches of power, in particular the executive (to avoid calling it the general political) branch of power, do not strive to gain, have, or maintain their influence on the judiciary. Perhaps at this moment it is no longer possible to speak as vehemently as in the past of decades of judicial power being subordinated to politics; however, despite everything, it is still better to be cautious. The establishment of judicial power that is independent in all aspects is a very demanding process that must continuously be striven for and which can never be fully achieved.

The Slovene judiciary acts in a cramped manner and under numerous pressures, due to which it cannot realise its creative potentials, irrespective of the fact that these are lesser in scope than one would wish. It does not enjoy sufficient public trust, and at the same time very little has been done to increase such trust. Society is insufficiently aware that the judiciary is only a reflection thereof, of its members, and institutions. The judiciary is continuously being criticised due to the delays, which it largely did not cause itself. Among the solutions for such and for the other problems in the judiciary, quantity criteria, instead of quality, prevail, which results in positive effects being smaller than they could be, or even in there being none at all. The structure of the judiciary is unfavourable from a number of aspects and it is even becoming worse. Moreover, the judiciary is extremely poorly paid, despite the fact that the opposite is constantly asserted.

Not that I uncritically accept everything that is happening in the judiciary and in connection therewith, and that I do not see numerous deficiencies concerning such, but the least I can say is that in our country the judiciary is treated on various levels in an incorrect manner and undervalued, and in a manner unconstructive from the viewpoint of the functioning of the state. The positive results achieved fade significantly in the face of the unresolved problems: as this matter does not concern an issue directly related to deciding on the case at issue, I perhaps should not state that according to numerous parameters the position of the judiciary at present is not better than it was a decade ago.

If for a certain period of time it appeared that with the amendments to the Constitution and judicial legislation the judiciary would move towards a better position at the most general level, it must be underlined that this did not occur. Judges are still

elected by the parliament: certainly, in connection with such we can say that in such a manner it democratically legitimises them to adjudicate in the name of the people, which is more or less a nice sounding declaration. However, judges adjudicate with no less legitimacy also where they are not elected by the parliament. Those of us who pay less importance to grandiose words say, concerning the election of judges by the parliament, that a judge whose office is professional is put in his or her position by a *par excellence* political authority. The Judicial Council indeed undoubtedly remains an important constitutional authority in the field of the judiciary, however its position has not significantly strengthened, and it is certainly far from being deemed to represent the apex of judicial self-governance.<sup>1</sup>

4. One element in the mosaic of regulating relations in the judiciary is the procedure for appointing presidents of courts. Perhaps it is not the most important one, but it should not under any condition be underestimated. The president of a court is the head of the judges in the authority that he or she directs, and is the one who decides on a number of matters. On the one hand, the president has an indisputable formal power of decision-making, while on the other, which is probably something that does not need to be specifically proven, the president has at his or her disposal countless levers by means of which he or she can influence the work, ambience, efficiency, professionalism, creativity, and many other aspects at the court that he or she directs. After all, it is the president whom a judge contacts when he or she simply needs – to talk. In sum, the president's influence on the operations of the court he or she directs is (or can be) formally and in reality very significant, therefore the significance of this office for the operation of the judiciary in the broadest sense possible should not in any manner be underestimated.
5. Ultimately, self-evident proof of the above statement is the indisputable fact that due to the successive changes in the judicial legislation the tasks of presidents of courts have accumulated to an extraordinary degree. With every amendment to the CtsA the competences of presidents of courts have only expanded. The legislature thus decided to react to problems in the judiciary, *inter alia*, by strengthening the office and position of presidents of courts.

The present Decision of the Constitutional Court is based on the reasoning of Decision No. U-I-224/96, wherein it compared the tasks and position of presidents of courts. It correctly established that, as already mentioned, in accordance with the existing regulation the competences and authorisations of presidents of courts are far more extensive than they were a decade ago; however, I cannot concur with the conclusion that their role is still predominantly limited to making proposals and issuing opinions.<sup>2</sup> The Constitutional Court established that deciding on the essential issues of a judge's position is reserved for the Judicial Council, whereas when the president

1 Concerning the Judicial Council and its role in the Slovene legal system, from the perspective of comparative law, and *de lege ferenda*, see also Z. Fišer, *Sodni svet ali pravosodni svet* [The Judicial Council or the Justice System Council], in: *Normativne spremembe na področju sodstva v Republiki Sloveniji* [Normative Changes in the Field of the Judiciary in the Republic of Slovenia], pp. 10–24, Slovensko sodniško društvo, Ljubljana 2001.

2 See Paragraph 29 of the reasoning of the Decision.

of a court decides on issues that could affect the position of judges and thereby indirectly(!) their independence, it is the CtsA that includes safeguards ensuring the independence of judges. The Constitutional Court listed the provisions of judicial legislation that fall within one or the other mentioned category,<sup>3</sup> and established in the end that the regulation does not give presidents of courts competences that when exercised would interfere with the independent position of judges.

Such a conclusion does not convince me. As seen above, the judiciary is a complexly structured mechanism that operates in an exceptionally sensitive field in which even the seemingly technical competences of presidents of courts may have very long-lasting consequences. Often it is impossible to carry out a precise analysis of everything an individual provision can cause in a concrete case in joint effect with other provisions. It is not necessary that, for instance, the regulation entails in itself an interference with the independent position of judges, as it can occur that this is what it results in, even unintentionally, in joint effect with other regulations. In such case it is necessary to consciously choose a solution that will not interfere or will interfere to a lesser degree with judicial self-regulation.

If one examines what has occurred in the last decade regarding the position of presidents of courts (excluding the Supreme Court, which is not relevant in the case at issue), it is first necessary to establish that development has not in any case followed the direction advocated by Krivic. After all the amendments to Article 62 of the CtsA and to numerous other provisions of that Act that regulate their tasks and competences, presidents of courts are still appointed by the Minister upon the proposal of the Judicial Council. The provisions that regulate appointment and have an influence thereon are, taken as a whole, such that in a concrete case they resulted in the largest district court in the state remaining without a president for significantly more than a year. The Constitutional Court itself recognised in the present Decision that that was not good, and suggested that such deficiency be remedied.<sup>4</sup> In this respect, I would be even stricter, as I am of the opinion that something like that is unacceptable and that the regulation cannot be in conformity with the Constitution already due to the fact that it can lead to a stalemate situation. The system of checks and balances is an important democratic achievement, however mutual blockages entail a disruption that is not acceptable. In my view, a regulation that results in such a consequence cannot pass constitutional review.

In brief, all of this means that the regulation of the appointment of presidents of courts currently in force is, in my opinion, inconsistent with Articles 3 and 125 of the Constitution. Therefore, I could not vote in favour of Point 1 of the operative provisions of the Decision.

6. The efforts of the state to make the judiciary work more effectively and efficiently are legitimate, even necessary; however, the increasingly detailed regulation of all possible situations and the strengthening of the competences of presidents of courts, which is

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3 See, in particular, notes 13–15 in Paragraph 29 of the reasoning of the Decision.

4 See, in particular, Paragraph 28 of the reasoning of the Decision.

consistently shown to be one of the critical points where the executive power can interfere with the judiciary, is not the right way forward. No matter how unusual, not to say heretical, it may sound at the moment, I am convinced that concerning the first part [of the reasoning], the path of internal judicial self-regulation with a strengthened role (and of course also responsibility) of the Judicial Council should have been pursued.

On the other hand, as regards the regulation of the competences of presidents of courts, with some poetic freedom I would characterise their position in the initial text of the CtsA as idealised and somewhat naïve. Since then [i.e. since the adoption of the original CtsA], the entire development has gone very decisively in the direction of emphasising the office of presidents of courts, which is leading them – if it has not yet led – towards the position of managers. This is where I see a further significant difference between the position of presidents of a court that they enjoyed at the time when the Constitutional Court decided on this matter for the first time, and the position that they enjoy today.

In other words, as long as the office of the president of a court remains within the limits of the tasks and competences that are traditional in our legal environment, then a decision on the appointment thereof should in terms of substance be made by the Judicial Council. However, if in the meantime the substance of such office has essentially changed – and I am increasingly inclined to consider that it has – then the matter at issue concerns a completely different position that should be regulated differently and assessed anew. This is then a type of head of a court that does not exist in our legal environment, let alone is familiar. Such regulation is indeed possible and recognised in comparative law; certainly it has its advantages and disadvantages. I am not going to adopt a position thereon at this time; however, I would like to warn against intermediate solutions. As Slovenes like to state robustly, such are neither fish nor fowl.

7. Although the key principled questions regarding the appointment of presidents of courts were completely the same also this time as those during the first decision-making [by the Constitutional Court on this issue], the present decision-making was accompanied by certain new aspects. Among such, particularly notable was the fact that the Constitutional Court was at the same time deciding on the constitutionality of a law on the basis of the petition of an individual as well as on his constitutional complaints. Due to such, it is impossible to avoid the impression that that part of the decision-making, which was extremely important for the complainant, at least partially diverted attention from the principled questions that I have discussed above. While I certainly do not claim that the Constitutional Court did not consider them very thoroughly, there was, nonetheless, at the same time a great deal of attention dedicated to various procedural aspects of decision-making in the procedure for appointing presidents of courts. For such reason, it appears that by its Decision the Constitutional Court attempted to establish a kind of balance between the problems of a principled nature and deciding on concrete violations that negatively affected the complainant. I am not convinced by the Decision also from this perspective.

*Dr Zvonko Fišer*

**DECISION**

At a session held on 18 October 2012, in proceedings to review constitutionality initiated upon the request of the National Council of the Republic of Slovenia, the Constitutional Court

*decided as follows:*

**The Act on Cooperation Between the National Assembly and the Government in EU Affairs (Official Gazette RS, Nos. 34/04, 43/10, and 107/10) is not inconsistent with the Constitution.**

*Reasoning***A**

1. The National Council (hereinafter referred to as the applicant) filed a request to initiate proceedings to review the constitutionality of the Act on Cooperation Between the National Assembly and the Government in EU Affairs (hereinafter referred to as the ACBNAGEUA). It alleges that the ACBNAGEUA is inconsistent with the Treaty of Lisbon, which amends the Treaty on European Union and the Treaty Establishing the European Community (UL C 306, 17 December 2007 – hereinafter referred to as the Treaty of Lisbon), because regarding EU affairs it does not regulate the role of the National Council.
2. The applicant alleges that the Parliament of the Republic of Slovenia is composed of two chambers, namely the National Assembly of the Republic of Slovenia and the National Council, and is of the opinion that in EU affairs the role of both chambers should have been regulated by law. The ACBNAGEUA is allegedly unconstitutional precisely because it fails to regulate the role of the National Council in the field of EU affairs and it only regulates the relationships between the National Assembly and the Government. The applicant alleges that its role in the consideration of EU affairs is very weak, if compared with the role of parliaments' second chambers in other EU Member States. This weakness is allegedly expressed both in the relation to the National Assembly and in the

relation to the Government. It is of the opinion that in EU affairs the National Assembly and the National Council should be more equal. In the opinion of the applicant, the role of the National Council in the procedure for the adoption of legal acts and decisions in the European Union should not only entail the hindering and correction of hasty decisions of the National Assembly, as is characteristic of internal legislative procedures; instead, the National Assembly and the National Council should complement each other and together cooperate with the Government, which directly cooperates, as the executive branch of power, in decision-making within the institutions of the European Union. The applicant substantiates such standpoint by stating that the role of national parliaments in the European Union increased after the implementation of the Treaty of Lisbon. It refers to Article 12 of the Treaty on European Union (UL C 83, 30 March 2010, consolidated version – hereinafter referred to as the TEU), which determines how national parliaments contribute actively to the good functioning of the European Union and in such framework emphasises, above all, Protocol (No. 1) on the Role of National Parliaments in the European Union, which in Article 8 determines that in the systems that are not unicameral, its provisions shall apply to all the chambers of which such parliaments are composed. The applicant is therefore of the opinion that also [Slovene] national law should in an appropriate manner take into consideration the fact that at the level of EU law, a formal role is envisaged in procedures before the institutions of the European Union for both chambers – i.e. both the National Assembly and the National Council. However, due to the fact that in the field of EU matters the challenged ACBNAGEUA only regulated the position of the National Assembly and entirely overlooked the National Council, in the national legal order there allegedly exists a legal gap with regard to the National Council that is inconsistent with the Treaty of Lisbon.

3. Within the framework of the general allegation that the ACBNAGEUA does not regulate the position of the National Council in EU affairs, the applicant alleges in particular that Article 11a of the ACBNAGEUA is inconsistent with the Treaty of Lisbon – or, more precisely, with the first paragraph of Article 8 of Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality (UL C 83, 30 March 2010 – hereinafter referred to as Protocol No. 2) – because it does not determine that in addition to the National Assembly also the National Council can require that an action be filed before the Court of Justice of the European Union on grounds of a violation of the principle of subsidiarity by a legislative act of the European Union.
4. Due to the mentioned inconsistencies with the Treaty of Lisbon, the ACBNAGEUA is consequently allegedly inconsistent also with Articles 8 and 153 of the Constitution.
5. The National Assembly did not reply to the request.

#### **B – I**

6. With regard to the fact that the applicant proposes that the Treaty of Lisbon be the criterion for the review of the constitutionality of the ACBNAGEUA, and in particular that the first paragraph of Article 8 of Protocol No. 2 [be the criterion] for the assessment of Article 11a of the ACBNAGEUA, the Constitutional Court first had to assess whether it has jurisdiction to carry out such assessment. In the hitherto

constitutional case law, the Constitutional Court adopted the position that it is not competent to assess the conformity of national regulations with EU directives (Decision No. U-I-32/04, dated 9 February 2006, Official Gazette RS, No. 21/06, and OdlUS XV, 10). Similar holds true for the review of the constitutionality of national regulations with EU regulations; by Order No. Up-328/04 and U-I-186/04, dated 8 July 2004 (OdlUS XIII, 82), the Constitutional Court *inter alia* adopted the position that in light of the fact that EU regulations are not treaties, Article 8 of the Constitution does not apply thereto, and the Constitutional Court is also not competent on the basis of the second indent of the first paragraph of Article 160 of the Constitution.

7. In the case at issue, the legal situation is different. The Treaty of Lisbon, to which the applicant refers, represents so-called primary EU law. Its fundamental characteristic is that it is adopted and amended in such form and by such procedure as is ordinary for treaties, because ratification in all the Member States is necessary, in conformity with their constitutional rules, in order for the amendments to enter into force.<sup>1</sup> The Treaty of Lisbon also entered into force in such manner; it was signed on 13 December 2007 and on 1 December 2009 it entered into force, after it was ratified by all EU Member States. In the Republic of Slovenia, the National Assembly ratified by law, on the basis of Article 86 of the Constitution, the Treaty of Lisbon.<sup>2</sup> Therefore, in the Slovene national constitutional [legal] order, the Treaty of Lisbon has the status of a treaty. Such entails that for the review of the constitutionality of the ACBNAGEUA in the case at issue, Article 8 and the second paragraph of Article 153 of the Constitution, in conformity with which laws must be in conformity with treaties that are binding on Slovenia, are relevant. At the same time, such also entails that the Constitutional Court has jurisdiction under the second indent of the first paragraph of Article 160 of the Constitution, in conformity with which the Constitutional Court has jurisdiction to decide on the conformity of laws with ratified treaties.
8. With regard to the fact that the Treaty of Lisbon amended the previous TEU and the Treaty Establishing the European Community – the latter was renamed the Treaty on the Functioning of the European Union (hereinafter referred to as the TFEU), the Constitutional Court deemed that in the part in which the applicant alleges an inconsistency of the ACBNAGEUA with the Treaty of Lisbon it alleges an inconsistency with the TEU and the TFEU. The European Union is based on these two treaties, which have equal legal validity, as is explicitly determined by the third paragraph of Article 1 of the TEU and the second paragraph of Article 1 of the TFEU.
9. The Constitutional Court also has jurisdiction to assess the consistency of Article 11a of the ACBNAGEUA with the first paragraph of Article 8 of Protocol No. 2, because on the basis of Article 51 of the TEU, Protocols form an integral part of treaties and have thus the same legal status as the TEU and the TFEU.

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1 The procedure for the revision of the treaties on which the European Union is based is regulated by Article 48 of the TEU.

2 The Act Ratifying the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (Official Gazette RS, No. 20/08, and MP, No. 4/08).

## B – II

10. With the transfer of the exercise of part of [Slovene] sovereignty to the European Union, which occurred on the basis of the first paragraph of Article 3a of the Constitution, important substantive changes arose in the constitutional relationship between the National Assembly as the legislative branch of power and the Government as the executive branch of power. The legislative competence of the National Assembly substantially diminished, precisely to the benefit of the Government, because the representatives of the latter in the EU adopt legislative and other decisions that with regard to their content would otherwise fall within the competence of the National Assembly. Precisely due to these changes in the constitutional balance between the National Assembly and the Government, which is based on the constitutional principle of the separation of powers, the Constitution envisaged the cooperation of the National Assembly and the Government in EU affairs. It ensured the National Assembly the possibility to directly monitor and assess the activities of the Government in the European Union and, in doing so, direct and even bind it with its positions.<sup>3</sup> In accordance with the fourth paragraph of Article 3a of the Constitution, in the procedures for the adoption of legal acts and decisions in the European Union the Government informs the National Assembly thereof; with regard to the proposals of acts and decisions, as well as the activities of the Government, the National Assembly may adopt positions that the Government must take into consideration in its activities. The Constitution left the regulation of the relations between the National Assembly and the Government in the procedures for the adoption of EU acts and decisions to be regulated in more detail by a law adopted by a two-thirds majority vote of National Assembly deputies present. The ACBNAGEUA is this law.

11. The fourth paragraph of Article 3a of the Constitution thus does not envisage the direct cooperation of the National Council in EU affairs, and this also does not follow from other provisions of the Constitution. In fact, such does not entail that the National Council cannot cooperate in the formation of the opinions of the Republic of Slovenia with regard to the legal acts and decisions of the European Union; such cooperation in the legal procedures that are carried out in conformity with the national law takes place within the framework of its other constitutional competences determined by Article 97 of the Constitution.<sup>4</sup> From this constitutional provision it follows that the Constitution does not ensure a direct relationship between the National Council and the Government. The influence of the National Council on the functioning of the Government – also in EU affairs – is only indirect, i.e. through the

3 Cf. I. Kaučič, *Uvodno pojasnilo* [Introductory Explanation], in: *Ustava Republike Slovenije* [Constitution of the Republic of Slovenia], 4<sup>th</sup> revised edition, GV Založba, Ljubljana 2003, pp. 25–26. See also F. Grad, in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, pp. 95–100.

4 The National Council also carries out certain competences on the basis of laws. For instance, Article 23a of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) determines that the National Council can require that the Constitutional Court review the constitutionality of regulations or general acts issued for the exercise of public authority.

influence that it may have on the functioning of the National Assembly when carrying out its constitutional and statutory competences. In such context, of particular importance is the constitutional competence of the National Council entailing that it may convey to the National Assembly its opinion on all matters within the competence of the National Assembly (the second indent of the first paragraph of Article 97 of the Constitution), therefore also on all the matters that refer to the European Union. In order for this constitutional competence of the National Council to be effectively carried out, legislative solutions were adopted that impose certain obligations on the National Assembly (and also the Government) in relation to the National Council. For instance, the first paragraph of Article 54 of the National Council Act (Official Gazette RS, No. 100/05 – official consolidated text – hereinafter referred to as the NCA) determines that the president of the National Assembly is to inform the president of the National Council of the sessions of the National Assembly and send him or her all the materials on matters that are on the agenda of the sessions of the National Assembly, and the second paragraph of Article 56 determines that the National Council and its working bodies are to cooperate with the working bodies of the National Assembly and present them opinions on the matters falling within their competence. In relation to the Government, it is in particular the first paragraph of Article 56 of the NCA that is relevant, which determines that the National Council and its working bodies have the right to request from state authorities explanations and information with regard to matters that they are dealing with.

12. When alleging an unconstitutionality of the national legislation that regulates the procedures under national law in which those positions are formed that the Government supports in the institutions of the European Union – in the case at issue, the ACBNAGEUA – it is not possible to refer to the Treaty of Lisbon or the TEU and the TFEU. In fact, it is true that the TEU, the TFEU, and the Protocols that form an integral part of the treaties regulate in multiple places the significance and the role of national parliaments and also give them certain concrete authorisations;<sup>5</sup> however,

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5 The fundamental provision that defines the role of national parliaments in the European Union is Article 12 of the TEU, which determines:

“National Parliaments contribute actively to the good functioning of the Union:

- (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
- (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
- (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 61c of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles 69g and 69d of that Treaty;
- (d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
- (e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
- (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the

these instances concern the regulation of direct relationships between the national parliaments (and their individual chambers) and the European Union and its institutions, and not the regulation of how Member States are to form and adopt, in their national legal orders, the positions that the representatives of their governments support in the institutions of the European Union or that are, within the framework of the European Union, the subject of intergovernmental cooperation.

13. The treaties on which the European Union is based do not determine how Member States are to form and adopt, in conformity with their national law, [their] positions in EU affairs and what the role of national parliaments and their individual chambers is to be in these procedures. Also the provisions of the treaties on which the European Union is based that otherwise refer to the position of national parliaments in the European Union do not deal with national constitutional questions. Therefore, the TEU, the TFEU, and Protocol No. 2 are not relevant in any manner to the question of what the constitutional relationship between the National Assembly, the National Council, and the Government should be in the national procedures that refer to EU affairs. The allegation of the applicant that the ACBNAGEUA (or the legal order as such) is inconsistent with the TEU and the TFEU, and consequently with the Constitution, because it does not regulate the role of the National Council in EU affairs, is thus unsubstantiated.
14. In the assessment of the Constitutional Court, also the special allegation that Article 11a of the ACBNAGEUA is inconsistent with the first paragraph of Article 8 of Protocol No. 2 is unsubstantiated. The applicant alleges that Article 11a of the ACBNAGEUA, which regulates the procedure by which the National Assembly imposes on the State Attorney's Office [the obligation] to file an action before the Court of Justice of the European Union on grounds of a violation of the principle of subsidiarity by a legislative act of the European Union, should also give the same competence to the National Council. Such a requirement entailing the equal treatment of the National Assembly and the National Council allegedly follows from the first paragraph of Article 8 of Protocol No. 2 and also from the general equal treatment of the second chambers of national parliaments under EU law.
15. The competence of national parliaments to ensure, in the fields that do not fall within the exclusive competence of the European Union, compliance with the principle of subsidiarity, is a special competence of theirs that is originally determined by EU law and does not follow from Member States' national law. The third paragraph of Article 5 of the TEU and point (b) of Article 12 of the TEU thus determine that national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol No. 2. This protocol envisaged, as a primary mechanism, the cooperation of national parliaments in the legislative procedure: in conformity with Article 4 of Protocol No. 2, draft legislative acts are sent to national parliaments, and then, on the basis of Article 6 of Protocol No. 2, any national par-

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European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.”

liament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, submit a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. Further reasoned opinion procedures depend on how many national parliaments (or individual chambers) were opposed to the draft legislative act at issue due to the alleged violation of the principle of subsidiarity. When taking into account the “weight” of the collective veto of national parliaments against a certain draft legislative act, each national parliament has two votes, and in bicameral parliamentary systems each of the two chambers has one vote (Article 7 of Protocol No. 2).

16. In addition to the *ex ante* cooperation of national parliaments, Protocol No. 2 also envisaged an *ex post* mechanism to ensure [the implementation of] the principle of subsidiarity. On the basis of Article 8 of Protocol No. 2, the Court of Justice of the European Union has jurisdiction in actions on grounds of infringement of the principle of subsidiarity. With regard to the subjects entitled to file an action, the mentioned provision of the Protocol determines that a Member State may file an action before or notify the Court of Justice thereof in accordance with its legal order on behalf of its national parliament or a chamber thereof.<sup>6</sup>
17. From the above it is evident that there is a significant difference between the cooperation of national parliaments in the initial phase of the legislative procedure and their role before the Court of Justice of the European Union after the legislative act has already been adopted. While Protocol No. 2 directly and comprehensively regulates their role in the legislative procedure of the European Union, with regard to their position before the Court of Justice of the European Union it refers to the regulation under national law. From the wording of the first paragraph of Article 8 of Protocol No. 2, which states that [the Court of Justice of the European Union] is “notified [by Member States of actions] in accordance with their legal order on behalf of their national Parliament or a chamber thereof;” it clearly follows that EU law does not give national parliaments or their individual chambers active standing to directly file actions on grounds of a violation of the principle of subsidiarity; their legal position, as well as the position of individual chambers of parliaments, with regard to the initiation of a procedure before the Court of Justice of the European Union is a question of national law.
18. On the basis of the above, the Constitutional Court assessed that the fact that the challenged Article 11a of the ACBNAGEUA gave only the National Assembly the competence to require the State Attorney’s Office to file, on its behalf (and in conformity with its instructions), an action before the Court of Justice of the European Union on grounds of a violation of the principle of subsidiarity by a legislative act of the European Union, is not inconsistent with the first paragraph of Article 8 of Protocol No. 2.

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6 The first paragraph of Article 8 of Protocol No. 2 determines the following: “The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.”

19. Since the Constitutional Court assessed that the ACBNAGEUA is not inconsistent with the TEU and the TFEU, and that Article 11a of the ACBNAGEUA is not inconsistent with the first paragraph of Article 8 of Protocol No. 2, there is consequently also no inconsistency with Articles 8 and 153 of the Constitution.

### C

20. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 21 of the Constitutional Court Act, composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The decision was reached by eight votes against one. Judge Sovdat voted against and submitted a dissenting opinion.

*Dr Ernest Petrič*  
*President*

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#### DISSENTING OPINION OF JUDGE DR JADRANKA SOVDAT

1. I voted against the Decision because I do not concur with the argumentation on the basis of which the Constitutional Court established that the Act on Cooperation Between the National Assembly and the Government in EU Affairs (Official Gazette RS, Nos. 34/04 etc. – hereinafter referred to as the ACBNAGEUA) is not inconsistent with the Constitution. Due to the fact that the applicant required, above all, a review of the constitutionality of Article 11a thereof, I will also focus on the reasons for the assessment of this statutory provision. The finding that this statutory provision is not inconsistent with the Constitution in fact entails the finding that it is not inconsistent with the first paragraph of Article 9 of Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality (UL C 83, 30 March 2010), which was the major premise of the assessment of the Constitutional Court in the case at issue. I am of the opinion that before such a finding was adopted the Constitutional Court should have either submitted a question to the Court of Justice of the European Union for a preliminary ruling, in conformity with the third paragraph in relation to point (a) of the first paragraph of Article 267 of the Treaty on European Union (UL C 83, 30 March 2010 – consolidated version – hereinafter referred to as the TEU), with regard to the interpretation of the mentioned provision of the Protocol, or convincingly reasoned why it deems that what is at issue is an entirely clear provision of primary EU law.
2. I concur with the starting points of the Decision regarding the fact that what the Constitutional Court is dealing with is a request for the review of the consistency of a statutory provision with a provision of primary EU law and that the Constitutional Court has jurisdiction to carry out such assessment on the basis of the second indent of the first paragraph of Article 160 of the Constitution, in conformity with which

the Constitutional Court has jurisdiction to decide on the conformity of laws with ratified treaties. The treaty that we are dealing with in the case at issue is a special treaty that does not grant national constitutional courts jurisdiction to interpret it, but explicitly entrusts such jurisdiction to the Court of Justice of the European Union. Many years ago that Court determined, in the case *CILFIT* (No. 283/81, dated 6 October 1982), the criteria on the basis of which national courts may also in cases where there has been no prior decision made by the Court of Justice of the European Union interpret by themselves individual provisions of primary law. The so-called *acte clair* doctrine established a general starting point in accordance with which the correct application of law must be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved; before they can come to such a conclusion, the national court at issue must be convinced that such interpretation is equally obvious to all the courts of the other Member States and to the Court of Justice of the European Union (paragraph 16 of the judgment). Moreover, the Court of Justice of the European Union determined additional criteria that require a comparison of all the different language versions of the text, the observance of peculiar EU law terminology, and the placement of the interpretation in the context of this law (paragraphs 18, 19, and 20 of the judgment).

3. It is true that in legal theory many objections have already appeared against such strictness as follows from the *CILFIT* judgment.<sup>1</sup> In newer legal theory it is proposed that the sole limitation should be the finding that the correct application of law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved,<sup>2</sup> which should unburden national courts of the impossible task that the *CILFIT* judgment requires them to carry out and at the same time establish mutual consideration and trust between courts.<sup>3</sup> These are the “arguments” that could at least call for the Court of Justice of the European Union to reconsider the criteria set forth in the *CILFIT* judgment. However, the Court also has to be given the possibility to actually do that. In my opinion, the fact that until now it has not done so does not allow us to simply state that the matter is clear, with regard to which the applicant alleges that primary EU law ensures him a position that the challenged statutory provision deprives him of.
4. Is it really possible in the case at issue to substantiate that from the first paragraph of Article 8 of Protocol [No. 2] it clearly follows, not only that EU law does not give national parliaments or their individual chambers active standing to directly file “actions on grounds of infringement of the principle of subsidiarity” but also that their legal position, as well as the position of individual chambers of parliaments with regard to the initiation of a procedure before the Court of Justice of the European Union, is a question of national law? Does such argumentation ensure the Consti-

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1 With regard to this, see, e.g., P. Craig, G. De Búrca, *EU Law, Text, Cases and Materials*, Third Edition, Oxford University Press, Oxford 2003, p. 451.

2 This is stated by D. Sarmiento, in: M. Avbelj, J. Komárek, (Ed.), *Constitutional Pluralism in the European Union and Beyond*, p. 314.

3 *Ibidem*.

tutional Court that it manifestly correctly interpreted the wording of primary [EU] law so that this interpretation leaves no room for any reasonable doubt with regard to [the question of] in what manner the question at issue should be resolved, if we go no further than the fundamental starting point that the Court of Justice of the European Union introduced in the judgment *CILFIT*? In this [interpretation], the Constitutional Court deemed that the wording “in accordance with their legal order” is not connected only to the phrase “notified by them in accordance with their legal order,” i.e. the fact that the regulation of who shall have *locus standi*, on behalf of the “national Parliament or a chamber thereof,” before the Court of Justice of the European Union, depends on the national law of the [Member] States; obviously, individual [Member] States entrusted such active standing to their governments and not to the State Attorney’s Office, as Slovenia has done by the challenged provision, and this is also a subject of discussion in the legal literature.<sup>4</sup> The Constitutional Court also stated that the Protocol left the question of what is a “national Parliament or a chamber thereof” entirely to the national regulation of Member States.<sup>5</sup> Nevertheless, what is at issue is that in this case the primary EU law especially and explicitly regulates the relations between national parliaments and their chambers [on the one hand] and the European Union and its institutions [on the other], i.e., in the case at issue, the Court of Justice of the European Union. In fact, if the Constitutional Court adopted the position that the phrase “(notified by them) in accordance with their legal order” only refers to the question of who files an action on behalf of the national parliament or a chamber thereof and in what manner it files an action (i.e. whether this is the government or, in Slovenia, the State Attorney’s Office, and what the procedure is after the decision to file an action), then immediately the following question arises: Who decides on the filing of an action in the instances of bicameral parliaments, with all the variations from complete bicameralism to different types of so-called incomplete bicameralism, or to authorities such as the Slovene National Council is in this respect? Even the question of whether such a decision can also be made on behalf of an individual chamber by its internal working bodies can arise.<sup>6</sup>

4 See, e.g., M. Wyrzykowski *et al.*, The Role of National Parliaments in the European Union, General Report, Proceedings of the FIDE XXIV Congress, Madrid 2010, Vol. 1. See also P. Kiiver, The National Parliaments in the European Union: A Critical View on EU Constitution-Building, Kluwer Law International, The Hague 2006, pp. 164–165. See also R. Barents, The Court of Justice after the Treaty of Lisbon, Common Market Law Review, Vol. 47, 3/2010, p. 727.

5 If it did leave it, also the question can be raised to which Kiiver draws our attention and which in the case at issue opens a whole variety of subjects that in light of truly different national legal regulations can access the Court. In such manner, Kiiver *inter alia* states: “Who are ‘the national parliaments’ in the specific context of subsidiarity enforcement? On what basis should they be assigned formal privileges before the ECJ? There do not seem to be any selection criteria. As noted at the very beginning, leaving the determination of who is the parliament to the Member States may work with the assignment of duties, but not with the distribution of powers and privileges. [...] Methodologically, the only solid solution would again be to draw up a list mentioning exhaustively all national parliaments that would have *locus standi* by name.” Kiiver, *op. cit.*, p. 166.

6 This is also discussed in M. Wyrzykowski *et al.*, *op. cit.*

Is all of this really completely beyond a reasonable doubt? Would it not be just as possible for the Constitutional Court to arrive at the opposite interpretation, i.e. that the phrase “in accordance with their legal order” only refers to the question of who “notifies”, i.e. files the action, and by what procedure? In fact, if this is so, then the question arises whether in instances of multi-chambered national parliaments primary [EU] law really entrusts, in the case of complete bicameralism, the role of guardian of the principle of subsidiarity only to both chambers together or to each of them [separately], or in the case of incomplete bicameralism, equally [the role of guardian to each of them], and in such framework also whether, if what is at issue is such an authority as the Slovene National Council, such an authority [is entrusted with this role] as well, as the applicant in the case at issue alleges.

5. Since, in my opinion, the Decision does not provide satisfactory answers to all of these questions, I did not vote in favour of it.

*Dr Jadranka Sovdat*

**DECISION**

At a session held on 14 November in proceedings to review constitutionality initiated upon a request of the Ombudsman for Human Rights, the Constitutional Court

*decided as follows:*

1. The first paragraph of Article 188 of the Fiscal Balance Act (Official Gazette RS, Nos. 40/12, and 105/12) in conjunction with the eleventh paragraph of Article 429 of the Pension and Disability Insurance Act (Official Gazette RS, Nos. 96/12, and 39/13), and the second, third, and fourth paragraphs of Article 188, and Article 246 of the Fiscal Balance Act are inconsistent with the Constitution insofar as they concern female civil servants as insured women who have not yet fulfilled the same conditions for acquiring the right to an old age pension as apply to insured men.
2. The first paragraph of Article 188 of the Fiscal Balance Act (Official Gazette RS, No. 40/12) was inconsistent with the Constitution insofar as it concerned female civil servants as insured women who have not yet fulfilled the same conditions for acquiring the right to an old age pension as applied to insured men.
3. The legislature must remedy the inconsistency established by Point 1 of the operative provisions within a time limit of six months following the publication of this Decision in the Official Gazette of the Republic of Slovenia.
4. Until the established inconsistency is remedied, the employment contract of a female civil servant may be terminated due to the [fulfilment of the] prescribed retirement conditions only after she has fulfilled the same conditions for acquiring the right to an old age pension as apply to insured men on the basis of the challenged provisions.
5. In the remaining part, the provisions of the Fiscal Balance Act referred to in Points 1 and 2 of the operative provisions are not or, as applicable, were not inconsistent with the Constitution.

**A**

1. In the request of 13 June 2012 and the supplement to the request of 15 January 2013, the Ombudsman for Human Rights challenges Article 188 of the Fiscal Balance Act (hereinafter referred to as the FBA), in its original text and its text as amended by the eleventh paragraph of Article 429 of the Pension and Disability Insurance Act (hereinafter referred to as the PDIA-2), and Article 246 of the FBA. It alleges that the challenged provisions are inconsistent with the prohibition of discrimination on grounds of sex and age, as defined by the first paragraph of Article 14 of the Constitution in conjunction with Articles 49 and 66 of the Constitution. It alleges that the challenged regulation treats women unequally and less favourably in comparison with men in the regulation of the termination of an employment contract due to the fulfilment of the prescribed retirement conditions, as women fulfil these conditions, which are determined by the Pension and Disability Insurance Act (Official Gazette RS, No. 109/06 – official consolidated text – hereinafter referred to as the PDIA-1) and the PDIA-2, at a younger age than men. It is of the opinion that the special, more favourable regulation of the conditions for obtaining an old age pension for women may not be a reason for less favourable regulation of their protection with regard to the termination of an employment contract. As a result [of such differentiation], female civil servants, allegedly, can no longer avail themselves of labour law protection of their employment at a younger age and find themselves in a more precarious position with regard to their future employment sooner [than men]. Such allegedly reduces the opportunities of women to equally participate in employment and develop their professional careers. The applicant adds that the challenged regulation is also disputable from the viewpoint of the law of the European Union (hereinafter referred to as the EU), whereby it relies on the case law of the Court of Justice of the European Union (hereinafter referred to as the CJEU) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, 26. 7. 2006, p. 23 – hereinafter referred to as Directive 2006/54/EC).
2. In the applicant's opinion, the challenged regulation also places all older civil servants who fulfil the prescribed retirement conditions in an unequal or less favourable position in comparison with younger civil servants who have not yet fulfilled these conditions with regard to labour law protection in connection with the termination of an employment contract. In such manner, the challenged regulation allegedly denies older civil servants any manner of appropriate protection against arbitrary and unsubstantiated termination of employment on grounds of age. Their employment is allegedly precarious and dependant on the will of the employer. This allegedly places them in an excessively subordinate position, which, in the applicant's opinion, can have negative consequences in other areas as well. The applicant is of the opinion that the attainment of a certain age or the fulfilment of retirement conditions which

is inseparably linked with the attainment of a certain age, cannot be regarded as a circumstance that would by itself be linked with a worker's (in)ability to perform his or her work. In connection with the prohibition of discrimination, [the applicant] also mentions Article 4 of the Convention of the International Labour Organisation No. 158 concerning Termination of Employment at the Initiative of the Employer (Official Gazette of the Socialist Federal Republic of Yugoslavia, MP, No. 4/84, Act on Notification of Succession to UNESCO Conventions, International Multilateral Air Traffic Agreements, ILO Conventions, International Maritime Organisation Conventions, Customs Conventions and Certain Other International Multilateral Agreements, Official Gazette RS, No. 54/92, MP, No. 15/92), and Article 24 of the European Social Charter (Revised) (Official Gazette RS, No. 24/99, MP, No. 7/99 – hereinafter referred to as the ESC). As the opportunities for these persons to find new employment are allegedly rather limited due to the characteristically poor employability of older persons, in the applicant's opinion, the right to an old age pension in fact becomes the obligation [to retire]. The applicant also refers to Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2. 12. 2000, p. 16 – hereinafter referred to as Directive 2000/78/EC) and the CJEU case law based thereon. In addition, the applicant substantiates its allegation of a violation of the prohibition of discrimination by claiming that by means of a so-called provisional measure intended to balance public finances the challenged regulation interferes permanently with the labour law position of persons in a particular age group who will fulfil the retirement conditions precisely when the challenged measure enters into force or who have already fulfilled such conditions before its entry into force. Due to this “provisional” measure, only those to whom the “provisional” regulation applies will have to bear the permanent and irreparable consequences in the fields of labour law and social law also after the “provisional” measure ceases to be in force.

3. Furthermore, in the applicant's opinion, the challenged regulation, without any justification, puts public sector employees in an unequal position in comparison with those who are not employed in the public sector, as for the latter the general labour law regulation does not provide for termination of an employment contract due to similar reasons.
4. The applicant claims that, insofar as it concerns the termination of the employment contracts of university teachers and researchers, the challenged regulation is inconsistent with the constitutionally guaranteed autonomy of the university and other institutions of higher education (Article 58 of the Constitution) in conjunction with the constitutionally guaranteed freedom of scientific and artistic endeavour (Article 59 of the Constitution), also because it does not provide for a transitional period to enable adaptation. It is of the opinion that the legislature's interference with the recruitment of academic personnel is contrary to the constitutionally protected autonomy of universities, in particular due to the omission of prior coordination with the universities. The applicant emphasises that the provision of scientific instruction is subject to decades of scientific and educational training, as obtaining the title of

a university teacher for a particular area is subject to extremely demanding habilitation procedures. The challenged regulation therefore allegedly creates difficulties for the universities that cannot be resolved in the short term, but require long-term additional resources and effort to fill the resulting void. The challenged measure therefore allegedly constitutes a severe interference with the functioning of the universities and allegedly threatens the pursuit of their mission in the areas of education and research. Thereby the applicant refers to Constitutional Court Decisions No. U-I-156/08, dated 14 April 2011 (Official Gazette RS, No. 34/11), and No. U-I-22/94, dated 25 May 1995 (Official Gazette RS, No. 39/95, and OdlUS IV, 52). It also draws attention to the possibility that the challenged regulation could result in the termination of the employment contracts of the rector of [one of the] universities and some of the deans of its faculties, who were democratically elected to such positions by the university's employees and students. It adds that scientific activity requires continuity that cannot be ensured through the continuous extension of employment relationships by means of the *ad hoc* arrangements envisaged [by the challenged regulation]. Continuity is alleged to be a necessary precondition for the freedom of scientific endeavour within an autonomous university space.

5. The applicant also alleges that the challenged regulation is unclear and insufficiently precise (an inconsistency with Article 2 of the Constitution), as allegedly its content and purpose cannot be established. Thereby the applicant highlights a lack of clarity regarding the possibility that a person who has already fulfilled the prescribed retirement conditions could be employed anew in the public sector and the question of the legal nature of a final decision on the termination of an employment contract. As the challenged regulation does not include a transitional period, it allegedly inadmissibly interferes with the principles of a state governed by the rule of law determined by Article 2 of the Constitution, since it further violates the principle of trust in the law. With regard to such, the applicant emphasises that the legislature has to provide for a transitional period when a new regulation interferes with on-going relationships or legitimate legal expectations. From the viewpoint of the affected individuals, such allegedly concerns an unconstitutional interference with their legitimate expectations, as at the time they entered into such employment and during its duration they could not have expected such a change in their position with regard to labour and social law due to the complete absence of similar provisions before the challenged regulation. The applicant further stresses that the challenged regulation entails extremely significant changes for the universities, which have to provide scientific, research, and educational activities that will be sustainable in the long-term and developmentally oriented, whereby planning the careers of professors constitutes a long-term process and not an *ad hoc* decision.
6. In its reply to the request, the National Assembly highlights that when comparing public sector employees with those who work in the private sector with regard to the termination of their employment contracts one must take into account that such concern different positions. Resources for private sector employees are ensured by private entities that are constantly exposed to the functioning of the market and required to make adaptations, which entails a lower degree of employment security.

Employment in the private sector is conditioned by the market, while in the public sector employment is a matter of the state providing resources for employees from its budget. With regard to discrimination on grounds of age, the National Assembly emphasises that the measures adopted by the legislature have a different effect on individual age groups, depending on the economic situation of society and the time of the adoption of a concrete measure. It adds that the affected employees have already secured for themselves a level of social security that younger employees have yet to attain. It is of the opinion that the challenged regulation is consistent with the case law of the CJEU as well as the Constitutional Court, which has not yet adopted the explicit position that a regulation is automatically inconsistent with the Constitution solely due to the application of age as a condition for the termination of an employment contract. It also draws attention to other positions where one is deemed to no longer be eligible to continue to work after attaining a certain age (judges, notaries). With regard to discrimination on grounds of sex, the National Assembly states that not a single concrete case of a woman who would have been affected by the alleged discriminatory differentiation has been demonstrated. The National Assembly further opposes the allegation that the challenged provisions are unclear and insufficiently precise, as the statements that the challenged regulation was unexpected allegedly in fact indicate that the regulation is comprehensible, but individuals have difficulty accepting it. However, regarding the allegations in relation to the transitional period of the challenged regulation, it states that, taking into account the nature and objectives of the FBA, it would not have been feasible for the Act to determine a longer transitional period. In addition, in certain instances the challenged provisions already allegedly enable an uninterrupted work process, whereby the affected civil servants have at their disposal adequate legal protection against arbitrary decisions by their superiors. The National Assembly is further of the opinion that the applicant's allegation regarding the interference with the autonomy of the universities and the faculties as well as with the freedom of scientific and artistic endeavour (Articles 58 and 59 of the Constitution) is unsubstantiated, as it is for the employer (i.e. the universities and the faculties) to decide whether to conclude an agreement with a civil servant to continue an employment relationship in order to ensure an uninterrupted work process. The National Assembly is of the opinion that due to the different possibilities to engage in educational and scientific work even in the event of the termination of their employment contracts, the affected individuals are not deprived of their autonomy in educational and scientific pursuits. The National Assembly assesses that the challenged regulation entails a balancing between different interests and generations. The affected individuals are allegedly able to continue to work elsewhere or on a contractual basis. The National Assembly adds that the Constitution does not guarantee long-term or permanent employment.

7. The Government also submitted an opinion. It emphasises that the challenged provisions regulate the termination of the employment contracts of civil servants and do not entail their direct or even mandatory retirement. It states that the challenged measure of the termination of an employment contract due to the fulfilment of the

conditions for acquiring the right to an old age pension without reductions pursues, on the one hand, the objectives of personnel restructuring, promoting younger workers' access to employment and thereby improving the intergenerational distribution [of employees], and, on the other hand, the objective of controlling public finance expenditures, namely by reducing the labour costs, as during their careers civil servants progress to higher pay grades than the one they had upon entering the civil service system, and by reducing the number of public sector employees. The Government adds that civil servants whose employment contracts are terminated on the basis of the challenged regulation have the right to an old age pension without reductions and thus their social security is guaranteed. Notwithstanding such, they may allegedly independently and freely choose to either retire or remain on the employment market by concluding a new employment relationship in the private sector, in another form of employment, as job seekers, or as unemployed persons. The Government explains that it already drew attention to Directive 2000/78/EC in the draft of the FBA and highlighted the admissible option of different treatment on grounds of age that does not entail discrimination. The Government is further of the opinion that the challenged provisions do not treat civil servants who have fulfilled the conditions for obtaining an old age pension unequally in comparison with private sector workers, as they are not prevented from working for another employer after their employment contract has been terminated. It adds that in the private sector employees are faced with the termination of employment contracts for different reasons on a daily basis, whereby the majority [of the affected persons] do not benefit from a guarantee of social security in the form of a pension. It also draws attention to the possibility to conclude an agreement between a given civil servant and his or her superior on the continuation of the employment relationship, which is provided for by the challenged provisions. Through such, the legislature allegedly enabled all employers – including the universities – to assess in every individual case what consequences the termination of an employment contract would have for the work process. Therefore, the Government believes that it is not possible to speak of an interference with the autonomous regulation of the universities. With regard to the allegations of discrimination on grounds of sex, the Government states that the challenged regulation refers to the provisions of the PDIA-1 that determine the same retirement age for both men and women, as the transitional provision of Article 389 of the PDIA-1 was not taken into account. It also refers to the case law of the CJEU. In light of all of the above, the Government proposes that the Constitutional Court establish that the challenged provisions are not inconsistent with the Constitution.

8. The reply of the National Assembly and the opinion of the Government were sent to the applicant, who did not reply to the opinion of the Government, however in its reply to the statements of the National Assembly, the applicant maintains its request in its entirety. The applicant states that the National Assembly did not reply to all of its allegations and that the challenged measure is not intended to achieve the alleged objective of reducing the average age of the personnel structure of professors but to reduce expenses. This allegedly entails that, due to insufficient resources, no new employees can

be hired to replace the retiring professors, and the other teachers would have to fulfil the obligations of the retired professors alongside their own obligations. The applicant is of the opinion that such rejuvenation of the age structure of university teaching staff is a process that requires long-term planning. It emphasises that the challenged provisions consider the possibility of a professor who has fulfilled the conditions for retirement continuing to work as an exception and make such subject to certain conditions.

9. On the basis of a request of the Constitutional Court, the Ministry of the Interior provided data regarding the personnel structure of the employees of the authorities of the state administration for the years 2012 and 2013.

### **B – I**

10. On 1 January 2013, the PDIA-2, which abrogated the PDIA-1 in its entirety, entered into force (the first paragraph of Article 429 of the PDIA-2). On the basis of the transitional provision of the eleventh paragraph of Article 429 of the PDIA-2, also the first paragraph of Article 188 of the FBA ceased to have effect insofar as it determined the conditions for acquiring the right to an old age pension. Since the entry into force of the PDIA-2, the conditions for obtaining an old age pension, which used to be determined by the first paragraph of Article 36 in conjunction with the first paragraph of Article 54, the fourth paragraph of Article 430, Article 402, or Article 404 of the PDIA-1, are determined by the fourth and fifth paragraphs of Article 27 of the PDIA-2 in conjunction with Article 398 of the PDIA-2.
11. If during proceedings before the Constitutional Court a regulation ceases to be in force in the challenged part, the Constitutional Court decides on its constitutionality or legality if the applicant or petitioner demonstrates that the consequences of its unconstitutionality or unlawfulness have not been remedied (the second paragraph of Article 47 of the Constitutional Court Act, Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA). Therefore, the Constitutional Court required the applicant to provide such a statement.
12. The applicant informed the Constitutional Court that it would continue to pursue the lodged request for the review of the constitutionality of Articles 188 and 246 of the FBA, taking into account the original text of the challenged first paragraph of Article 188 of the FBA as was in force until 31 December 2012, as well as the text of this provision as amended on the basis of the eleventh paragraph of Article 429 of the PDIA-2 and as it has been in force since 1 January 2013. It states that the amendment of the challenged first paragraph of Article 188 of the FBA that came into force with the [enactment of the] PDIA-2 did not change the constitutionally disputed position of the affected individuals whose employment contracts had been terminated on the basis of this provision before the amendment entered into force and that in on-going proceedings the challenged provision will have to be applied in its original text. It emphasises once more that although the challenged regulation is incorporated into the chapter on provisional measures for balancing public finances, due to the unconstitutionality of the challenged regulation the affected individuals have experienced and continue to experience lasting consequences in the fields of labour and social law.

These have not been remedied by the amendment of the challenged regulation and they also will not be remedied when the provisional measures in accordance with the FBA cease to be in force. The applicant proposes that the Constitutional Court, in addition to abrogating the challenged provisions in force at present and establishing the unconstitutionality of the first paragraph of Article 188 of the FBA in the text that had been in force before the entry into force of the PDIA-2, also determine the manner of the implementation of its Decision in order to remedy the severe and lasting consequences that the unconstitutionality produced for the affected individuals.

13. With these statements the applicant substantiated that the alleged consequences of the unconstitutionality of the first paragraph of Article 188 of the FBA in its original text have not been remedied by the amendment that entered into force with the [enactment of the] PDIA-2. Therefore, the Constitutional Court proceeded with the procedure to review its constitutionality (the second paragraph of Article 47 of the CCA).
14. It follows from the applicant's statements that on the basis of the same grounds under constitutional law it extended the request also to the amended first paragraph of Article 188 of the FBA, as it entered into force on the basis of the eleventh paragraph of Article 429 of the PDIA-2. Therefore, the Constitutional Court also reviewed [the constitutionality of] the new regulation, as it is determined by the first paragraph of Article 188 of the FBA in conjunction with the eleventh paragraph of Article 429 of the PDIA-2.
15. The Constitutional Court did not send the extension of the request to the National Assembly, as the applicant challenges the regulation in force for the same reasons as the prior regulation, regarding which the National Assembly had already been given an opportunity to provide its opinion.

## **B – II**

### **The content of the challenged provisions**

[Translator's note: A thorough understanding of this Decision requires the clarification of some of the terms applied by the PDIA-1 and the PDIA-2. The term insurance period thus denotes periods in which the insured person was covered by compulsory or voluntary pension and disability insurance and periods for which the relevant contributions have been paid. The pension qualifying period is comprised of insurance periods and special qualifying periods and serves as a basis for establishing whether the conditions for obtaining a pension are fulfilled and determining the amount of the pension. Special qualifying periods are periods during which an insured person was not covered by compulsory or voluntary pension and disability insurance that are nevertheless included in the pension qualifying period regardless of the payment of contributions (e.g. the period of caring for a child up to the child's first year of age if the caretaker was not insured on any other grounds). The term purchased period denotes periods that can be included in the insurance period if the relevant contributions are paid (e.g. the period of caring for a child up to the child's third year of age or a period of unemployment if during such time the person in question was not insured on any other grounds). The added qualifying period in accordance with the PDIA-1 is a period during which an insured person was not covered by insurance but

which is taken into account in the determination of the pension qualifying period for the acquisition of the right to an old age pension (e.g. periods of undergraduate and postgraduate studies or mandatory military service).]

16. Before the PDIA-2 came into force, under the challenged regulation, namely according to the first paragraph of Article 188 of the FBA, the employment contract of a civil servant who fulfilled the conditions for obtaining an old age pension on the basis of the first paragraph of Article 36<sup>1</sup> in conjunction with the first paragraph of Article 54, the fourth paragraph of Article 430, Article 402, or Article 404 of the PDIA-1 was terminated. In light of this, insofar as the measure of the termination of an employment contract is concerned, the fulfilment of such retirement conditions was taken into account that enabled an individual to obtain an old age pension without reductions (*malus*), i.e. the age of 58 years for both sexes along with a period of 40 years of employment for men and a period of 38 years of employment for women (a full period of employment).<sup>2</sup>
17. Furthermore, the conditions for early retirement due to fulfilment of the conditions for an increase in the insurance period that had been in force under the prior valid Pension and Disability Insurance Act (Official Gazette RS, Nos. 12/92, 5/94, 7/96, and 54/98 – hereinafter referred to as the PDIA) and that, in accordance with the transitional provisions, continue to be applied in some instances (the fourth paragraph of Article 430 of the PDIA-1) were taken into account.<sup>3</sup> As the connection with Article 402 of the PDIA-1 was considered as well, a decrease in the pensionable age according to the prior valid regulations was also taken into account when assessing the fulfilment of the conditions for termination of the employment contracts of insured persons who had been entitled to an increase in the insurance period prior to the entry into force of the PDIA-1.<sup>4</sup> The connection of the challenged provisions with Article 404 of the PDIA-1 entails that the gradual amendment of the conditions for obtaining an old age pension according to special regulations was considered as well.<sup>5</sup>

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- 1 The first paragraph of Article 36 of the PDIA-1 reads as follows: “An insured person acquires the right to an old age pension at the age of 58 after completing a pension qualifying period of 40 years (men) or a pension qualifying period of 38 years (women).”
  - 2 The first paragraph of Article 54 of the PDIA-1 reads as follows: “The pension of an insured person who has attained 58 years of age and completed 40 years of employment (men) or 38 years of employment (women) is to be determined in an amount that depends solely upon the completed pension qualifying period, without a reduction due to retirement before the attainment of the full pensionable age.”
  - 3 Insured persons who on the day the PDIA-1 entered into force held posts that were entitled to an increase in the insurance period and who have completed at least 25 years of the pension qualifying period (men) or 23 years of the pension qualifying period (women) continue to be entitled to an increase in the insurance period according to the old PDIA.
  - 4 The pensionable age prescribed for obtaining an old age pension and the full pensionable age are reduced by as many months as their insurance period has been increased, thereby also taking into account the lowest possible pensionable age and the lowest possible full pensionable age for obtaining an old age pension on such basis.
  - 5 The gradual adaptation of these conditions to the new limit determined by Article 154 of the PDIA-1 is regulated differently for men and for women through a gradual annual increase in the lowest admissible

18. The amended first paragraph of Article 188 of the FBA in conjunction with the eleventh paragraph of Article 429 of the PDIA-2 refers to the fourth and fifth paragraphs of Article 27 of the PDIA-2 in conjunction with Article 398 of the PDIA-2 as regards the conditions for acquiring the right to an old age pension.<sup>6</sup> The fourth paragraph of Article 27 of the PDIA-2 completely harmonised the retirement conditions with regard to [the insured person's] sex (60 years of age and 40 years of the pension qualifying period, excluding purchased periods),<sup>7</sup> however, in the transitional period until 31 December 2018, the fifth paragraph of the same Article still determines a different condition as to the pension qualifying period, excluding purchased periods, for men and women (40 years for men, and a gradual increase from 38 years and 4 months to 40 years for women), and the pensionable age is also determined differently for men and women (a gradual increase from 58 years and 4 months to 60 years for men, and a gradual increase from 58 years to 60 years for women). Therefore, until 2019 the pensionable age for men and women will constantly differ by 4 months. This entails that until 31 December 2018, with regard to their age, it will be possible to terminate employment contracts of women 4 months earlier in comparison to men, while with regard to pension qualifying periods the difference between them will gradually decrease.
19. In accordance with the second paragraph of Article 188 of the FBA, the employment contract of a civil servant is terminated on the basis of a final decision adopted by his or her supervisor on the first day following the expiry of two months from the fulfilment of the conditions determined by the first paragraph of this Article. In the event of the termination of his or her employment contract, a civil servant has the right to severance pay in the amount of two average monthly salaries in the Republic of Slovenia calculated for the past three months or his or her last two monthly salaries if such is more favourable for him or her. In accordance with the third paragraph of Article 188 of the FBA, without prejudice to the first paragraph of Article 188 of the FBA, a civil servant's employment contract is not terminated if the employer and the civil servant agree within a time limit of two months following the fulfilment of the conditions determined by the first paragraph of this Article to continue the employment relationship in order to ensure an uninterrupted work process. The agreement regarding the continuation of the employment relationship shall also determine the duration of the employment relationship, and after the termination of the employ-

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pensionable age. Insured persons who exercise their [right to a] pension on the basis of the so-called "Asbestos" Act or the Act regulating the rights of victims of war are exempted from such. The determined age limits are additionally decreased for insured persons who worked in positions that were eligible for an increase in the insurance period, namely for as many months as corresponds to the increase in their insurance period, but not exceeding the limits determined by Article 402 of the PDIA-1, if this is more favourable for the insured person.

6 Article 398 of the PDIA-2 provides for the possibility to take into account some instances of decreases in the age limit under the regulations previously in force (increases in the insurance period, added periods).

7 The fourth paragraph of Article 27 of the PDIA-2 determines the following: "Without prejudice to the provision of the first paragraph of this Article, an insured person (men and women) acquires the right to an old age pension upon attainment of 60 years of age and 40 years of the pension qualifying period, excluding purchased periods."

ment relationship the civil servant shall be entitled to a (higher) severance pay in the amount of three average monthly salaries in the Republic of Slovenia calculated for the past three months or his or her last three monthly salaries if such is more favourable for him or her. For the purpose of determining the fulfilment of conditions determined by the first paragraph of this Article, the employer may obtain data from the databases of the Pension and Disability Insurance Institute of the Republic of Slovenia (the fourth paragraph of Article 188 of the FBA).

20. The first paragraph of Article 246 of the FBA determines that the employment contracts of those civil servants are terminated who, on the day of the entry into force of the Act, have already fulfilled the conditions for acquiring the right to an old age pension on the basis of the first paragraph of Article 36 in conjunction with the first paragraph of Article 54, the fourth paragraph of Article 430, Article 402, or Article 404 of the PDIA-1. A civil servant's employment contract is terminated on the basis of a final decision adopted by his or her superior on the first day following the expiry of two months from the entry into force of the Act. A civil servant whose employment contract is terminated has the right to severance pay in the amount of two average monthly salaries in the Republic of Slovenia calculated for the past three months or his or her last two monthly salaries if such is more favourable for him or her (the second paragraph of Article 146 of the FBA). Without prejudice to the second paragraph of Article 246 of the FBA, a civil servant's employment contract is not terminated if the employer and the civil servant agree within a time limit of two months following the entry into force of this Act to continue the employment relationship in order to ensure an uninterrupted working process. The agreement regarding the continuation of the employment relationship shall also determine the duration of the employment relationship, and after the termination of the employment relationship the civil servant shall be entitled to a (higher) severance pay in the amount of three average monthly salaries in the Republic of Slovenia calculated for the past three months or his or her last three monthly salaries if such is more favourable for him or her (the third paragraph of Article 246 of the FBA). If a civil servant [in the position] referred to by the first paragraph of Article 246 of the FBA retires within two months following the entry into force of this Act, he or she is entitled to severance pay in the amount of three average monthly salaries in the Republic of Slovenia calculated for the past three months or his or her last three monthly salaries if such is more favourable for him or her (the fourth paragraph of Article 246 of the FBA).
21. The provisions of Article 246 of the FBA, which by their nature are transitional provisions, differ from the provisions of Article 188 of the FBA, both those previously and currently in force, since they refer to civil servants who had fulfilled the conditions for acquiring the right to an old age pension in accordance with the PDIA-1 already at the moment of the entry into force of the FBA. All provisions thus concern the termination of an employment contract for the same reason, however when Article 246 of the FBA applied, the civil servant had already fulfilled this reason at the moment of the entry into force of the FBA, whereas in the event of the application of Article 188 of the FBA this reason could have arisen or could arise at any moment during

the period when this statutory measure is in force. All instances concern provisions with an essentially similar content that require the termination of an employment contract upon the fulfilment of the different conditions prescribed for acquiring the right to an old age pension.

### **B – III**

#### **Review from the viewpoint of the principle of the clarity and precision of regulations (Article 2 of the Constitution)**

22. The applicant alleges that the challenged regulation is unclear and not sufficiently precise as its content and purpose cannot be determined. The requirement that provisions be defined clearly and precisely so that their content and purpose can be identified with certainty is the substance of one of the principles of a state governed by the rule of law determined by Article 2 of the Constitution. However, this does not entail that regulations do not require any interpretation. It follows from constitutional case law that a regulation is inconsistent with this constitutional principle when the clear content of the legal provisions cannot be obtained by applying rules of interpretation.<sup>8</sup>
23. The content of the challenged provision can be determined by means of established methods of interpretation. The challenged regulation raises no such doubts regarding its content and purpose, as the Constitutional Court found in Decision No. U-I-227/06, dated 16 November 2006 (Official Gazette RS, No. 131/06, and OdlUS XV, 81), with regard to the second paragraph of Article 162 of the Civil Servants Act in force at that time (Official Gazette RS, No. 35/05 – official consolidated text). With regard to the retirement conditions that have to be fulfilled for the termination of an employment contract, the challenged provisions refer to precisely determined provisions of the PDIA-1 or the PDIA-2, as applicable. These concern the period of employment (PDIA-1) or the pension qualifying period, excluding purchased periods (PDIA-2). As follows from Article 8 of the PDIA-1 (which defines the meaning of terms), the period of employment encompasses the insurance period without taking into account any purchased periods regarding studies and military service or added periods. Since the period of employment does not include any special periods, the moment when a civil servant fulfils the conditions that may result in the termination of his or her employment contract on the basis of the challenged provisions can be determined with certainty. The PDIA-2 defines the meaning of the term pension qualifying period, excluding purchased periods, in point 23 of Article 7. Such concerns the period of mandatory participation in the compulsory pension and disability insurance scheme and the period of pursuing agricultural activity, but without purchased pension qualifying periods. Thus, also in accordance with the amended first paragraph of Article 188 of the FBA in conjunction with the eleventh paragraph of Article 429 of the PDIA-2, only periods of insurance that can easily be identified

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<sup>8</sup> See, e.g., Constitutional Court Decision No. U-I-29/04, dated 30 June 2005 (Official Gazette RS, No. 68/05, and OdlUS XIV, 64).

are taken into account. Consequently, the allegations that it is not possible to determine the content and purpose of the challenged provisions are not true.

24. In addition, the applicant's allegations that the challenged provisions lack clarity with regard to the existence of the possibility of new recruitment in the public sector is not true, as these provisions do not interfere with the issue of concluding new employment contracts in the public sector (which is governed by other regulations). The challenged provisions regulate a special manner of terminating an employment contract in accordance with the seventh indent of Article 75 of the Employment Relationships Act (Official Gazette RS, Nos. 42/02, and 103/07 – hereinafter referred to as the ERA) or, at present, the seventh indent of Article 77 of the Employment Relationships Act (Official Gazette RS, Nos. 21/13, and 78/13 – hereinafter referred to as the ERA-1).
25. Furthermore, the legal nature of a final decision on the termination of an employment contract is clear (the second paragraph of Article 188 and the second paragraph of Article 246 of the FBA). It entails a declaratory decision by which the existence of the conditions for the termination of an employment contract, determined by the first paragraph of Article 188 or the first paragraph of Article 246 of the FBA, is confirmed and the right to severance pay, determined by the second paragraph of Article 188 or the second paragraph of Article 246 of the FBA, is concretised. The adoption of such a decision is also necessary due to the possibility to extend an employment contract despite the fulfilment of the conditions determined by the first paragraph of Article 188 or the first paragraph of Article 246 of the FBA that is provided to the employer and the civil servant by the challenged third paragraph of Article 188 or the third paragraph of Article 246 of the FBA. Such a decision thus entails a decision by the employer whether to terminate the employment contract of a civil servant. It entails a *sui generis* termination of the employment contract, which is one of the options (i.e. in other cases determined by law) envisaged by the Act regulating employment relationships (the seventh indent of Article 75 of the ERA or, at present, the seventh indent of Article 77 of the ERA-1). In some instances, a legal remedy is provided against the employer's decision to terminate an employment contract (a complaint or an objection), depending on the field or part of the public sector wherein the civil servant is employed.<sup>9</sup> When such preliminary protection of workers' rights is provided by the employer, the moment the decision becomes final and thereby the employment contract is terminated depends on the exercise of such a legal remedy. In all such cases, the employer's decision becomes final either when the time limit for lodging the legal remedy expires or upon the decision on the legal remedy. If the legislation does not provide for preliminary protection of workers' rights by the employer (e.g. civil servants in public institutes, with the exception of institutes in the field of cul-

9 The possibility to lodge a legal remedy is, for example, determined by the Civil Servants Act (Official Gazette RS, Nos. 63/07 – official consolidated text, and 65/08 – hereinafter referred to as the CSA), the Realisation of the Public Interest in the Field of Culture Act (Official Gazette RS, Nos. 77/07 – official consolidated text, 56/08, 4/10, and 20/11 – RPIFCA), the Organisation and Financing of Education Act (Official Gazette RS, Nos. 16/07 – official consolidated text, 36/08, 58/09, and 20/11 – OFEA), the Defence Act (Official Gazette RS, No. 103/04 – official consolidated text – hereinafter referred to as the DefA).

ture and education and schooling, public agencies, public funds, etc.), and the general legislation (the Act regulating employment relationships), which does not envisage such a legal remedy in instances of the termination of employment contracts, applies, a civil servant's employment contract is terminated already on the basis of the employer's decision. However, such entails that the employment contract is in no event terminated directly on the basis of the challenged provisions of the FBA. Therefore, the case at issue does not concern *ex lege* termination of employment contracts.

26. In light of the above, Article 188 of the FBA (both prior to the entry into force of the PDIA-2 and thereafter) and Article 246 of the FBA are not inconsistent with the principle of the clarity and precision of regulations determined by Article 2 of the Constitution.

## B – IV

### **Review from the viewpoint of the prohibition of discrimination (the first paragraph of Article 14 of the Constitution)**

#### GENERAL PREMISES

27. The applicant alleges that the challenged regulation entails an interference with the right to non-discriminatory treatment as it treats civil servants differently on grounds of age and sex with regard to the termination of an employment contract due to the fulfilment of the statutorily determined retirement conditions.
28. The prohibition of discrimination is a universal principle of international law. The first paragraph of Article 14 of the Constitution prohibits discrimination on grounds of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. Discrimination is also prohibited by numerous international instruments that are binding on the Republic of Slovenia, such as the Universal Declaration of Human Rights of 1948 (*Človekove pravice, Zbirka mednarodnih dokumentov, I. del, Univerzalni dokumenti* [Human Rights, Collection of International Documents, Part I, Universal Documents], Društvo za ZN za Republiko Slovenijo, Ljubljana 1995, p. 1), the International Covenant on Civil and Political Rights (Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92 – ICCPR), 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), the ESC, International Labour Organisation Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (Official Gazette of the Federal People's Republic of Yugoslavia, MP, No. 3/61, and the Notification of Succession Act, Official Gazette RS, No. 54/92, MP, No. 15/92).
29. The prohibition of discrimination on grounds of age and sex is also regulated by EU law.<sup>10</sup> The TFEU determines already in its general provisions (Article 10) that

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<sup>10</sup> The legal system of the EU is based on the Treaty on European Union (consolidated version, OJ C 326, 26. 10. 2012 – hereinafter referred to as the TEU) and the Treaty on the Functioning of the European Union (consolidated version, OJ C 326, 26. 10. 2012 – hereinafter referred to as the TFEU). In order to achieve objectives

in defining and implementing its policies and activities the EU shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. On this basis, the first paragraph of Article 19 of the TFEU determines the Council's competence to take (with the consent of the European Parliament) appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. In addition, in the chapter on Social Policy, the TFEU specifically determines that the European Parliament and the Council, after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and the equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value (the third paragraph of Article 157). The existence of the principle of the prohibition of discrimination on grounds of age as a general principle of EU law, which in the field of employment and work is given special expression by Directive 2000/78/EC and Directive 2006/54/EC,<sup>11</sup> has also been recognised by the CJEU.<sup>12</sup>

30. The FBA does not explicitly state that it implements the two above-mentioned Directives into the Slovene legal order.<sup>13</sup> The challenged regulation governs the termination of an employment contract upon the fulfilment of the statutorily determined retirement conditions that are determined differently with regard to age and sex. By determining such a differentiation, the FBA interferes with an area (the prohibition of discrimination) that is also the subject matter that is regulated by Directive 2000/78/EC and Directive 2006/54/EC. In this sense, the challenged provisions of the FBA entail the implementation of the mentioned Directives in the Slovene legal order.
31. With regard to national regulations implementing EU law, the Constitutional Court already adopted the positions that, on the one hand, it is not competent to review the consistency of these regulations with Directives,<sup>14</sup> while, on the other hand, its competence to review the conformity of regulations that implement Directives into the

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they have in common, the Member States confer competences on the EU (the first paragraph of Article 1 of the TEU). The EU shall pursue its objectives by appropriate means commensurate with the competences that are conferred upon it in the Treaties (the sixth paragraph of Article 3 of the TEU). Competences not conferred upon the EU in the Treaties remain with the Member States (the first paragraph of Article 4 of the TEU), taking into account the principle of conferral of competences, the principle of subsidiarity, and the principle of proportionality (Article 5 of the TEU). The areas of, delimitation of, and arrangements for exercising the competences of the EU are determined in the TFEU (the first paragraph of Article 1 of the TFEU).

- 11 The CJEU Judgment in the case *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, C-447/09, dated 13 September 2011, Para. 38.
- 12 The CJEU Judgments in the case *Werner Mangold v. Rüdiger Helm*, C-144/04, dated 22 November 2005, Para. 75, and the case *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, C-555/07, dated 19 January 2010, Paras. 21 and 50.
- 13 The Implementation of the Principle of Equal Treatment Act (Official Gazette RS, No. 93/07 – official consolidated text – IPETA), the ERA, the ERA-1, and the PDIA-1 are explicitly intended for the implementation of the mentioned Directives in the Slovene legal order.
- 14 See Constitutional Court Orders No. U-I-44/05, dated 11 September 2007, and No. U-I-116/07, dated 25 May 2007, and Constitutional Court Decision No. U-I-32/04, dated 9 February 2006 (Official Gazette RS, No. 21/06, and OdIUS XV, 10).

internal legal order with the Constitution cannot be excluded.<sup>15</sup> In the case at issue, such entails that the Constitutional Court is competent to review the consistency of the challenged provisions of the FBA with the Constitution, however, it is not competent to review the consistency of these provisions of the FBA with the [above-cited] Directives.

32. Without prejudice to the above-stated, when reviewing regulations that entail the implementation of Union law, on the basis of the third paragraph of Article 3a of the Constitution,<sup>16</sup> the Constitutional Court must take into account the primary and secondary legislation of the EU and the case law of the CJEU.<sup>17</sup> The Constitution does not regulate in more detail the position of rules that enter the Slovene constitutional order on the basis of the third paragraph of Article 3a of the Constitution, neither in terms of their temporal effects nor their hierarchical position.<sup>18</sup> From this constitutional provision there follows only the requirement that, in the exercise of their competences, all state authorities, including the Constitutional Court, must apply EU law in accordance with the legal order of this [international] organisation.<sup>19</sup> The effect of EU law in the internal legal order thus depends on the rules that regulate the functioning of the EU at a given moment. Such concerns the fundamental principles of EU law that are enshrined in the TEU and the TFEU or that the CJEU has developed through its case law. Due to the third paragraph of Article 3a of the Constitution, the fundamental principles that define the relationship between internal law and EU law are at the same time also internal constitutional principles that have the same binding effect as the Constitution.<sup>20</sup>
33. The most important of these is the principle of the primacy of Union law, which entails that in the event of an inconsistency between EU law and the law of the

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15 See Constitutional Court Order No. U-I-113/04, dated 7 February 2007 (Official Gazette RS, No. 16/07, and OdlUS XVI, 16), and Constitutional Court Decision No. U-I-37/10, dated 18 April 2013 (Official Gazette RS, No. 39/13).

16 The third paragraph of Article 3a of the Constitution determines the following: "Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations."

17 The first and second paragraphs of Article 3a of the Constitution define the procedural and substantive conditions for the transfer of the exercise of a part of sovereign rights to an international organisation (M. Avbelj, *Slovensko ustavno pravo v odnosu do prava EU* [Slovene Constitutional Law in Relation to EU Law] in: I. Kaučič (Ed.), *Pomen ustavnosti in ustavna demokracija, Znanstveni zbornik Dvajset let Ustave Republike Slovenije* [The Importance of Constitutionality and Constitutional Democracy, 20 Years of the Constitution of the Republic of Slovenia, Collection of Scientific Papers], Ustavno sodišče Republike Slovenije, Ljubljana 2012, p. 346). The first paragraph of Article 3a of the Constitution entailed the constitutional legal basis that enabled Slovenia to transfer the exercise of a part of its sovereign rights to international organisations, first and foremost to the EU, and thereby it at least partially denied the Constitution the power that had been assigned to it in accordance with the classical spirit of the organisation of the state upon its adoption (M. Cerar in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, p. 74).

18 F. Testen in: L. Šturm (Ed.), *op. cit.*, p. 91.

19 See Constitutional Court Order No. U-I-65/13, dated 26 September 2013.

20 Cf. S. Nerač, *Recepcija prava Evropske unije v nacionalno ustavno pravo: Ustavno sodišče med pravom Evropske unije in Ustavo* [The Reception of European Union Law into National Constitutional Law: the Constitutional Court between European Union Law and the Constitution], in: I. Kaučič (Ed.), *op. cit.*, p. 383.

Member States, EU law has to be given precedence over the law of a Member State. Other fundamental principles that regulate the relationship between EU law and national law include the principle of sincere cooperation, including the principle of consistent interpretation (the third paragraph of Article 4 of the TEU),<sup>21</sup> the principle of the direct applicability of EU law, the principle of the direct effect of EU law, the principle of conferral of competences (the first paragraph of Article 5 of the TEU), the principle of subsidiarity (the third paragraph of Article 5 of the TEU), and the principle of proportionality (the fourth paragraph of Article 5 of the TEU).

34. As internal constitutional law principles, these principles also bind the Constitutional Court in the exercise of its competences in the framework of legal relationships that concern EU law. When interpreting national law (the Constitution and other regulations) in a procedure for the review of regulations, the Constitutional Court must take into account EU law, namely in such manner as it derives from the acts of the EU or as it has developed in the case law of the CJEU. It must interpret national law in the light of EU law in order to ensure its full effectiveness.<sup>22</sup>
35. In the case at issue, such entails that the Constitutional Court will take into account Directive 2000/78/EC, Directive 2006/54/EC, and the case law of the CJEU when interpreting the challenged provisions of the FBA and in the review of their consistency with the right to non-discriminatory treatment according to the Constitution.

#### DISCRIMINATION ON GROUNDS OF AGE

36. The applicant alleges an inconsistency of the challenged provisions with the prohibition of discrimination on grounds of age (the first paragraph of Article 14 of the Constitution). It is of the opinion that from the viewpoint of labour law protection, with regard to the termination of an employment contract, the challenged regulation inadmissibly places all civil servants who have fulfilled the prescribed retirement conditions in a less favourable position, namely, only older civil servants in comparison to younger civil servants who have not yet fulfilled these conditions.
37. The first paragraph of Article 14 of the Constitution determines that in Slovenia everyone is guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance.
38. It follows from the hitherto constitutional case law that the Constitutional Court has not yet adopted an explicit position on the issue of admissible discrimination on grounds of age in relation to the termination of an employment relationship. By Decision No. U-I-49/98, dated 25 November 1999 (Official Gazette RS, No. 101/99, and OdlUS VIII, 266), it found that a provision of the Employment Relationships Act in force at that time (Official Gazette RS, Nos. 14/90, 5/91, 29/92, 71/93, 19/94, and

21 It derives from the case law of the CJEU that Member States, and thus also national courts, must ensure the application of and respect for EU law in their territory (See the Judgment in the case *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, dated 13 March 2007, Para. 38).

22 See Constitutional Court Decision No. Up-2012/08, dated 5 May 2009 (Official Gazette RS, No. 22/09, and OdlUS XVIII, 65).

38/94), which applied to all employed persons, was inconsistent with the Constitution since it determined the *ex lege* termination of an employment contract upon the fulfilment of the conditions for acquiring the right to a full old age pension for male and female workers, and the employer's consent was required for the continuation of the employment relationship. The Constitutional Court adopted the position that there was a violation of the prohibition of discrimination as under the regulation of pension insurance in force at that time the conditions had been determined differently for men and for women with regard to age as well as the pension qualifying period for obtaining a full old age pension,<sup>23</sup> which entailed that the employment relationships of individuals were terminated differently with regard to their sex and indirectly also with regard to their age. As regards the termination of an employment relationship in the state administration upon the fulfilment of retirement conditions, the Constitutional Court has adopted two decisions. By Order No. U-I-329/04, dated 12 May 2005 (Official Gazette RS, No. 53/05, and OdlUS XIV, 27), it dismissed a petition for the initiation of a procedure for the review of the constitutionality of Article 92 of the DefA that, on the basis of the fifth indent of Article 75 of the ERA and Article 153 of the Civil Servants Act (Official Gazette RS, No. 56/02), determined that the employment relationship of a person serving in the field of defence in the armed forces shall be terminated no later than by the end of the calendar year wherein he or she fulfils the conditions for acquiring the right to an old age pension according to general regulations, regardless of the period for which the employment contract was concluded in accordance with general provisions. It found that the allegations as to the inconsistencies of the challenged regulation with the second paragraph of Article 14 and Article 49 of the Constitution were unsubstantiated. In the opinion of the Constitutional Court, due to the specificity and different nature of the work, organisation, and other requirements of professional service in the army, the legislature was accorded the possibility to regulate individual questions of labour law [in this field] differently than they are regulated in other fields of employment. It dismissed the allegation of an inconsistency with Article 49 of the Constitution by reasoning that this constitutional provision does not guarantee long-term or even permanent employment in a specific post. By Decision No. U-I-227/06 it reviewed the second paragraph of Article 162 of the Civil Servants Act (Official Gazette RS, No. 35/05 – official consolidated text), which determined that, as regards authorities of the state or local communities administrations, a supervisor may terminate a civil servant's employment contract in the regular manner, taking into account the period of notice, at any time after the first day of the month following the month when the civil servant attained the full pensionable age and the full pension qualifying period for retirement according to the legislation in force at that time. The Constitutional Court abrogated the challenged provisions, however not due to discrimination, but because they were unclear (Article 2 of the Constitution).

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23 On the basis of the PDIA workers acquired the right to an old age pension upon the fulfilment of the condition of attaining the full pension qualifying period and the age of 58 years (men) and 53 years (women).

39. In the case at issue, however, the applicant alleges an inconsistency of the challenged provisions with the prohibition of discrimination on grounds of age. In order to assess whether the allegation of unequal, discriminatory treatment is substantiated, the Constitutional Court must answer the following questions: 1) does the alleged different treatment refer to ensuring or exercising a human right or fundamental freedom; 2) if so, is there a difference as to the treatment of the persons whom the applicant is comparing; 3) are the *de facto* positions that the applicant is comparing essentially the same and thus the differentiation is based on a circumstance determined by the first paragraph of Article 14 of the Constitution; and 4) if the differentiation is indeed based on a circumstance determined by the first paragraph of Article 14 of the Constitution and thus there is an interference with the right to non-discriminatory treatment, is such interference constitutionally admissible.<sup>24</sup> As EU law must be taken into account in the case at issue, the Constitutional Court must also consider EU law, including the case law of the CJEU, when reviewing the constitutional admissibility of the challenged regulation.
40. The first paragraph of Article 14 of the Constitution prohibits discrimination in ensuring, exercising, and protecting human rights and fundamental freedoms with regard to an individual's personal circumstances. In order to establish a violation of the constitutional prohibition of discriminatory treatment, the determination of the existence of inadmissible discrimination in the enjoyment of any human right suffices, whereby it is not necessary to demonstrate an interference with this human right in and of itself.<sup>25</sup> In the case at issue, the applicant alleges discriminatory treatment on grounds of age by the statutory regulation of the termination of an employment contract upon the fulfilment of statutorily determined retirement conditions.
41. The alleged different treatment concerns the exercise of the right to freedom of work and, in this framework, also [the right] to freely choose one's employment. In accordance with the third paragraph of Article 49 of the Constitution, everyone shall have access under equal conditions to any position of employment. Access under equal conditions to any position of employment entails that the termination of an employment relationship must also be regulated under equal conditions for all, i.e. the personal circumstances determined by the first paragraph of Article 14 of the Constitution may not be the only criterion of differentiation.<sup>26</sup> However, this constitutional provision guarantees neither long-term nor permanent employment in a specific post.<sup>27</sup> In accordance with the Constitution, instances of and conditions

24 See Constitutional Court Decisions No. U-I-212/10, dated 14 March 2013 (Official Gazette RS, No. 31/13), and No. U-I-425/06, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 29).

25 As held by the Constitutional Court already in Decisions No. U-I-146/07, dated 13 November 2008 (Official Gazette RS, No. 111/08, and OdlUS XVII, 59), No. U-I-425/06, and No. U-I-212/10. The European Court of Human Rights (hereinafter referred to as the ECtHR) also assesses alleged violations of the prohibition of discrimination under Article 14 of the ECHR in the same manner – *cf.* the Judgment in the case *E. B. v. France*, dated 22 January 2008 (Grand Chamber), Para. 48.

26 See Constitutional Court Decision No. U-I-49/98, Paragraph 14.

27 *Cf.* Constitutional Court Order No. U-I-329/04, Paragraph 14, and Constitutional Court Decision No. U-I-

for the termination of employment relationships may be determined only by law, which follows from Article 66 of the Constitution, which requires that the state create opportunities for employment and work and ensure their protection by law. The state implements this obligation mainly by laying down protective norms and determining a minimum of rights for workers, who are usually the weaker party in comparison to employers.<sup>28</sup> In light of these statements, legal protection with regard to the termination of an employment relationship falls within the scope of the third paragraph of Article 49 of the Constitution. [The case at issue] thus concerns an allegation of inadmissible discrimination in the exercise of this human right.

42. In instances of the termination of an employment contract due to the fulfilment of retirement conditions, the challenged regulation treats civil servants differently with regard to their age, whereby from the viewpoint of performing their work, they are in a comparable position.<sup>29</sup>
43. Directive 2000/78/EC must be taken into account in determining the constitutional admissibility of the challenged regulation. The purpose of this Directive is to establish a general framework for combating discrimination on grounds of religion, belief, disability, age, or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment (Article 1 of Directive 2000/78/EC). The concept of discrimination (the principle of equal treatment) is defined by Article 2 of Directive 2000/78/EC.<sup>30</sup> The Directive accords to the

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271/95, dated 15 May 1996 (Official Gazette RS, No. 27/96, and OdlUS V, 82, Paragraph 65).

28 See, e.g., Constitutional Court Decisions No. U-I-271/95, Paragraph 65, and No. U-I-294/04, dated 16 June 2005 (Official Gazette RS, No. 62/05, and OdlUS XIV, 52, Paragraph 24).

29 Cf. the CJEU Judgment in the case *European Commission v. Hungary*, C-286/12, dated 6 November 2012, Para. 50.

30 Article 2 of Directive 2000/78/EC determines as follows:

- “1. For the purposes of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
  - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
  - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
    - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
    - (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.
3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating

Member States a wide margin of appreciation for justified different treatment on grounds of age in the field of employment and the labour market, as national law may provide for [justified] instances of different treatment on grounds of age. In the sense of the first paragraph of Article 6 of the mentioned Directive,<sup>31</sup> different treatment on grounds of age does not constitute discrimination if the Member States, within the context of national law, establish that it is objectively and reasonably justified by a legitimate aim. However, the means of achieving that aim must be appropriate and necessary. In accordance with the mentioned Directive, aims that may be regarded as legitimate in the meaning of the cited provision include, *inter alia*, legitimate employment policy, labour market, and vocational training objectives. In interpreting Directive 2000/78/EC, which allows justification of different treatment on grounds of age, the CJEU in its decisions has often referred to recital 25 of the Directive, which outlines the essential importance of distinguishing “between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.”

44. In accordance with the standpoint of the CJEU, the automatic termination of an employment contract upon the fulfilment of retirement conditions entails discrimination on grounds of age that may, however, be admissible if it is justified by a legitimate aim and when the means of achieving that aim are appropriate and necessary.<sup>32</sup> However, the CJEU has also repeatedly emphasised that the automatic termination of the employment contracts of employees who have met the conditions as regards age and contributions paid for the exercise of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely applied. It is a mechanism that is based on the balance to be struck between political, economic, social, demographic, and/or budgetary considerations, and the choice to be made between prolonging people’s working lives or, conversely, providing for early retirement.<sup>33</sup> The termination of an employment contract does not have the automatic effect of forcing the affected person to leave the labour market for good. It does not prevent an employee who wishes to continue his or her professional activity after reaching retirement age, e.g. for financial reasons, from doing so.

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or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

[...]”

- 31 Article 6 of Directive 2000/78/EC is entitled Justification of differences of treatment on grounds of age.
- 32 See the CJEU Judgments in the case *Gisela Rosenblatt v. Oellerking Gebäudereinigungsges. mbH*, C-45/09, dated 12 October 2010, the joined cases *Vasil Ivanov Georgiev v. Tehnicheski universitet - Sofia, filial Plovdiv*, C-250/09 and C-268/09, dated 18 November 2010, the joined cases *Gerhard Fuchs and Peter Köhler v. Land Hessen*, C-159/10 and C-160/10, dated 21 July 2011, and the case *Félix Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05, dated 16 October 2007.
- 33 See, e.g., the CJEU Judgments in the case *Félix Palacios de la Villa*, Para. 69, and in the case *Gisela Rosenblatt*, Para. 44.

45. In the assessment of the Constitutional Court, the challenged regulation on the basis of which an employment contract is terminated upon the fulfilment of retirement conditions precisely determined by the PDIA-1 or the PDIA-2, as applicable, which refer to the age of the insured persons, entails an interference with the right of older civil servants to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution), and therefore an assessment of the constitutional admissibility of the interference is required.<sup>34</sup> An interference with a human right is only constitutionally admissible if it is grounded in a constitutionally admissible, i.e. reasonably justified objective (the third paragraph of Article 15 of the Constitution) and if it is consistent with the principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court conducts an assessment of the consistency of a challenged regulation with the general principle of proportionality by means of the so-called strict proportionality test, which encompasses a review of three aspects of the interference, namely a review of the appropriateness, necessity, and proportionality in the narrow sense.<sup>35</sup>

#### THE CONSTITUTIONALLY ADMISSIBLE OBJECTIVE

46. The main objective of the FBA as a whole, as such was stated by the Government and as derives already from Article 1 of the FBA, is to ensure sustainable public finances and reduce budgetary expenditure. Even though the legislature did not explicitly define any special objectives of the challenged measure, in the opinion of the Government, such does not entail that the challenged regulation does not have a (different) legitimate objective. In any event, the realisation of the objectives of social policy and employment policy must be included among the objectives that the legislature and the Government pursued with this measure. In accordance with the Government's statements, the challenged measure thus allegedly pursues the objectives of personnel restructuring and establishing a favourable age structure as regards civil servants, encouraging access to employment by means of a better intergenerational distribution, and controlling public finance expenditure. The termination of the employment contract of a civil servant who has fulfilled the conditions for acquiring the right to an old age pension without reductions is only one of the instruments by means of which the Government wishes to achieve in part a reduction in the number of public sector employees (a reduction in the public sector wage bill) and in part an altered age structure of civil servants. With regard to such, the Government also submitted data from personnel reports regarding the number of employees in state authorities broken down by age as of 31 December for the years from 2008 to 2011, and the Ministry of the Interior submitted data from the central personnel records of the state administration (hereinafter referred to as the central personnel records) as of 31 December 2012 and 1 June 2013.

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34 The Constitutional Court reviewed the prohibition of discrimination with regard to the termination of an employment contract in relation to age in the framework of the first paragraph of Article 14 of the Constitution already in Decision No. U-I-49/98.

35 See Constitutional Court Decisions No. U-I-18/02, dated 24 October 2003 (Official Gazette RS, No. 108/03, and OdlUS XII, 86), Paragraph 25, and No. U-I-212/10, Paragraph 19.

47. The FBA is a law by which the Government tackled the consequences of the crisis through a package of austerity measures. The measures affected all social groups (for example, civil servants, retired persons, families, young persons, persons with disabilities). The FBA amends and supplements the provisions of 39 other laws (See Article 1 of the FBA). Therefore, the legislature only defined the objective that the adopted measures pursue in all areas with which the FBA interferes as the objective of this law. However, this does not entail that in specific areas the adopted measures do not also pursue other objectives that are only important for those areas. What applies in general to all measures contained in the FBA also applies to the measure of the termination of an employment contract upon the employee fulfilling the conditions for acquiring the right to an old age pension. These measures are intended to overcome the critical conditions that resulted from the economic and financial crisis, which also affected the Republic of Slovenia, and to fulfil the requirements in the context of the excessive deficit procedure that the European Commission initiated against the Republic of Slovenia. It follows already from the legislative materials<sup>36</sup> that in relation to the challenged measure the legislature drew attention to employment policy by referring to the case law of the CJEU and Directive 2000/78/EC, according to which Member States may provide that different treatment on grounds of age shall not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market, and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. All of the above required the adoption of certain employment policy measures in the public sector with the purpose of harmonising the employment rates in the public and the private sectors. Along with the decrease in economic growth, the number of private sector employees namely also decreased such that their number fell three years in a row. In contrast, in these years the number of employees in the state sector increased by 1.9% in 2009 and 2010 and by 0.6% in 2011.

48. According to the CJEU, it cannot be inferred [from the first paragraph of Article 6 of Directive 2000/78/EC] that the lack of precision in the item of legislation at issue, as regards the objective pursued, automatically excludes the possibility that it may be justified under that provision. In the absence of such precision, it is important that other elements taken from the general context of the measure concerned (i.e. the measure under review) enable the underlying objective of that measure to be identified for the purposes of review by the courts whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary.<sup>37</sup> As regards reliance on several objectives at the same time, it may be inferred from the case law that the coexistence of a number of objectives does not preclude the existence of a legitimate

36 See the Draft of the Fiscal Balance Act – FBA, The Gazette of the National Assembly, dated 17 April 2012, EPA 263-VI (hereinafter referred to as the Draft of the FBA), the reasoning regarding Article 205, p. 187.

37 Held by the CJEU in the joined cases *Gerhard Fuchs and Peter Köhler*, Para. 39, in the case *Félix Palacios de la Villa*, Paras. 56 and 57, in the case *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-341/08, dated 12 January 2010, Para. 40, and in the case *Gisela Rosenblatt*, Para. 58.

aim within the meaning of the first paragraph of Article 6 of Directive 2000/78/EC.<sup>38</sup> This entails that, in addition to the main objective defined by a statute, the Constitutional Court may also take into account objectives that can be identified on the basis of other circumstances. In light of such, the Constitutional Court, in addition to the objective defined by the FBA (ensuring sustainable public finances and reducing budget expenditures), also considered the objective that can be inferred from the legislative materials and which the Government stated in its opinion, namely to establish a favourable age structure of civil servants. In the assessment of the Constitutional Court, however, one evident objective of the challenged regulation is also the prevention of conflicts regarding an employee's ability to perform his or her work after a certain age. Hereinafter, the Constitutional Court had to consider whether these objectives are constitutionally admissible.

49. The CJEU has already adopted the position that while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of the first paragraph of Article 6 of Directive 2000/78/EC.<sup>39</sup> The objectives that a Member State relied on may be linked to one another or classified in order of importance.<sup>40</sup> At the national level, Member States enjoy broad discretion in their choice not only to pursue a particular objective in the field of social and employment policy, but also in the determination of measures capable of achieving it.<sup>41</sup>
50. According to the position of the CJEU, encouragement of recruitment may constitute a legitimate aim of the social policy or employment policy of the Member States in terms of the first paragraph of Article 6 of Directive 2000/78/EC, in particular when the promotion of the access of young persons to a profession is concerned.<sup>42</sup> The establishment of a balanced age structure in order to ensure high-quality service, facilitate the planning of retirements, ensure the promotion of civil servants, particularly younger civil servants among them, and prevent disputes that might arise upon retirement regarding an employee's ability to perform his or her work, may further constitute a legitimate aim under this Directive.<sup>43</sup>
51. In light of all of the above, the Constitutional Court assesses that the main objective of the challenged measure is to ensure sustainable public finances, which in the field of employment entails a reduction in the public sector wage bill. However, according to the position of the CJEU, rationalising expenditure cannot be a constitutionally admissible aim that could in and of itself justify an interference with the right to non-discriminatory treatment or be a legitimate aim in the meaning of the first

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38 The CJEU Judgment in the case *Gerhard Fuchs and Peter Köhler*, Para. 44.

39 *Ibid.*, Paras. 73 and 74.

40 *Ibid.*, Para. 46.

41 Held by the CJEU in the Judgments in the case *Werner Mangold*, Para. 63, and in the case *Félix Palacios de la Villa*, Para. 68.

42 See the CJEU Judgment in the case *Vasil Ivanov Georgiev*, Para. 45.

43 See the CJEU Judgment in the joined cases *Gerhard Fuchs and Peter Köhler*, Paras. 60 and 89.

paragraph of Article 6 of Directive 2000/78/EC, therefore the Constitutional Court had to review whether the establishment of a balanced age structure of civil servants and the prevention of disputes regarding a civil servant's ability to perform his or her work after reaching a certain age constitute constitutionally admissible objectives.

52. According to the Government's statements, an additional objective of the challenged provisions of the FBA is the establishment of a favourable age structure of civil servants. It is evident from the data and tables that the Government submitted to the Constitutional Court that the age of the employees of the authorities of the state administration is increasing, and younger civil servants predominantly perform their work on the basis of fixed term employment contracts, work contracts, or as student work. The proportion of employees aged 39 years or less is steadily decreasing<sup>44</sup> due to the increasing proportion of employees aged 40 years or more.<sup>45</sup> The decrease in the proportion of employees aged 30 years or less is the most acute, as the proportion of this age group dropped from 18.6% on 31 December 2008 to 12.4% by 31 December 2011. This entails that in the period before the entry into force of the FBA the proportion of younger civil servants (30 years or less) in the state administration decreased, while according to the latest available data only 32.4% of the youngest civil servants have a permanent employment contract. On the contrary, the proportion of civil servants in the state administration who are older than 50 years of age and have a permanent employment contract amounts to 98%.
53. The Constitutional Court assesses that the aim of establishing a balanced age structure of civil servants constitutes a constitutionally admissible objective. The employment of civil servants of different ages namely provides an opportunity for the transfer of experience from older to younger employees and for the younger employees to convey the knowledge they have obtained in their education to older employees. The varied age structure thus contributes to the quality of public services in the state administration as well as in the public sector as a whole.
54. In the assessment of the Constitutional Court, the prevention of disputes regarding an employee's ability to perform his or her work after a certain age also constitutes a constitutionally admissible objective. Consequently, civil servants are protected from procedures for the establishment of their ability to work and to achieve the expected work results in cases when civil servants are no longer fit for service due to their age. While in such cases the employer may terminate their employment contract due to inability, this may entail a severe interference with the personal integrity of employees, who may have been very successful in their active period, but the decline of their vigour due to their age prevents them from reaching the required minimum work results, which they may find difficult to accept.<sup>46</sup>

44 [Their proportion amounted to] 54.4% on 31 December 2008 and then gradually dropped to 47.1% by 31 December 2011. According to data from the central personnel records, on 1 June 2013 their proportion only amounted to 43.3% of all employees in the state administration.

45 [Their proportion amounted to] 45.7% on 31 December 2008 and then gradually increased to 52.9% by 31 December 2011. According to data from the central personnel records, the proportion of civil servants in the state administration who are older than 40 years increased to 56.6% by 1 June 2013.

46 See also the CJEU, e.g., in its judgment in the joined cases *Gerhard Fuchs and Peter Köhler*, Para. 50.

55. In light of the above, the Constitutional Court assesses that the interference with the right to non-discriminatory treatment aims to achieve constitutionally admissible objectives and is therefore not inadmissible in this aspect.

#### APPROPRIATENESS

56. As it established the existence of constitutionally admissible objectives, the Constitutional Court also had to assess whether the challenged measure was appropriate and necessary for the attainment of the above-mentioned objectives, and proportionate in the narrower sense. From the aspect of the criterion of appropriateness, the Constitutional Court verifies if the interference under assessment is appropriate for attaining the pursued objective in the sense that this objective may in fact be attained through the interference with the human right.
57. According to the position of the CJEU, only general statements concerning the appropriateness of a specific measure to contribute to employment policy, labour market, or vocational training objectives are not enough to demonstrate that the aim of that measure can justify a derogation from the principle of the prohibition of discrimination on grounds of age, and, moreover, on the basis of such statements it cannot reasonably be concluded that the means chosen are appropriate to achieving that aim.<sup>47</sup> The CJEU stated that the first paragraph of Article 6 of Directive 2000/78/EC imposed on Member States the obligation to establish with a high standard of proof the legitimacy of the aim relied on as justification.<sup>48</sup> With regard to the assessment of the degree of accuracy of the evidence required, the CJEU pointed out that Member States enjoy broad discretion in the choice of the measure they consider appropriate.<sup>49</sup> That [choice] may be based on economic, social, demographic, and/or budgetary considerations, which include existing and verifiable data, as well as forecasts that, by their nature, may prove to be inaccurate and are thus to some extent inherently uncertain. The measure in question may, moreover, be based on political considerations, which will often involve a compromise between a number of possible solutions and, again, cannot with certainty lead to the expected result.<sup>50</sup> In order to demonstrate that the challenged measure is appropriate and necessary, it must not appear unreasonable in light of the objective pursued and must be supported by evidence whose probative value the national court has to assess in accordance with the rules of national law.<sup>51</sup> In accordance with the established case law of the CJEU, legislation is appropriate for ensuring the attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.<sup>52</sup>

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47 The CJEU Judgment in the case *The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07, dated 5 March 2009, Para. 51.

48 *Ibidem*, Para. 67, and the Judgment in the joined cases *Gerhard Fuchs and Peter Köhler*, Para. 78.

49 The CJEU Judgment in the joined cases *Gerhard Fuchs and Peter Köhler*, Para. 80.

50 *Ibidem*, Para. 81.

51 *Ibidem*, Paras. 82 and 83.

52 The CJEU Judgments in the case *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung and Oberösterreichische Landesregierung*, C-169/07, dated 10 March 2009, Para. 55, in the case *Domnica Petersen*, Para. 53, and in

58. In the opinion of the Constitutional Court, the challenged regulation entails an appropriate measure for attaining the objective of sustainable public finances or limiting the public sector wage bill. The cost of labour of employees in the public sector<sup>53</sup> may be reduced by dismissals on the basis of labour law legislation (the ERA-1, the CSA). The challenged provisions of the FBA determine a new manner of terminating the employment contracts of those civil servants who have fulfilled the conditions for acquiring the right to an old age pension. Such terminations [of employment contracts] also contribute to reducing the public sector wage bill. The challenged measure (together with the other measures that were introduced by the FBA) thus contributes to reducing the public sector wage bill and thereby to ensuring the sustainability of public finances.
59. The challenged regulation is further an appropriate measure for achieving the objective of establishing a favourable age structure of civil servants. It namely enables the freeing up of positions that are occupied by workers who have already fulfilled the conditions for acquiring the right to an old age pension. Through a system of promotions and internal transfers, these positions will shortly become available to younger civil servants who are already employed in the civil service.<sup>54</sup> The termination of the employment contracts of older civil servants will presumably contribute to an increase in the proportion of younger civil servants, the intergenerational balance will be improved, and the personnel structure of public sector employees will be rejuvenated.
60. The pursued objectives (reducing the public sector wage bill, establishing a balanced personnel structure) can only be attained by measures that will remain in force over a long period of time. While the legislature classified the challenged measure as a provisional measure, it conditioned the termination of an employment contract with the fulfilment of an uncertain future fact.<sup>55</sup> The measure's duration is envisaged rather than determined, and only descriptively defined. It derives from data published by the Institute of Macroeconomic Analysis and Development (hereinafter

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the joined cases *Gerhard Fuchs and Peter Köhler*, Para. 85.

- 53 It follows from the clarifications of the Ministry of the Interior that expenditure for labour costs (labour costs of direct budget users and transfers to indirect budget users) entail almost one third of the total resources in the proposal for amendments to the Budget of the Republic of Slovenia for the year 2014. According to the data of the Agency of the Republic of Slovenia for Public Legal Records and Related Services (AJPES), 158,778 civil servants were employed in the public sector in June 2013.
- 54 In accordance with the third paragraph of Article 163 of the FBA, regardless of the suspension of the effects of promotions until the year 2014 (Article 162, and the first and second paragraphs of Article 163 of the FBA), civil servants and public officials acquire a professional title or a higher title and the right to payment in accordance with the acquired title if the acquisition of the professional title or higher title in question is a condition for carrying out the work at the position to which the civil servant is transferred or for which an employment contract is concluded.
- 55 Article 128 of the FBA determines that Articles 183 through 188 of this Act remain in force until the expiry of the year following the year in which economic growth will exceed 2.5% of the gross domestic product.

referred to as the IMAD) in the Summer Forecast of Economic Trends 2013<sup>56</sup> that the growth of the gross domestic product was negative in 2012. It follows from this Forecast that a further decrease in economic activity is expected in 2013. The gross domestic product is expected to drop by 2.4% in 2013, and a further decrease (-0.2%) is also expected in 2014. In the Autumn Forecast for the period 2012–2014,<sup>57</sup> the European Commission also projected a 1.6% decrease in the gross domestic product in 2013, and only a 0.9% increase in 2014. The presented data show that gross domestic product growth will not exceed 2.5% for some time. Even though the legislature classified the challenged measure as a provisional measure, considering the economic indicators,<sup>58</sup> it thus entails a measure that will remain in force for a long period.

61. In addition, the measure is appropriate to attaining the objective of preventing potential disputes regarding a civil servant's ability to perform his or her work after a certain age. It namely enables the termination of a civil servant's employment contract upon fulfilment of the retirement conditions (with regard to age and the pension qualifying period) without requiring that his or her ability to perform the work in question and attain the expected work results be established in a procedure for the regular termination of an employment contract due to inability.<sup>59</sup>
62. In light of such, the Constitutional Court deems that the challenged measure is appropriate for the attainment of the objectives pursued.

#### NECESSITY

63. As part of the review of the consistency of an interference with a human right with the general principle of proportionality, the Constitutional Court also reviews whether the measure is in fact necessary (indispensable) for the attainment of the objective in the sense that the objective could not (in equal measure) be attained through a lesser interference or even without it.
64. The Constitutional Court assesses that the sustainability of public finances is threatened by the consequences of the economic and financial crisis, and therefore it accepts the Government's statement that measures for reducing the public sector wage bill are necessary.<sup>60</sup> The necessity of adopting an appropriate law is dictated by the situ-

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56 Accessible at: [http://www.umar.gov.si/fileadmin/user\\_upload/publikacije/analiza/Poletna\\_napoved\\_2013/UMAR\\_POLETNA\\_NAPOVED\\_GOSPODARSKI\\_H\\_GIBANJ\\_2013.pdf](http://www.umar.gov.si/fileadmin/user_upload/publikacije/analiza/Poletna_napoved_2013/UMAR_POLETNA_NAPOVED_GOSPODARSKI_H_GIBANJ_2013.pdf) (accessed 18 September 2013).

57 Accessible at: [http://ec.europa.eu/economy\\_finance/eu/forecasts/2012\\_autumn/si\\_en.pdf](http://ec.europa.eu/economy_finance/eu/forecasts/2012_autumn/si_en.pdf) (accessed 18 September 2013).

58 For more detail, see the Summer Forecast of Economic Trends 2013 of the IMAD, the Autumn Forecast for the period 2012–2014 published by the European Commission, and the OECD's economic forecast for Slovenia (Economic Outlook, Analysis and Forecasts, Slovenia – Economic Forecast Summary, November 2012, accessible at: <http://www.oecd.org/eco/economicoutlookanalysisandforecasts/sloveniaeconomicforecastsummary.htm>, accessed 18 September 2013).

59 See the CJEU Judgment in the joined cases *Gerhard Fuchs and Peter Köhler*, Para. 50.

60 It derives from the clarifications of the Ministry of the Interior that in the proposal for amendments to the Budget of the Republic of Slovenia for the year 2014 almost one third of the total resources entail expenditure for labour costs (labour costs of direct budget users and transfers to indirect budget users).

ation on the financial markets, the requirements of the European Commission for faster consolidation of the public finances, and the intention to uphold certain rights of employees with regard to revenue, even if on the basis of a different regulation. The entry into force of the proposed measures also entails the assurance that the Republic of Slovenia will remain a state with stable public finances and a social state.<sup>61</sup> The developments with regard to the resources allocated for public sector wages in the period 2009–2011 indicate that these have been persistently increasing from year to year, including during the time when intervention measures, as determined by the Intervention Measures Act (Official Gazette RS, No. 94/10 – IMA) and the Additional Intervention Measures for 2012 Act (Official Gazette RS, Nos. 110/11, and 43/12 – AIMA12), were in force, which additionally substantiates that an interference with public finance expenditures on such basis is necessary.<sup>62</sup> In addition, the ongoing excessive deficit procedure against the Republic of Slovenia on the basis of Article 126 of the TFEU has to be taken into account. The Council Decision of 19 January 2010 on the existence of an excessive deficit in Slovenia (2010/289/EU)<sup>63</sup> established that an excessive deficit that is not only the consequence of temporarily exceeding the reference value exists in Slovenia. In the framework of that procedure, on 7 June 2013 the Council adopted a Council Recommendation with a view to bringing an end to the situation of an excessive government deficit in Slovenia.<sup>64</sup> In [the Recommendation] the Council found that the Republic of Slovenia is facing a steeply increasing public debt due to persistently large primary deficits and, to a lesser extent, stock-flow adjustments and higher interest payments.<sup>65</sup> The Council *inter alia* recommended that Slovenia should rigorously implement the measures already adopted to increase mainly indirect tax revenue and reduce the public sector wage bill and social transfers, while being prepared to complement them with additional measures if their yield proves to be less than foreseen or if any measure is repealed by the judicial system (Point 3 of the recommendations).

65. The Government demonstrated that the average age of public sector employees is increasing, while the proportion of younger civil servants is steadily decreasing on account of the increasing proportion of older civil servants. A possible alternative

61 See also the Draft of the FBA, p. 35.

62 The resources allocated for the payment of [the so-called] gross/gross public sector wages [i.e. gross wages plus employer contributions] amounted to EUR 4,245,170,688.65 in 2009, and EUR 4,372,035,386.72 in 2010. In 2010, the nominal growth in the resources for gross/gross public sector wages paid was 2.99% in comparison to 2009. In 2011, the resources for the payment of gross/gross public sector wages amounted to EUR 4,412,670,160.00. In 2011, the nominal growth in the resources for gross/gross public sector wages paid was 0.93% with regard to 2010 (See the Draft of the FBA, p. 35).

63 OJ L 125, 21. 5. 2010, p. 46.

64 Accessible at: <http://register.consilium.europa.eu/pdf/sl/13/st10/st10487.sl13.pdf> (accessed 12 June 2013).

65 From as low as 22% of GDP in 2008, the debt increased to 54% of GDP in 2012. The European Commission's updated 2013 Spring Forecast projects that it will increase to 61% of GDP in 2013, thus breaching the Treaty reference value. Based on a "no policy change" scenario, the debt is forecast to further increase to 69% of GDP in 2015 (Para. 19).

measure with regard to the aim of reducing the public sector wage bill could be the termination of the employment contracts of employees in accordance with labour law legislation, in particular, terminations for reasons of redundancy. In such a situation, the employment contracts of those civil servants who have already fulfilled the conditions for old age retirement would be terminated first, as they do not enjoy any special protection from dismissal (Article 114 of the ERA-1). However, the employment contracts of younger civil servants would also be terminated for reasons of redundancy, which could additionally reduce the proportion of employed younger civil servants, and therefore such terminations would not attain the pursued employment policy objective (i.e. a balanced personnel age structure).

66. A reduction in the number of employees in order to reduce expenditure could also be attained by other methods of terminating employment contracts, in particular by terminations of employment contracts with notice due to inability,<sup>66</sup> breach of obligation,<sup>67</sup> or even terminations of employment contracts without notice.<sup>68</sup> As such generally concern complicated procedures, before the employer as well in potential judicial proceedings (i.e. the employer has to demonstrate the existence of the reason for termination and the fulfilment of other conditions for the legality of such terminations of employment contracts), the effects of such measures would occur later than the effects of the challenged measure that merely concerns the finding that the retirement conditions are fulfilled. In addition, such procedures would interfere with the dignity of those civil servants with regard to whom the question of their ability to perform their work after a certain age would arise. When compared with the challenged regulation, such measures would not contribute to achieving the objective of stable public finances with the same efficiency, as their effects would be delayed. Furthermore, they would not necessarily contribute to balancing the personnel age structure, as they would affect civil servants of all ages. However, in the assessment of the challenged measure's necessity it is essential to consider that the objective of the challenged regulation is an employment policy intended to permanently reduce the public sector wage bill and, at the same time, to establish an appropriate personnel age structure in the long term. The above mentioned possibilities of terminating civil servants' employment contracts that are based on the assessment of an individual worker would not guarantee such permanently and systematically and would not enable a lasting structural stabilisation of expenditures in the area of labour costs. However, this does not entail that the employer is not required to terminate civil servants' employment contracts in accordance with labour law legislation if substantiated reasons for such exist. In light of such, the Constitutional Court deemed that the challenged measure is necessary to attain the outlined objectives simultaneously and with equal efficiency.

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66 See the second indent of the first paragraph of Article 89 of the ERA-1. On the basis of the first paragraph of Article 159 of the CSA, with regard to the definition of inability, the provisions of the CSA apply to civil servants in state authorities and the administrations of local communities instead of the provisions of the law that regulates employment relationships.

67 See the third indent of the first paragraph of Article 89 of the ERA-1.

68 See Article 110 of the ERA-1.

#### PROPORTIONALITY IN THE NARROWER SENSE

67. From the viewpoint of the principle of proportionality in the narrower sense, the Constitutional Court reviews whether the weight of the consequences of the interference with the affected human right under review is proportionate to the value of the objective pursued or the benefits that will result from the interference.
68. In the assessment of the Constitutional Court, the challenged measure is not disproportionate. This assessment is based on the finding that at the end of their professional career the persons whom the challenged measures concern are entitled to financial compensation in the form of an old age pension without reductions.<sup>69</sup> Moreover, the challenged regulation did not introduce mandatory retirement, as it does not prevent the affected persons from finding new employment or continuing their professional activities elsewhere.<sup>70</sup> A special possibility to continue professional activity is, *inter alia*, determined in the Labour Market Regulation Act (Official Gazette RS, Nos. 80/10, 21/13, and 36/13 – hereinafter referred to as the LMRA), which enables retired persons to perform temporary or occasional work on the basis of a contract for the provision of temporary or occasional work as a special agreement between an employer and a beneficiary, which may also have some elements of an employment relationship as determined by the law that regulates employment relationships (Articles 27a through 27g of the LMRA). In the assessment it must also be taken into account that [the challenged regulation] in fact does not concern a provisional measure, but economic indicators suggest that it will produce long-term effects. All the above-mentioned circumstances reduce the weight of the interference with the affected right of civil servants to non-discriminatory treatment.
69. Considering all the circumstances that reduce the weight of the interference with the affected right of civil servants to non-discriminatory treatment (see the preceding paragraph of the reasoning) and the importance of the objectives pursued by the challenged regulation, the Constitutional Court assesses that, even though it influences the financial as well as the social position of the affected civil servants, the challenged measure does not excessively interfere with the right of older civil servants to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution).
70. In light of the above, the challenged regulation is not inconsistent with the prohibition of discrimination on grounds of age as one of the other personal circumstances under the first paragraph of Article 14 of the Constitution.

#### DISCRIMINATION ON GROUNDS OF SEX

71. In its request the applicant also alleges the inconsistency of the challenged provisions of the FBA with the prohibition of discrimination on grounds of sex (the first paragraph of Article 14 of the Constitution).

69 See also the CJEU in the Judgments in the case *Félix Palacios de la Villa*, Para. 73, in the joined cases *Vasil Ivanov Georgiev*, Para. 54, and in the joined cases *Gerhard Fuchs and Peter Köhler*, Para. 66.

70 The CJEU considered a similar circumstance in the Judgments in the case *Gisela Rosenblatt*, Para. 75, and in the joined cases *Gerhard Fuchs and Peter Köhler*, Para. 66.

72. With regard to the termination of an employment contract, the challenged provisions of the FBA refer to the fulfilment of the above-mentioned retirement conditions under the PDIA-1 and the PDIA-2 that are determined differently for women and men. As the Government rightly pointed out in its opinion, the relevant provisions of the PDIA-1 determined the retirement age equally for both sexes (58 years); however the condition of years of employment was different with regard to sex, namely 40 years for men and 38 years for women. Prior to the entry into force of the PDIA-2, thus, in otherwise completely equal factual circumstances the challenged measure of the termination of an employment contract affected female civil servants two (working) years earlier than male civil servants.
73. In addition, the fifth paragraph of Article 27 of the PDIA-2, which is referred to by the first paragraph of Article 188 of the FBA as amended on 1 January 2013 in conjunction with the eleventh paragraph of Article 429 of the PDIA-2, does not remedy the differentiation on grounds of sex until the expiry of the transitional period on 1 January 2019. Even an additional difference with regard to the retirement conditions that enable the termination of an employment contract has been introduced. Under the new regulation, not only the condition of years of employment or the pensionable qualifying period, but also the required retirement age differ by sex. Therefore, on the basis of the text of the challenged Article 188 of the FBA currently in force, until 2019 the employment contracts of female civil servants may be terminated upon the attainment of an age that is four months less than [the retirement age determined] for men.
74. With regard to the test under Paragraph 39 of the reasoning of this Decision, the Constitutional Court deems that the challenged regulation treats civil servants differently on grounds of sex, whereby men and women are in a comparable position in terms of performing their work. It has further already been established that legal protection in connection with the termination of an employment contract falls within the scope of the third paragraph of Article 49 of the Constitution and, therefore, the case at issue concerns different treatment in the exercise of a human right.
75. When considering the constitutional admissibility of the challenged regulation, Directive 2006/54/EC, which gives expression to the prohibition of discrimination on grounds of sex,<sup>71</sup> and the case law of the CJEU must be taken into account. Point (a) of the first paragraph of Article 2 of Directive 2006/54/EC determines that there exists direct discrimination (*inter alia*) “where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.” In accordance with point (c) of the first paragraph of Article 14 of Directive 2006/54/EC, there shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to employment

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71 Previously Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 269, 5. 10. 2002, p. 15).

and working conditions, including dismissals<sup>72</sup> and pay.<sup>73</sup> Directive 2006/54/EC thus requires equal treatment regardless of sex in all aspects of employment, including the termination of an employment contract in connection with retirement. The CJEU has also repeatedly adopted the position that there exists inadmissible discrimination in the event of the termination of an employment contract that is connected with the attainment of the required retirement age if such is determined differently for men and women.<sup>74</sup>

76. The challenged regulation on the basis of which an employment contract is terminated upon the fulfilment of the statutory retirement conditions in accordance with the PDIA-1 or the PDIA-2, as applicable, whereby these are determined differently for men and women, entails an interference with the right of female civil servants (as women) to non-discriminatory treatment (the first paragraph of Article 14 of the Constitution).
77. In accordance with the Constitution, an interference with the right to non-discriminatory treatment is only admissible if it is grounded in a constitutionally admissible, i.e. reasonably justified, objective (the third paragraph of Article 15 of the Constitution), and if it is consistent with the general principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court carries out an assessment of consistency with the principle of proportionality by means of the so-called strict proportionality test.
78. The second paragraph of Article 14 of Directive 2006/54/EC must be taken into account with regard to the constitutionally admissible objective. In accordance with this provision, Member States may provide, as regards access to employment including the training leading thereto, that any difference in treatment that is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate. Furthermore, the CJEU emphasised that, given the fundamental importance of the principle of equal treatment, this exception to the prohibition of discrimination on grounds of sex must be interpreted strictly, so as to be applicable only to the

72 In connection with the question of the termination of an employment relationship upon the fulfilment of retirement conditions, the CJEU adopted the position that an age limit for the compulsory dismissal of workers pursuant to an employer's general policy concerning retirement falls within the term "dismissal", even if the dismissal involves the granting of a retirement pension (see *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, 152/84, dated 26 February 1986, Paras. 32 and 34).

73 On the basis of the second paragraph of Article 14 of Directive 2006/54/EC, Member States may provide, as regards access to employment including the training leading thereto, that a difference in treatment that is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

74 See the CJEU Judgments in the case *Pensionsversicherungsanstalt v. Christine Kleist*, C-356/09, dated 18 November 2010, Para. 46, and in the case *M. H. Marshall*, Para. 38.

determination of the pensionable age for the purposes of granting old age pensions and to the possible consequences thereof for other social security benefits.<sup>75</sup>

79. With regard to the existence of a constitutionally admissible objective, the Constitutional Court established that both the National Assembly and the Government failed to present in their submissions any reasons that could justify the described differentiation on grounds of sex, and such reasons are also not evident from the legislative materials. An objective that would justify the interference with the right of female civil servants (as women) to non-discriminatory treatment thus does not exist, nor did it exist prior to the entry into force of the PDIA-2. As a result, already the first requirement determined by the Constitution for the limitation of human rights is not fulfilled (the third paragraph of Article 15 of the Constitution).
80. The Constitutional Court therefore established that the first paragraph of Article 188 of the FBA in conjunction with the eleventh paragraph of Article 429 of the PDIA-2, the second, third, and fourth paragraphs of Article 188, and Article 246 of the FBA, insofar as they refer to female civil servants as insured women who have not yet fulfilled the same conditions for acquiring the right to an old age pension as apply to insured men, are inconsistent with the right to non-discriminatory treatment under the first paragraph of Article 14 of the Constitution (Point 1 of the operative provisions).
81. For the same reasons, the first paragraph of Article 188 of the FBA prior to the entry into force of the PDIA-2 was also inconsistent with the first paragraph of Article 14 of the Constitution, insofar as it referred to female civil servants as insured women who have not yet fulfilled the same conditions for acquiring the right to an old age pension as applied to insured men (Point 2 of the operative provisions).

## **B – V**

### **Review from the viewpoint of the unequal treatment of civil servants in comparison with private sector workers (the second paragraph of Article 14 of the Constitution)**

82. The applicant is of the opinion that the challenged provisions place public sector employees in a less favourable position in comparison to private sector employees, as for the latter the general labour law regulation does not envisage the termination of their employment contract due to the fulfilment of the statutorily determined retirement conditions.
83. The second paragraph of Article 14 of the Constitution ensures general equality before the law. It requires the legislature to regulate equal positions equally and different positions accordingly differently. If the legislature regulates essentially equal positions differently or if it regulates essentially different positions equally, a sound reason that derives from the nature of the matter must exist for such.<sup>76</sup>

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75 See the CJEU Judgments in the case *Pensionsversicherungsanstalt*, Para. 39, in the case *M. H. Marshall*, Para. 36, and the case *Niederösterreichische Landes-Landwirtschaftskammer v. Anneliese Kuso*, C-614/11, dated 12 September 2013, Paras. 52 and 53.

76 Cf. Constitutional Court Decisions No. U-I-18/11, dated 19 January 2012 (Official Gazette RS, No. 9/12), and No. U-I-149/11, dated 7 June 2012 (Official Gazette RS, No. 51/12).

84. The respective positions of employees in the public and the private sectors are fundamentally different in several aspects. Already at the outset, there is a difference in the regulation of their labour law positions, as numerous specificities for civil servants are determined by the CSA, the Public Sector Salary System Act (Official Gazette RS, Nos. 108/09 – official consolidated text, 13/10, 59/10, 85/10, 107/10, 35/11, and 46/13 – PSSSA), the DefA, and other laws. The Constitutional Court has already held that the positions of workers in the public and the private sectors are not comparable.<sup>77</sup> Even among civil servants themselves there exist numerous groups that cannot require equal treatment in comparison to other civil servants due to their different positions.<sup>78</sup>
85. With regard to the termination of an employment contract, the second part of the CSA, which applies to civil servants in authorities of the state and in the administrations of local communities, determines specificities in comparison to the general labour law regulation as determined by the ERA or as determined by the ERA-1 currently in force. These specificities are determined by Articles 153 through 162 of the CSA. Thus, for example, Article 156 determines that, instead of the ERA, provisions of the CSA apply with regard to the reasons for the regular termination of an employment contract for reasons of redundancy. The same is also true with respect to the termination of an employment contract due to inability, as the second paragraph of Article 159 of the CSA defines the term inability differently than the ERA. With regard to the termination of an employment contract for economic and financial reasons, public sector employees are in a different position in comparison to private sector employees mainly since the rights that derive from their employment relationships are financed from public resources. In this aspect, the position of civil servants thus essentially differs from the position of private sector employees, whose material rights under labour law are provided from private resources.
86. As employees in the public and private sectors are not in essentially equal positions, the legislature was entitled to regulate their positions differently. Consequently, the challenged provisions are not inconsistent with the second paragraph of Article 14 of the Constitution.

## B – VI

### **Review from the viewpoint of the principle of trust in the law (Article 2 of the Constitution)**

87. From the perspective of the affected individuals, there allegedly exists an unconstitutional interference with their reasonable expectations, as when they entered into employment and during the time of their employment, due to the absence of similar provisions prior to the [enactment of the] challenged regulation, they could

<sup>77</sup> Cf. Constitutional Court Decision No. U-I-244/08, dated 21 January 2010 (Official Gazette RS, No. 8/10), Paragraph 12.

<sup>78</sup> Cf. Constitutional Court Decision No. U-I-329/04, Paragraph 13.

not have expected such a change in their position under labour and social law. The applicant states that the challenged regulation does not contain a transitional period and therefore it is allegedly contrary to the principle of trust in the law, which is one of the principles of a state governed by the rule of law determined by Article 2 of the Constitution.

88. The legislature must respond to needs in all fields of social life by adopting appropriate statutory regulation, which is even truer if such needs concern the foundations of the functioning of the state or its ability to efficiently ensure human rights and fundamental freedoms.<sup>79</sup> Such is required by the principle that the law must adapt to social relations as one of the principles of a state governed by the rule of law (Article 2 of the Constitution).<sup>80</sup>
89. The Constitutional Court has repeatedly explained that the Constitution does not prevent a regulation from changing previously determined rights or conditions for their exercise with effect for the future, provided that such changes do not contradict constitutionally determined principles or other constitutional provisions, in particular the principle of trust in the law as one of the principles of a state governed by the rule of law as determined by Article 2 of the Constitution (Constitutional Court Decision No. U-I-66/08, dated 11 December 2008, Official Gazette RS, No. 121/08, and OdlUS XVII, 73). According to the established constitutional case law, this principle ensures individuals that the state will not aggravate their legal position in an arbitrary manner, i.e. without a sound reason substantiated by a prevailing and legitimate public interest (Constitutional Court Decisions No. U-I-66/08, No. U-I-370/06, dated 17 January 2008, Official Gazette RS, No. 15/08, and OdlUS XVII, 3, and No. U-I-79/12, dated 7 February 2013, Official Gazette RS, No. 17/13). As such concerns a general legal principle and not directly a human right, which under Article 15 of the Constitution enjoy stricter protection from potential limitations and interferences, this principle does not have absolute validity. It is open to potential limitations to a greater extent than individual human rights, i.e. in the event of a conflict or collision between this and other constitutional values, a so-called weighing of values must be carried out in order to decide which of the constitutionally protected values (either the principle of trust in the law or the principle that the law must adapt to social conditions) is to be given precedence in an individual case (*cf.* Constitutional Court Decision No. U-I-66/08).
90. When the new regulation interferes with on-going relationships or legitimate legal expectations, due to the observance of the principle of trust in the law, the legislature must lay down a transitional period intended to regulate the rights and legal relationships that have already been established under the law that was previously in force and that still exist upon the entry into force of the new law (Constitutional Court Decision No. U-I-123/11, dated 8 March 2012, Official Gazette RS, No. 22/12).

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79 See Constitutional Court Decision No. U-II-1/12, U-II-2/12, dated 17 December 2012 (Official Gazette RS, No. 102/12, and OdlUS XIX, 39).

80 *Cf.* Constitutional Court Decision No. U-I-186/12, dated 14 March 2013 (Official Gazette RS, No. 25/13).

The legislature may change the position of civil servants under labour law if it takes into account the above-mentioned conditions. Whether and to what extent a transitional period is necessary is assessed by weighing the statute's objective against the interference with [existing] legal positions (held by the Constitutional Court, for example, in Decisions No. U-I-206/97, dated 17 June 1998, Official Gazette RS, No. 50/98, and OdlUS VII, 134, and No. U-I-90/05, dated 7 July 2005, Official Gazette RS, No. 75/05, and OdlUS XIV, 66).

91. By the challenged regulation the legislature determined that a civil servant's employment contract is terminated when he or she fulfils the statutorily determined conditions for acquiring the right to an old age pension. Thereby, the legislature determined a new reason for the termination of an employment contract and interfered with on-going legal relationships. In such manner it interfered with the expected right of civil servants that their employment relationship would be terminated for [one of the] reasons that had been determined by law before the change. The interference with these rights is, however, not unconstitutional if there exist sound reasons substantiated by an overriding and legitimate public interest that are more important than the interference with the position of the affected persons.
92. In light of the objectives pursued by the challenged measure, the Constitutional Court deems that they entail sound reasons that are substantiated by an overriding and legitimate public interest.<sup>81</sup> Therefore, the Constitutional Court proceeded to assess whether the challenged provisions provided civil servants with sufficient time to adapt to the new conditions.
93. The FBA in fact did not determine a transitional period for the implementation of the challenged regulation. Nevertheless, it has to be noted that the existence of a possibility to adapt to the new regulation cannot be ruled out completely, as the consequences of the challenged regulation do not take effect for two months following the fulfilment of the statutory conditions for acquiring the right to an old age pension (the second paragraph of Article 188 and the second paragraph of Article 246 of the FBA).
94. Furthermore, it has to be taken into account that, under the regulation currently in force as well as under the regulation valid until 31 December 2012, the social security of the affected civil servants is already guaranteed in the form of the right to an old age pension without reductions. This makes adaptation to the challenged regulation considerably easier, since civil servants who are not able to find other employment or other means of obtaining resources through work, can retire and thus guarantee their social security. In addition, upon the termination of their employment contracts they are entitled to a special kind of severance pay (the second paragraph of Article 188 and the second paragraph of Article 246 of the FBA).
95. In light of the above, the challenged regulation is not inconsistent with the principle of trust in the law determined by Article 2 of the Constitution.

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<sup>81</sup> *Ibidem*.

## **B – VII**

### **Review from the viewpoint of the requirement of the autonomy of universities and other institutions of higher education in conjunction with the freedom of science and the arts (Articles 58 and 59 of the Constitution)**

96. Article 58 of the Constitution determines that state universities and state institutions of higher education shall be autonomous. The manner of their financing shall be regulated by law. Article 59 of the Constitution guarantees the freedom of scientific and artistic endeavour.
97. The Constitutional Court has already adopted the position that, due to respect for the autonomy of the university, the legislature must not regulate the question of whether and in which instances teachers, researchers, and other personnel at institutions of higher education may continue their employment relationship even if they have already fulfilled the conditions for acquiring the right to an old age pension (see Constitutional Court Decision No. U-I-22/94, Paragraph 14 of the reasoning). The provision of the Higher Education Act (Official Gazette RS, No. 67/93) that was abrogated in that case differed essentially from the challenged regulation in Articles 188 and 246 of the FBA, as it provided that, regardless of the fulfilment of the prescribed retirement conditions, full professors could only occupy their posts until attaining 65 years of age. It did not enable universities and other institutions of higher education to independently decide on the continuation of the employment relationships of individual full professors, in consideration of the specific needs of their professional activity (given the specificities of the educational process, educational work, and the personnel structure of universities and other institutions of higher education). The Constitutional Court stated that the specificities of the educational process, educational work, and the personnel structure of universities and other institutions of higher education are included among those questions that constitute the content of the autonomy of universities that is protected by Article 58 of the Constitution.
98. The challenged regulation is essentially different as it enables employers (including universities and other institutions of higher education) to conclude an agreement for the continuation of an employment relationship, regardless of the fulfilment of the conditions for the termination of an employment contract, with a civil servant (including teachers, researchers, and other personnel at institutions of higher education) in order to ensure an uninterrupted work process (the third paragraph of Article 188 and the third paragraph of Article 246 of the FBA). Precisely by providing for this possibility the legislature enabled universities and other institutions of higher education to independently decide on the continuation of the employment relationships of teachers, researchers, and other personnel at institutions of higher education in order to ensure an uninterrupted work process and guarantee the freedom of scientific endeavour and research. Thereby it is guaranteed that universities and other institutions of higher education may themselves take into account the specificities of the educational process, educational work, and personnel structure. With regard to such, the challenged regulation does not interfere with the requirement of the autonomy of universities and other institutions of higher education (Article 58 of

the Constitution) and the freedom of science and the arts (Article 59 of the Constitution). As a result, the legislature was also not required to determine a transitional period for the adaptation of universities and other institutions of higher education to the changed regulation.

99. In light of the above, the challenged provisions are not inconsistent with Articles 58 and 59 of the Constitution.

### B – VIII

100. The Constitutional Court may in whole or in part abrogate a law that is not in conformity with the Constitution (Article 43 of the Constitution). If the Constitutional Court deems a law unconstitutional as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable abrogation, a declaratory decision is adopted on such (Article 48 of the Constitution).
101. In the case at issue, the Constitutional Court only established the partial unconstitutionality of the challenged provisions. Insofar as it refers to male civil servants, the challenged regulation is not inconsistent with the Constitution, thus there are no reasons for its abrogation in that part (Point 5 of the operative provisions). The abrogation of the challenged regulation only insofar as it refers to female civil servants as insured women who have not yet fulfilled the same conditions for acquiring the right to an old age pension as apply to insured men would result in constitutionally inadmissible discrimination against male civil servants, as the challenged measure of the termination of an employment contract would only continue to be in force with regard to them. Therefore, the abrogation of the challenged regulation is not possible and, considering the established inconsistency with the Constitution, the Constitutional Court thus adopted a declaratory decision (Points 1 and 2 of the operative provisions) and determined a six-month deadline for the legislature to remedy the established unconstitutionality (Point 3 of the operative provisions).
102. As on its own the Constitutional Court decision referred to in the preceding paragraph would entail a perpetuation of the unconstitutional state of affairs and thereby the further unconstitutional discrimination of female civil servants, the Constitutional Court determined the manner of the implementation of its Decision on the basis of the second paragraph of Article 40 of the CCA. It determined that until the unconstitutionality established by this Decision is remedied, the employment contracts of female civil servants as insured women who have not yet fulfilled the same conditions for acquiring the right to an old age pension as apply to insured men may only be terminated when they have fulfilled the same conditions for acquiring the right to an old age pension as apply to insured men on the basis of the challenged provisions (Point 4 of the operative provisions).

### C

103. The Constitutional Court adopted this Decision on the basis of Articles 21, 47, and 48, and the second paragraph of Article 40 of the CCA, composed of: the President Mag. Miroslav Mozetič and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag.

Marta Klampfer, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. It adopted the first and second Points of the operative provisions unanimously. The third and fourth Points of the operative provisions were adopted by eight votes against one. Judge Jadek Pensa voted against. The Constitutional Court adopted the fifth Point of the operative provisions by six votes against three. Judges Jadek Pensa, Korpič – Horvat, and Sovdat voted against. Judges Jadek Pensa, Korpič – Horvat, and Sovdat submitted dissenting opinions.

Mag. Miroslav Mozetič  
President

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#### DISSENTING OPINION OF JUDGE DR JADRANKA SOVDAT

1. I voted for the first four points of the operative provisions of the Decision, and against the fifth point. My vote for the first four points of the operative provisions does not entail that I accept the discrimination on grounds of age that persists in the legal system due to the majority decision. I expressed my opposition to discrimination on grounds of age through my vote against the fifth point. Even if I agreed that there has been no inadmissible discrimination on grounds of age, there would namely still exist inadmissible discrimination on grounds of sex to the extent that follows from the first and second points of the operative provisions of the Decision.
2. As I agree with the established inadmissible discrimination on grounds of sex, I also agree that by determining the manner of the implementation of its Decision in the fourth Point of the operative provisions of the Decision in accordance with the second paragraph of Article 40 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – CCA), the Constitutional Court created a basis that has equal legal effects as a statutory basis and that (at least) establishes gender equality.
3. However, I cannot agree with the arguments by which the majority substantiated its decision in the fifth Point of the operative provisions, although I agree with some of the premises on the basis of which the review was carried out. I cannot agree with the *rationes decidendi* that justify the different treatment on grounds of age in the case at issue due to a number of reasons that diverge mainly in two directions. The first concerns the justification of the constitutionally admissible objectives, and the second the review of the necessity and appropriateness of the measure for attaining the objectives.

#### I

4. Today, the prohibition of discrimination on grounds of personal circumstances is a truly universal legal principle that is also enshrined in international instruments, first among them being the Universal Declaration of Human Rights of 1948,<sup>1</sup> which

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1 Published in: *Človekove pravice, Zbirka mednarodnih dokumentov, I. del, Univerzalni dokumenti* [Human Rights, A

is considered to be an integral part of customary international law.<sup>2</sup> The Universal Declaration of Human Rights<sup>3</sup> and the International Covenant on Civil and Political Rights<sup>4</sup> as well as the Constitution [of the Republic of Slovenia] (the first paragraph of Article 14) determine the prohibition of discrimination on grounds of personal circumstances as regards human rights and fundamental freedoms. Age is undoubtedly such a personal circumstance regardless of the fact that it is not explicitly mentioned by these documents. Furthermore, the basic text of the Convention on the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR) contains a provision in Article 14 that prohibits discrimination in the enjoyment of human rights and fundamental freedoms guaranteed by the Convention. However, it should be noted that the Republic of Slovenia is a signatory to Protocol No. 12 to the ECHR (Official Gazette RS, No. 46/10, MP, No. 8/10), which in the first paragraph of Article 1 determines the prohibition of discrimination more broadly, not only in the enjoyment of human rights and fundamental freedoms.<sup>5</sup> This provision prohibits discrimination regarding any right set forth by law. This is also the approach of European Union law. Not only Articles 10 and 19 of the Treaty on the Functioning of the European Union (OJ C 326, 26. 10. 2012 – hereinafter referred to as the TFEU), but also Article 21 of the European Union Charter of Fundamental Rights (OJ C 326, 26. 10. 2012) generally prohibit discrimination (i.e. not only as regards fundamental rights), whereby such is a principle,<sup>6</sup> not a fundamental right. Indeed, the principle of non-discrimination

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Collection of International Documents, Part I, Universal Documents], Društvo za ZN za Republiko Slovenijo, Ljubljana 1995.

- 2 Held by the Constitutional Court in Order No. Up-490/03, dated 22 March 2005. See also M. Škrk, *Odnos med mednarodnim pravom in notranjim pravom v praksi Ustavnega sodišča* [The Relationship between International Law and Domestic Law in the Case Law of the Constitutional Court], *Pravnik*, No. 6–8 (2007), p. 292.
- 3 The first sentence of Article 2 reads as follows: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- 4 Official Gazette SFRJ, MP, No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the ICCPR. The first paragraph of [Article] 2 of the ICCPR reads as follows: “1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- 5 The European Court of Human Rights applies both [instruments] as its legal basis. Thus, in the Judgment in the case *Konstantin Markin v. Russia*, dated 22 March 2012, the Grand Chamber of the Court established a violation of the right determined by Article 14 in conjunction with Article 8 of the ECHR. In the Judgment in the case *Sejdić and Finci v. Bosnia and Herzegovina*, dated 22 December 2009, the Grand Chamber of the Court established a violation of the first paragraph of Article 1 of Protocol No. 12 to the ECHR, as the case concerned the election of a head of state, which is not encompassed by the third paragraph of Article 3 of the Protocol to the ECHR.
- 6 This can also be concluded from the Judgments of the Court of Justice of the European Union (hereinafter referred to as the CJEU). In the Judgment in the case *Kücükdeveci v. Swedex GmbH & Co. KG*, C-555/07, dated 19 January 2010 (Paras. 21–23), the CJEU referred to the principle of the prohibition of discrimination on

on grounds of age in European Union law is regulated in further detail by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2. 12. 2000 – hereinafter referred to as Directive 2000/78/EC).<sup>7</sup>

5. Why am I drawing attention to this? Because the Decision refers to all of these legal sources and its reasoning relies to a significant extent on European Union law; however, it is not expressly evident from the aspect highlighted [by the Decision] why the prohibition of discrimination with regard to a human right has been reviewed, and Paragraph 39 of the reasoning would be misinterpreted if someone were to derive from it that there are no restrictions of discrimination on grounds of age with regard to rights that are not human rights. In fact, in my opinion, quite the contrary is true. There exists a general prohibition of discrimination on grounds of personal circumstances that naturally applies *a fortiori* to human rights and fundamental freedoms, with regard to which the Constitution and international legal instruments specifically lay down such a prohibition.
6. This case concerns a right that is (also) a human right. I namely agree that the case concerns the question of the admissibility of discrimination on grounds of age with regard to the human right determined by the third paragraph of Article 49 of the Constitution. If the cited Constitutional provision guarantees equality as regards access to any position of employment, then it also guarantees equality as regards the refusal thereof. Equality constitutes the essence of this human right; it does not entail that a person enjoys the right to a position of employment, but that everyone can compete for a position of employment under the same conditions or, as applicable, that such can be refused to them under the same conditions. If according to the essence of this right (even general) inequality is prohibited, then the prohibition must apply even more to discrimination on grounds of a personal circumstance such as age. In light of such, in cases concerning discrimination with regard to a human right it would be more appropriate if the Constitutional Court in the future explicitly emphasised that it applied the prohibition of discrimination with regard to precisely the human right that the case concerned as the upper premise of its review – in the case at issue namely the review and establishment of (in)consistency with the first paragraph of Article 14 of the Constitution in conjunction with the third paragraph of Article 49 of the Constitution. As can be derived from the reasoning [of the Decision],<sup>8</sup> the Constitutional Court namely conducted such a review; however, in conclusion it only established an (in)consistency with the first paragraph of Article 14 of the Constitution. In light of Article 1 of Protocol No. 12 to the ECHR and in light of the principle of European

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grounds of age as a general principle of European Union law and thereby also recalled the prohibition of discrimination determined by the first paragraph of Article 21 of the Charter.

7 See Para. 27 of the Judgment referred to in the preceding note.

8 The Constitutional Court reviewed the prohibition of discrimination with regard to a human right in the same manner in Decision No. U-I-425/06, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 29); however, it only established an inconsistency with the first paragraph of Article 14 of the Constitution, even though it was in fact reviewing the prohibition of discrimination with regard to the human right determined by Article 33 of the Constitution.

Union law that extend the prohibition of discrimination beyond the scope of the first paragraph of Article 14 of the Constitution, it appears that such an emphasis would have been appropriate. However, I agree that both types of review may also include intertwining arguments and the application of European Union law as regards the review of the admissibility of discrimination on grounds of age.

7. I agree with the approach adopted in the Decision that in the case at issue European Union law also has to be taken into consideration when reviewing the conformity of the law in terms of the first paragraph of Article 14 in conjunction with the third paragraph of Article 49 of the Constitution. It is a fact that by the third paragraph of Article 3a of the Constitution the Slovene constitution framer explicitly established the constitutional obligation on the basis of which in the Republic of Slovenia legal acts and decisions adopted within the European Union are applied in accordance with the legal regulation of the European Union.<sup>9</sup> I agree that taking European Union law into consideration is a constitutional obligation,<sup>10</sup> and not merely an obligation arising from a treaty by which the exercise of part of our sovereign rights have been transferred to the European Union in such a manner that since then we have been exercising them together with the other Member States in the manner determined by European Union law. This constitutional obligation requires all authorities of the state, including the Constitutional Court, to also take this dimension into consideration when interpreting constitutional provisions.<sup>11</sup> Therefore, I further agree that the general principle of the European Union regarding the prohibition of discrimination on grounds of age and Directive 2000/78/EC, which concretises it, as well as the CJEU judgments in which that court interpreted the provisions of the mentioned Directive, have to be taken into account in the review in the case at issue. However, I do not agree with the method applied by the majority in the case at issue.

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- 9 A constitutional provision such as the third paragraph of Article 3a of the Constitution (which, although general, is distinctly adapted to the specificities of the European Union) is found in neither the German Constitution, which, in contrast to Slovene regulation, contains a so-called European Article (Article 23 of the Fundamental Law of the Federal Republic of Germany), nor the Austrian Constitution, which also regulates questions related to the European Union separately (Articles 23a through 23f of the Federal Constitutional Law of the Republic of Austria).
  - 10 This then obviates the application of the constitutional rule that only treaties that have been validly ratified and published are directly applicable, as stated by Prof. Grad (See F. Grad, *Evropsko ustavno pravo, Prvi del, Ustavno pravo Evropske unije* [European Constitutional Law, Part One, Constitutional Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2010, p. 199). It namely excludes the application of Article 8 of the Constitution.
  - 11 In this regard, the warning of a former President of the Constitutional Court should be recalled, i.e. that this provision entails a wide blanket authorisation for the application of European Union law that does not precisely determine the rules that enter the Slovene constitutional legal order in such manner in terms of their temporal effects or hierarchical position. See F. Testen in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement–A], Fakulteta za državne in evropske študije, Ljubljana 2011, p. 91.

## II

8. In accordance with the first paragraph of Article 6 of Directive 2000/78/EC, different treatment on grounds of age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market, and vocational training objectives, and if the means of achieving that aim are appropriate and necessary; this different treatment may also include the determination of conditions as regards both access to employment and the dismissal of older persons. The provision thus leaves quite some room to manoeuvre in the interpretation of which objectives may constitute legitimate aims that can render differentiation on grounds of age admissible.
9. The Decision recognises that the main objective of the Fiscal Balance Act (Official Gazette RS, Nos. 40/12, and 105/12 – hereinafter referred to as the FBA) is to ensure sustainable public finances. As it establishes that, in accordance with the case law of the CJEU, budgetary considerations cannot in themselves constitute legitimate aims for the different treatment of older persons, it supplements such with two additional objectives (which in itself is not inadmissible), i.e. the establishment of a balanced age structure of civil servants and the prevention of potential disputes regarding whether a civil servant is still able to perform his or her work after a certain age (Paragraph 51 of the reasoning of the Decision). It then proceeds to justify not only why the measure is necessary and appropriate from the viewpoint of the additional objectives, but also in terms of the objective of sustainable public finances (Paragraphs 58, 60, 64, and 66 of the reasoning of the Decision). This entails that the majority [of the Constitutional Court judges] understand the emphasis stemming from numerous CJEU judgments that budgetary considerations cannot in themselves constitute justifiable reasons for discrimination on grounds of age in the following manner: Discrimination cannot be admissible solely on the basis of budgetary reasons; however, if these are supplemented by other, legitimate objectives, budgetary reasons (in themselves) also become a legitimate objective for differentiation on grounds of age.
10. In my opinion, CJEU judgments cannot be understood in such a manner. If we examine, for example, the Judgment in the case *Gerhard Fuchs and Peter Köhler v. Land Hessen*, C-159/10, C-160/10, dated 21 July 2011, in Para. 74 the CJEU states that while budgetary considerations may underpin the choice of social policy and influence the nature and extent of the measures that a Member State wishes to adopt, such considerations “cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.”<sup>12</sup> I understand this as meaning that budgetary reasons simply cannot constitute a legitimate aim in the sense of the first paragraph of Article 6 of the cited Directive. Furthermore, they cannot become such aims even if they are supplemented by other objectives that could in themselves be legitimate

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12 In French, the quoted part of the Judgment reads as follows: “ne peuvent constituer à elles seules un objectif légitime au sens de l’article 6, paragraphe 1, de la directive 2000/78.” [...] In Italian, it reads as follows: “non possono però, di per sé sole, costituire una finalità legittima ai sensi dell’art. 6, n. 1, della direttiva 2000/78.” In German, it reads as follows: “für sich allein aber kein legitimes Ziel im Sinne des Art. 6 Abs. 1 der Richtlinie 2000/78 darstellen.”

aims. If they are supplemented by other objectives, differentiation that is based on these other objectives that are also in themselves legitimate can potentially be justified. In other words, aims that are legitimate in themselves constitute sufficient aims to justify differentiation on grounds of age if it can be established that the measure [in question] is necessary and appropriate to actually achieve these aims. The legitimacy of the other aims, however, does not entail the legitimacy of budgetary objectives. In my opinion, such also derives from the reasoning that the CJEU provided in judgments in which it considered discrimination on grounds of age. If I continue to focus only on the above-highlighted Judgment in *Gerhard Fuchs and Peter Köhler v. Land Hessen*, the CJEU thus established that the cited Directive does not preclude a law that provides for the compulsory retirement of public prosecutors at a certain age, “provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees’ fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means.”<sup>13</sup> If the situation was such as derives from our Decision, the CJEU would additionally apply budgetary considerations in its reasoning, but that is not the case.

11. Therefore, firstly, I have serious doubts that on the basis of the CJEU judgments that we [i.e. the Constitutional Court] refer to the co-existence of budgetary reasons could be taken into account as a legitimate aim alongside other legitimate aims, and that we would in this sense be dealing with an *acte éclairé*. If we wanted to draw such a conclusion, in my opinion, we would have been required to previously refer a preliminary question to the CJEU regarding the admissibility of such an interpretation of the first paragraph of Article 6 of the cited Directive. The fact that the Republic of Slovenia is in an excessive deficit procedure in accordance with Article 126 of the TFEU could have been a particular argument in this regard. However, thus far such an argument has not been recognised by CJEU judgments as a legitimate aim that would exceed the reasons that the CJEU classifies as budgetary considerations. This is therefore another argument in favour of referring a question for a preliminary ruling in accordance with the first paragraph of Article 267 of the TFEU. In this sense, we are thus also not dealing with an *acte éclairé*. As the CJEU has consistently stated that budgetary reasons in themselves cannot constitute legitimate aims for differentiation on grounds of age in accordance with the first paragraph of Article 6 of Directive 2000/78/EC, in my opinion, we are thus far from an *acte clair* in this regard as well.
12. In my opinion, in the case at issue the arguments that substantiate the necessity and appropriateness of the differentiation on grounds of age in the sense of the objective of ensuring sustainable public finances thus should not have found a place in the Decision, at least not without previously establishing a dialogue with the CJEU. Once I eliminate [these arguments], I am left with the question of whether the objectives stated in Paragraph 51 of the reasoning of the Decision, which the CJEU, in my opin-

<sup>13</sup> See Point 1 of the operative provisions and Para. 75 of the Judgment.

ion, deems to be a single aim,<sup>14</sup> can justify the differentiation. Thereby, firstly, the question arises whether the additional objectives that the Decision refers to in Paragraph 51 are in fact the actual objectives of the challenged statutory regulation. Such might be disputable, as was also stressed by the applicant in its statement regarding the reply of the National Assembly. However, this does not even have to be resolved, as, in my opinion, in light of the mentioned objectives, even if they were considered to constitute the actual objectives [of the challenged statutory regulation] that could allegedly render differentiation on grounds of age admissible, the challenged measure appears to be neither necessary nor appropriate.

### III

13. The CJEU, which through its decisions is obliged to ensure the uniform application of Directive 2000/78/EC in the entire territory of the European Union, has frequently left the final decision on the necessity and appropriateness of a measure to the national courts.<sup>15</sup> However, at the same time it has repeatedly stated that the national court must ascertain whether the age limit guarantees that the aims pursued by the measure will be attained in a consistent and systematic manner or whether the exceptions to the age limit interfere with the consistency of the legislation in question by leading to a result that is contrary to that objective.<sup>16</sup>
14. In my opinion, the legislature itself successfully contested the necessity of the measure as in the third paragraph of Article 188 and the third paragraph of Article 246 of the FBA it provided for the possibility that an employer and a civil servant agree to continue the employment relationship, whereby they define the further duration of the employment relationship that is not limited by statute, and thus it can last for 5 or even 10 years, namely for a period lasting until the civil servant would in any event decide to cease to work and retire. This period will thus exceed the provisional nature of the challenged measure and in such instances no differentiation will occur at all. These are, therefore, exceptions that lead in the opposite direction of the objective. If such exceptions exist, in my opinion, one cannot deem the measure to be necessary.
15. Moreover, one cannot deem that the legislature established the consistency of the implementation of the measure for attaining the objective of an intergenerationally balanced personnel structure. For some this measure will produce effects, for others, due to the discretion of the employer (when assessing whether the continuation of the employment relationship is necessary to ensure an uninterrupted work process), it will

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14 See, e.g., Para. 50 of the CJEU Judgment in the case *Gerhard Fuchs and Peter Köhler v. Land Hessen*.

15 In this regard, legal doctrine warns that consistent interpretation of European Union law is threatened within individual Member States as well as among Member States; see Elaine Dewhurst, *Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance Between the Generations?*, *Common Market Law Review*, No. 50 (2013), p. 1334.

16 See, e.g., the Judgment in the case *Vasil Ivanov Georgiev v. Tehnicheski universitet – Sofia, filial Plovdiv*, C-250/09, C-268/09, dated 18 November 2010, Para. 5[6], and the Judgment in the case *Dominica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-341/08, dated 12 January 2010, Para. 53.

not, and due to the provisional nature of the measure (Article 182 of the FBA<sup>17</sup>), for some it will produce no effects at all. This creates additional differentiation on grounds of age between civil servants. In addition, such concerns a measure that is evidently intended to reduce the size of the public sector (which also indicates that fundamentally the measure pursues public-finance objectives, as has also been stressed by the applicant). Such entails that, as a rule, in instances of terminations of employment contracts due to limited budgetary (public) resources, firstly, an assessment of the organisational possibilities of reducing the number of employees to achieve the required reduction in the public wage bill will have to be carried out, and only afterwards will there be room for substitute recruitment. The Government only submitted data on the personnel situation and changes regarding such during the period of the validity of this law for state administration authorities, but failed to provide such data for the entire public sector. This may also constitute a problem, as due to such it is not possible to assess with certainty whether such a measure is indeed appropriate for the consistent attainment of the aim. The data submitted by the Government also include a table indicating the age structure of employees in state administration authorities as of 31 December 2012, namely a good half year after the FBA entered into force, and as of 1 June 2013, namely a good year after the FBA entered into force. If such concerns a measure of a provisional nature, although due to economic reasons this provisional measure may remain in force for several years, in such a period of time the first results of the measure in terms of the highlighted objective should become apparent, at least as a trend towards halting the further deterioration of the intergenerational age structure (as it has to be considered that intergenerational balance may in fact be established [only] over a longer period of time). The submitted data, however, do not show that the trend as regards the deterioration of the age structure of employees halted, but rather suggest the contrary. In the first half of this year, the number of the oldest group of civil servants (aged 60 years and over) increased from 518 to 545 in comparison to the end of the previous year, while in the next category (aged 50 to 59 years) the number increased from 6,012 to 6,220, and in the next (aged 40 to 49 years) it increased from 11,582 to 11,625. On the contrary, the number of civil servants aged 30 to 39 years decreased from 11,404 to 11,050, and of those younger than 30 years from 3,408 to 3,022. At the present moment, this rather indicates that the measure does not in fact pursue the additional objectives from Paragraph 51 of the Decision, but rather its main objective – i.e. to reduce the size of the public sector or the public wage bill due to budgetary reasons. The young are not being recruited, and the age of civil servants is in fact increasing.

16. The objective of intergenerational balance could in fact be achieved in the long term through consistent recruitment of young persons. However, if recruitment is suspended due to budgetary reductions, it will not be possible to attain this objective (at least to a large extent), which was also pointed out by the applicant. The need to reduce the size of the public sector is completely legitimate and could be attained in different

17 In accordance with the cited provision, the measure remains in force until the expiry of one year following a year in which economic growth exceeds 2.5% of the gross domestic product.

ways, and while the state can decide to take such action, it may not do so by allowing discrimination on grounds of age. The data supporting the fact that civil servants who have not yet attained the age of 30 years have concluded the highest proportion of fixed-term employment contracts also does not favour a different conclusion. While this data in itself is understandable, as it is common knowledge that trainees and individuals in other professions (e.g. internships and residency of physicians) who are training to be able to perform their profession independently or, for example, junior researchers pursuing doctoral studies conclude fixed-term employment relationships. By itself, this does not entail a deterioration of the intergenerational age structure of civil servants, provided that, after the completion of the training, the normal transfer of such persons to available positions is ensured. Opening the doors of the public sector to young educated persons is legitimate and necessary. It would be appropriate if the legislature adopted measures to ensure such. However, if in this process, due to the necessarily limited number of employment positions available in the public sector, differentiation on grounds of age is to occur, then the legislature must implement it in such a manner that the measure pursues a legitimate objective and that this measure is necessary and appropriate as well as consistently implemented such that the objective will in fact be attained, and not by establishing further inequality between civil servants on grounds of their personal circumstances.

#### IV

17. I would have arrived at the same conclusion also through a constitutional review of the admissibility of the interference with the non-discriminatory exercise of the right determined by the third paragraph of Article 49 of the Constitution without any reference to European Union law. Even if all the objectives mentioned by the Decision could (but they must not) be considered as possible constitutionally admissible objectives for the mentioned interference (the third paragraph of Article 15 of the Constitution), in my opinion, the measure from the challenged provisions would not pass the strict proportionality test (Article 2 of the Constitution). It depends solely on the employer's discretion which civil servants will be affected by the provisional measure, and with whom he or she will conclude agreements for the continuation of the employment relationship, potentially for several years. Such a measure cannot be necessary. If the attainment of the objective(s) can in fact to a large extent be avoided through exceptions that lie in the employer's discretion and given the measure's provisional nature, also the appropriateness of such a measure is called into question. If these exceptions are dictated by the resources available for public sector wages, it is again clear that the true objective of the measure is a reduction in expenditure and not the attainment of an intergenerationally balanced age structure. Budgetary considerations, however, cannot constitute constitutionally admissible objectives that could justify discrimination on grounds of a personal circumstance. If we were to recognise them as such, we would open wide the doors to discrimination.
18. Since the challenged measure introduces differentiation regarding the termination of employment contracts between civil servants on grounds of age and due to rea-

sons and in a manner that in my opinion is not consistent with the principle of the prohibition of discrimination on grounds of age, the Constitutional Court should have established its unconstitutionality in this sense as well. As I believe that there also exists inadmissible discrimination on grounds of age due to which the challenged provisions (insofar as they still remain in force) should have been abrogated or (insofar as they ceased to have effect, but will continue to be applied in potential judicial proceedings) their unconstitutionality should have been established (Article 47 of the CCA), I did not at all address the questions of whether the challenged measure is consistent with the principle of trust in the law and whether it further entails an inadmissible interference with the autonomy of universities.

*Dr Jadranka Sovdat*

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**DISSENTING OPINION OF JUDGE DR ETELKA KORPIČ – HORVAT**

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1. The prohibition of discrimination, as determined by the first paragraph of Article 14 of the Constitution, according to which in Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of their personal circumstances (e.g. national origin, race, sex, language, religion, political, or other conviction, material standing), is one of the fundamental constitutional values, as this human right is intertwined with people's daily lives and their basic human dignity. I believe that in the case at issue the right to non-discriminatory treatment has been violated since the challenged statutory regulation established an unjustified differentiation between individuals, namely on grounds of age.<sup>1</sup>
2. Below, I will clarify the reasons why I believe that Articles 188 and 246 of the Fiscal Balance Act (Official Gazette RS, Nos. 40/12, and 105/12 – hereinafter referred to as the FBA), which concern the termination of an employment contract due to the fulfilment of the prescribed conditions for acquiring the right to an old age pension, are inconsistent with the prohibition of discrimination on grounds of age determined by the first paragraph of Article 14 of the Constitution.
3. In accordance with Constitutional Court doctrine, an interference with the right to non-discriminatory treatment is constitutionally admissible only if it is based on a constitutionally admissible and legitimate, i.e. objectively justified aim (the third paragraph of Article 15 of the Constitution), and provided that it passes the strict proportionality test (Article 2 of the Constitution).<sup>2</sup> In the case at issue, I particularly

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1 Age is one of the personal circumstances that are not explicitly listed in the first paragraph of Article 14 of the Constitution; however, by means of the prohibition of discrimination on grounds of "other personal circumstances" it is clearly encompassed by this provision.

2 The Constitutional Court reviews an interference with a human right on the basis of a test of legitimacy and a test of proportionality. In order for the restriction of a human right to be admissible there must exist a legitimate (constitutionally admissible) objective. In addition, the following three conditions have to be fulfilled: firstly, the interference must be necessary – this entails that the objective cannot be achieved through a less

disagree with the part of the Decision that establishes that the legislature was entitled to pursue public-finance objectives and that the interference with the first paragraph of Article 14 of the Constitution was thus justified by public-finance reasons. In addition, I believe that also the remaining three conditions of the strict proportionality test in a constitutional review (necessity, appropriateness, and proportionality in the narrower sense) were not fulfilled.

4. In accordance with EU law, whereby the review of the case at issue must primarily take into account Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2. 12. 2000), it is not disputed that national legislations can determine instances of different treatment regarding the termination of an employment contract on grounds of age, provided that they are objectively and reasonably justified by legitimate aims [that are pursued by means] that must be appropriate and necessary. The legitimate aims can include employment policy, labour law, and vocational objectives.
5. In Paragraph 46 of the reasoning the Constitutional Court stated: “In any event, the realisation of the objectives of social policy and employment policy must be included among the objectives that the legislature and the Government pursued with this measure. [...] The termination of the employment contract of a civil servant who has fulfilled the conditions for acquiring the right to an old age pension without reductions is only one of the instruments by means of which the Government wishes to achieve in part a reduction in the number of public sector employees (a reduction in the public sector wage bill) and in part an altered age structure of civil servants. [...]” I could not agree with this line of reasoning as, in the meantime, the legislature adopted the Pension and Invalidity Insurance Act (Official Gazette RS, Nos. 96/12, and 39/13 – hereinafter referred to as the PDIA-2), which entered into force on 1 January 2013 (namely only half a year after the FBA) and determined that insured persons who remain employed until the age of 65 although they have already fulfilled the conditions for acquiring the right to an early pension or an old age pension have the right to receive, in addition to the entire wage from their employment relationship, 20% of their pension even though they have not formally acquired the status of pensioners (the third paragraph of Article 38 of the PDIA-2).<sup>3</sup> The institution of partial retirement is also intended for gradual retirement due to active ageing (Article 40 of the PDIA-2). Moreover, due to the increasing life expectancy, trends in

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severe interference with the constitutional right in question or even without such interference; secondly, the interference must be appropriate for actually achieving the objective; and, thirdly, the so-called proportionality in the narrower sense has to be taken into account to establish whether the interference with the human right is proportionate to the [resulting] benefit.

- 3 The third paragraph of Article 38 of the PDIA-2 determines the following: “An insured person who, upon fulfilment of the conditions for obtaining an early or an old age pension, is insured by the Agency and remains insured to the same extent, is, from the day following the lodging of the application, provided that the insured person decides to lodge such, entitled to a monthly payment of 20% of the early or old age pension which he or she would have been entitled to on the day of acquiring such right until the insurance is terminated or a partial pension is claimed, but no longer than until 65 years of age.”

the field of pension insurance are in favour of raising the retirement age.<sup>4</sup> What then is the aim of employment and social policy in the Republic of Slovenia: active ageing or retirement? The employment and social objectives pursued by the challenged provisions of the FBA and the above-mentioned provisions of the PDIA-2 are contradictory. In my opinion, this is already a sufficient reason to convince me to not accept that the FBA, in addition to evident public-finance objectives, also pursued objectives in the fields of employment policy and social policy. Public-finance objectives were, in my opinion, evidently the only objectives of this law, and by themselves these objectives do not constitute constitutionally admissible objectives that would allow an interference with the right to non-discriminatory treatment.

6. The Constitutional Court deemed that the following constituted constitutionally admissible objectives for the less favourable (discriminatory) treatment of older persons who have fulfilled the conditions for old age retirement: firstly, the public-finance objective, i.e. reducing budgetary expenses (reducing the number of employees and thereby the wage bill to achieve budgetary effects; Paragraphs 48 and 51 of the reasoning). It follows from the Decision that, in particular in light of CJEU decisions, this objective by itself is insufficient. Therefore, the Decision also established the objective that derives from the legislative materials and that was also asserted by the Government, i.e., secondly, the establishment of a favourable age structure of civil servants (Paragraph 48 of the reasoning). In addition, in the assessment of the Constitutional Court, an evident objective of the challenged regulation is also, thirdly, the prevention of disputes regarding an employee's ability to perform his or her work after a certain age (Paragraph 48 of the reasoning).
7. With regard to the public-finance objective, the question arises whether [the reduction of] the budgetary deficit may constitute a legitimate aim that justifies an interference with the right to non-discriminatory treatment on grounds of age. The Constitutional Court considered this question relying on the CJEU Judgment in the joined cases *Gerhard Fuchs and Peter Köhler*, C-159/10 and C-160/10, dated 21 July 2011, according to which public-finance considerations cannot in themselves constitute a legitimate aim, but budgetary considerations can underpin the chosen social policy of a Member State. The question of how Para. 74 of that Judgment is to be understood in the application and interpretation of the challenged provisions of the FBA is essential.
8. In my opinion, the reference to the mentioned Judgment in the sense of establishing the public-finance objective as the primary legitimate objective that may justify discrimination remains disputable. Neither in the mentioned Judgment nor in its decisions in other cases<sup>5</sup> did the CJEU directly link the co-existence of several objectives

4 In Decision No. U-I-49/98, dated 25 November 1999, the Constitutional Court also deemed that trends in the field of pension insurance – including the proposed amendments to the Slovene pension legislation – were moving towards raising the retirement age, encouraging late retirement, and equalising retirement conditions (in particular regarding age) for men and women.

5 See the CJEU Judgments in the case *Gisela Rosenblatt v. Oellerking Gebäudereinigungsges. mbH*, C-45/09, dated 12 October 2010, Paras. 43 and 45, in the joined cases *Vasil Ivanov Georgiev v. Tehnicheski universitet - Sofia, filial Plovdiv*, C-250/09 and C-268/09, dated 18 November 2010, in the case *Félix Palacios de la Villa v. Cortefiel*

to a primary public-finance objective, and it also did not deem such an objective to be a legitimate aim. The mentioned cases (*Rosenbladt*, *Petersen*, and *Georgiev*) concerned [instances of the co-existence of] several legitimate aims, and not several aims that also included aims that were not legitimate. The CJEU only accepted that the budgetary situation may be taken into account in the determination of social and employment objectives. While a budgetary deficit may influence the determination of a legitimate employment or social objective, [budgetary considerations] may not in themselves constitute a direct objective that could justify discrimination on grounds of age. In my opinion, such follows from Para. 74 of the Judgment in the joined cases *Fuchs and Köhler*, which the Constitutional Court directly referred to.<sup>6</sup> This follows even more clearly from Para. 65 of the same Judgment, which reads as follows: “Therefore, in defining their social policy on the basis of political, economic, social, demographic and/or budgetary considerations, the national authorities concerned may be led to choose to prolong people’s working life or, conversely, to provide for early retirement (see *Palacios de la Villa*, paragraphs 68 and 69). [...]” The FBA, however, concerns a law that in its first Article explicitly determined only a single objective, i.e. “ensuring sustainable public finances and reducing budgetary expenses.” This is thus the only statutory objective that the legislature provided for the possibility of “mandatory” retirement. I believe that an interference with the right to non-discriminatory treatment cannot be based on a law that only lays down public-finance objectives, while its other objectives, i.e. employment and social policy objectives, which the legislature did not define, derive from other circumstances or submissions made by the Government.<sup>7</sup> On the basis of a poor state of public finances only the main act that regulates the position of civil servants under labour and social law can determine the objective of the termination of an employment contract due to the fulfilment of retirement conditions.

9. Moreover, the discriminatory effect of the FBA is distinctly emphasised as it allows the arbitrary termination of employment contracts. It determines that the employer has full discretion when deciding which civil servant’s employment contract is to be terminated upon the fulfilment of retirement conditions. Therefore, in my opinion, the provisions of the FBA discriminate against those civil servants who have fulfilled retirement conditions and are arbitrarily chosen by the employer (without being bound by any criteria when doing so), who thus decides that these civil servants have to retire. The challenged provisions of the FBA are thus already discriminatory in themselves.

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*Servicios SA*, C-411/05, dated 16 October 2007, Paras. 69 and 71, and in the case *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-341/08, dated 12 January 2010.

- 6 The text of Para. 74 of the Judgment in the joined cases *Fuchs and Köhler* reads as follows: “In that regard, while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.”
- 7 With regard to such, I would like to point out that, as regards public-finance objectives, in Decision No. U-II-1/11, dated 10 March 2011, the Constitutional Court already held that the unconstitutionality of the PDIA-1 cannot be substantiated, even though it can in general be substantiated that changes to the pension system are needed and even necessary for macroeconomic, public-finance, or demographic reasons (Paragraph 32).

- 10.** Furthermore, the public-finance objective cannot be reviewed as the legislature provided no data to demonstrate its effects (not even an estimate of budgetary net effects). The Constitutional Court lacked data regarding the number of civil servants who will fulfil the conditions for retirement as well as regarding the reduction in budgetary expenses due to their (potential) retirement. The Constitutional Court Decision also does not contain data on the expected reduction in budgetary expenses. The Decision only contains general statements on the critical conditions in the Republic of Slovenia, without providing an assessment of the budgetary consequences of the statutory provisions. As this manner of terminating an employment contract is not mandatory but subject to the employer's decision, it is questionable if and to what extent it will affect the sustainability of public finances or the reduction of budgetary expenses. I believe that no significant reductions of budgetary expenses will be achieved as the older civil servants who previously contributed to the budget will, following their retirement, receive pensions from the budget. While the wage bill will decrease, at least in the short term, the labour costs will increase due to the payment of severance pay. If new civil servants are employed, in my assessment, the reduction in labour costs will be negligible. Of course, in these assessments I have not considered the fact that the newly retired civil servants also rendered a useful service. Therefore, at least in the short term (and the FBA is a provisional statute), in my assessment, the Act will not produce budgetary effects due to the mentioned disputable provisions.
- 11.** In light of all of the above, I believe that the public-finance objective does not constitute a constitutionally admissible objective for the less favourable (discriminatory) treatment of older employees who have fulfilled the conditions for retirement.
- 12.** The Constitutional Court constructed the second legitimate objective – i.e. establishing a balanced age structure of civil servants – from data provided by the Government demonstrating that the age of the employees of the authorities of the state administration is increasing,<sup>8</sup> while the number of younger civil servants has decreased significantly (younger civil servants are predominantly employed on the basis of fixed-term contracts), and that a varied age structure contributes to the quality of the public service (Paragraphs 52 and 53). These statements should not be disputed as the issue of youth unemployment is a problematic one, not only in the public sector, but also in the private sector. The need for intergenerational cooperation in employment relations is equally not disputable in the provision of public services and in carrying out tasks in the other areas of the public sector, and in the private sector as well. Consequently, these aims may be defined as constitutionally admissible objectives for an interference with the human right to equality if they are objectively and reasonably justified. However, in the case at issue this does not apply.
- 13.** I believe that maintaining the employment of those who are able to achieve their goals, who are successful, and who fulfil contractual and other obligations arising from their employment relationship regardless of their age and regardless of reasons of social security is an objective and sound reason. This is especially true with regard to employees

<sup>8</sup> The data in the Decision refer only to the state administration, not the entire public sector.

in the public sector, where the principle of sound administration (economical, efficient, successful) is an important principle for the functioning of the state. Civil servants have to be successful, they have to attain the results set out in the employment contracts they concluded regardless of whether they are young or old. Is it better if lectures are given by a bad 35-year-old or a good 65-year-old professor? Providing access to employment for young persons or maintaining their employment only because they are young is discriminatory, as it places older, successful civil servants in a less favourable position without justification. If anywhere, then within the public sector the individual ability of each civil servant should be established, i.e. whether their work, their work results, justify their employment contract, in order to protect the public interest. The selection of civil servants belongs to the area of management, including actions in the field of human resources, and should not be addressed by the disputed provisions of the FBA that allow employers to terminate the employment contracts of civil servants simply on the basis of the establishment of the fulfilment of retirement conditions.

14. I also do not agree that the challenged regulation passes the strict proportionality test (necessity, appropriateness, and proportionality in the narrower sense). The Constitutional Court derives its appropriateness from three elements: firstly, the reduction of labour costs, whereby no assessment of the extent of the reduction of budgetary expenses is provided and thus the measure could not be reviewed; secondly, the establishment of a favourable age structure, whereby the Decision does not clarify when a favourable age structure can be deemed to exist; there is a lack of criteria for the definition of a favourable age structure with regard to current demographic trends; and, thirdly, that the measure was appropriate also due to the “prevention of potential disputes regarding the ability of a civil servant to perform his or her work after a certain age.” It is not disputable that an individual’s ability mainly depends on his or her personal characteristics, which differ from one individual to another. The Decision, however, is based on the presumption that, upon the attainment of the age condition for retirement, civil servants are no longer capable of working, and the further presumption that judicial disputes would arise if their employment were terminated for reasons of inability. With regard to such, I would like to recall Constitutional Court Decision No. U-I-49/98, wherein the Court stated the following: “The fulfilment of the conditions for obtaining a full old age pension – indirectly also the attainment of a certain age – does not entail in itself that individuals are no longer capable of performing their work. It only means that they are guaranteed a certain level of social security stemming from the mandatory pension insurance system” (Paragraph 17). It must further be taken into account that in the Republic of Slovenia in 2013 the pensionable age for men was 58 years and four months (the fifth paragraph of Article 27 of the PDIA-2),<sup>9</sup> which as a rule does not correspond to

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9 With regard to the pensionable age, a transitional period applies until 2019; until then, the age for men and women will be raised each year by four months and will be equalised in 2019, when persons of both sexes will acquire the right to old age retirement at the age of 60 years and 40 years of the pension qualifying period without purchased periods.

the old age retirement conditions in other EU Member States where the statutory regulation of pensions have raised this age to 65 or 67 years.<sup>10</sup>

15. I believe that the challenged regulation does not pass the test of necessity. Not only could the stated aims be achieved by means of a less invasive interference in accordance with the Constitution, the adoption of the measure, moreover, was not even necessary. The Constitutional Court established the necessity of the measure by means of general statements about the budgetary deficit and the public debt of the Republic of Slovenia (Paragraph 64). Ensuring a balanced personnel age structure allegedly also requires the necessity of retirement at a certain age. The Civil Servants Act (Official Gazette RS, Nos. 63/07, and 65/08 – hereinafter referred to as the CSA) defined a greater number of possible manners of terminating an employment contract than the Employment Relationships Act (Official Gazette RS, No. 21/13 – hereinafter referred to as the ERA-1), which applies to the private sector, as the CSA adopted all manners of terminating an employment contract in accordance with the ERA-1 and also added other manners of terminating such.<sup>11</sup> One of the manners of terminating an employment contract for business reasons is precisely the public-finance reason that the FBA determined as the objective of such retirement. It follows already from such that the disputed provision of the FBA was not even necessary because the termination of an employment contract for public-finance reasons is already possible in accordance with the CSA by means of dismissal for business reasons. In the public sector the personnel policy must be exercised consistently at all times. In accordance with the CSA, persons holding leading positions have at their disposal sufficient possibilities to dismiss underperforming civil servants. Therefore, I cannot agree with the statement in the Decision that “[the above mentioned possibilities of] terminating civil servants’ employment contracts that are based on the assessment of an individual worker would not guarantee such permanently and systematically and would not enable a lasting structural stabilisation of expenditures in the area of labour costs” (Paragraph 68 [*sic, recte*: Paragraph 66]). On the contrary, an appropriate organisation of work through appropriate measures in the field of personnel policy is a systematic and permanent process. Dismissals of workers are a part of regular personnel management in the private sector. However, in relation to such, the public sector, which is stronger than the private sector as regards the educational structure of the personnel, invokes complicated dismissal procedures that should not be acceptable.
16. In the Decision, the Constitutional Court itself lists other methods to achieve a reduction in the number of public sector employees; however, in the opinion of the Constitutional Court, these would not be effective due to the delay (mainly as a result of judicial proceedings) and the interference with the dignity of civil servants when establishing the reason for their dismissal due to inability, and since such methods

10 I believe that the Constitutional Court took the mentioned reason from a CJEU Judgment (in the joined cases *Fuchs and Köhler*, Para. 47). The relevant case concerned the German *Land* Hessen, where a retirement age of 65 years applied to civil servants. I believe that the implementation of CJEU standpoints in our circumstances is not a good idea, unless other elements of the relevant CJEU decision are also taken into account.

11 See Article 154 of the FBA.

would affect civil servants of all ages. I believe that the delay cannot be of such importance that it could not be outweighed by the greater level of legal certainty that is guaranteed to civil servants in the event of dismissal (in particular, the employer is required to substantiate the reason for the dismissal), as opposed to an arbitrary choice of the employer regarding which civil servants' employment contracts to terminate by a final decision in accordance with the FBA. I also believe that it is no less dignified if the civil servant has to wait for a decision of the employer that is not subject to any criteria that would have to be considered when choosing those civil servants whose employment contracts are to be terminated due to the fulfilment of retirement conditions than if an employer has to establish the inability of an incapable civil servant.

17. Furthermore, the measures under the FBA are not only unnecessary, but, in my assessment, also harmful as the employment contracts of scientists, researchers, teachers at institutions of higher education, and others who upon the attainment of the full pensionable age could have been at the peak of their creative abilities were (or will be) terminated. For every nation, knowledge is priceless and thus cannot be measured by public-finance scales. This is even truer in the functioning of a small state, such as the Republic of Slovenia, in times of crisis. The fact that the measure is not of a mandatory nature does not convince me that persons in leading positions will not apply the disputed measure in accordance with the FBA to terminate the employment contracts of civil servants in an arbitrary manner, since the measure does not prescribe any procedure therefor, but only requires establishing that a civil servant has fulfilled the retirement conditions. Such concerns the simplest manner and procedure for the termination of an employment contract. Instead of protecting the state governed by the rule of law and knowledge (i.e. successful civil servants), the legislature thus enabled the linear dismissal (without any criteria) of older civil servants simply because they have fulfilled the statutory conditions for old age retirement.
18. Moreover, I disagree with the conclusion that the challenged measure is not disproportionate. The loss of the status of civil servant is a measure that interferes, in a systemic manner, with the protection of income and employment (the right to work), i.e. with the most fundamental rights of a civil servant. Therefore, it entails severe consequences. It is true that the affected civil servants will receive pensions (although pensions are lower than wages), and it is also true that they are guaranteed the formal possibility of re-employment (their actual chances being small given the high supply of labour); however, the non-pecuniary aspect has to be considered as well, as such concerns an interference with a person's creative abilities, their essence, personality, and dignity. In my opinion, such interferences should not be admissible by means of provisional statutes with public-finance content that permanently change the positions of individuals under labour and social law.
19. I believe that in the case at issue there further occurred a violation of the autonomy of universities in accordance with the first paragraph of Article 58 of the Constitution. I agree with the applicant's statement that the personnel aspect is also part of the core of the autonomy of universities. Instead of supporting this statement by comparable regulations in other democratic states or references to monographs,

I simply refer to Decision No. U-I-22/94, dated 25 May 1995 (Official Gazette RS, No. 39/95, and OdlUS IV, 52), wherein the Constitutional Court held the following: “However, the regulation of the question of whether and in what instances teachers at institutions of higher education, research workers, and associates at institutions of higher education who have fulfilled the conditions for acquiring the right to a full old age pension may continue in their employment due to special reasons falls within the scope of the autonomy of universities and institutions of higher education” (the second subparagraph of Paragraph 14 of the Reasoning). I have not found a sound reason for a different conclusion.

20. I also believe that the disputed provisions of the FBA violated the principle of trust in the law (Article 2 of the Constitution), as the FBA did not determine a transitional period that would enable the affected persons to make appropriate preparations. The measure thus interfered with the expected rights of older civil servants who have fulfilled the conditions for old age retirement. The principle of foreseeability, however, is an important principle for the protection of the rule of law.
21. Due to the above-mentioned reasons, I believe that the challenged regulation is inconsistent with the first paragraph of Article 14 of the Constitution, which prohibits discrimination on grounds of age. The employment of young persons is an important part of the social and employment policy of each democratic country that has to be implemented, however, not by following the path of discriminating against older persons. It is in the public interest that the state ensures employment possibilities and social security for everyone in a constitutionally admissible manner, particularly without thereby interfering with the human right to equality and trust in the law.

*Dr Etelka Korpič – Horvat*

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#### **DISSENTING OPINION OF JUDGE DR DUNJA JADEK PENZA**

1. I completely agree with the general premises presented in Paragraphs 27 through 35 of the reasoning of the majority Decision. The reasons regarding the effects of Article 3a of the Constitution that substantiate the relationship between the legal order of the European Union (hereinafter referred to as the EU) and the domestic legal order in the territory of the Republic of Slovenia as well as the importance of these effects for a constitutional review are essential in the case at issue. However, these premises have not been taken into account in what I consider to be an important part of the consideration on the merits. As I believe that this was not unimportant for the review, I could not agree with the reasoning of the Decision on the constitutional admissibility of the interference with the right to non-discriminatory treatment on grounds of age regarding dismissal (Point 5 of the operative provisions). The specific decisions in Points 3 and 4 of the operative provisions of the majority Decision are tied to this constitutional review. As I could not agree with their assessment of the fact that the interference with the right to non-discriminatory treatment on grounds of age is con-

stitutionally admissible (these two points of the operative provisions namely presuppose such a review and refer to it), I also voted against these decisions. My vote against this part (i.e. Points 3 and 4) of the operative provisions is certainly not a negation of the right of female civil servants to non-discriminatory treatment on grounds of sex regarding dismissal, but, on the contrary, an affirmation of this right and thereby of the requirement that it be consistently observed in the domestic legal order.

2. It is namely my central belief that this right has already become effective within the domestic legal order since such is determined by EU law. The challenged statutory regulation could not have had an effect contradicting [this right] precisely due to the general premises of the majority Decision. In accordance with the principle of the primacy of EU law in this area, in the event of a collision between EU law and national law, EU law has to be applied. It further follows from the case law of the Court of Justice of the European Union (hereinafter referred to as the CJEU) that the prohibition of differentiation on grounds of sex regarding dismissal determined by the first paragraph of Article 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26. 7. 2006) has direct effect within the national legal order.<sup>1</sup> Consequently, even if the Constitutional Court had not established its inconsistency with the Constitution, the challenged regulation should not be applied by the national courts and individual women can directly rely on [the Directive] against employers who are “public institutions” (in so-called vertical relationships; such is also the case at issue). Therefore, I was of the opinion that the Constitutional Court decision regarding the manner of implementation determined by Point 4 of the operative provisions was not even necessary for the implementation of the right to the equal treatment of female civil servants in (real) life. The same applies, *mutatis mutandis*, to the request that the Constitutional Court addressed to the legislature.<sup>2</sup> In an ideal normative world, the challenged regulation has had and from now on also will have no effect on the implementation of the human right to non-discriminatory treatment on grounds of sex regarding dismissal.
3. In accordance with the premises in Paragraphs 34, 35, and 43 of the reasoning, in the case at issue the Constitutional Court also considered that, in addition to being bound by the (1) Constitution, it was also bound by (2) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2. 12. 2000 – hereinafter referred to as Directive 2000/78/EC) and (3) the case law that the CJEU has developed on its basis. Both the first paragraph of Article 6 of Directive 2000/78/EC, which defines a derogation from

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1 Cf. the CJEU Judgment in the case *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, 152/84, dated 26 February 1986, Paras. 47 *et seq.*

2 At this point, I would like to draw attention to the first paragraph of Article 7 of the Implementation of the Principle of Equal Treatment Act (Official Gazette RS, Nos. 50/04, and 61/07 – IPETA), which guarantees equal treatment *inter alia* with regard to sex and explicitly and specifically requires the National Assembly to create conditions for equal treatment also through measures of a normative nature.

the prohibition of the different treatment of individuals on grounds of age,<sup>3</sup> and the case law that the CJEU developed on its basis were important. In the terminology of constitutional law, the mentioned provision of Directive 2000/78/EC, together with the relevant CJEU case law, defines the test of (and thereby the “density” of) the assessment of the legitimacy and the proportionality of an interference with the right to non-discriminatory treatment on grounds of age in employment and occupation (in the case at issue, differentiation on grounds of age regarding dismissal is essential).

4. Even if we accept that, in accordance with the first paragraph of Article 6 of Directive 2000/78/EC, age is a specific personal characteristic and therefore different treatment on such grounds in employment and occupation is not inadmissible if, within the context of national law, it is objectively and reasonably justified by a legitimate aim; and even if, as the CJEU has consistently stated in preliminary ruling procedures in accordance with Article 267 of the Treaty on the Functioning of the European Union (consolidated version, OJ C 326, 26. 10. 2012 – hereinafter referred to as the TFEU), Member States enjoy a comprehensively wide margin of appreciation in identifying the objective needs in a Member State and choosing accordingly from among the competing interests of different policies in the fields of employment, the labour market, or vocational training,<sup>4</sup> age belongs to the suspicion-raising personal characteristics in this area of EU law. This entails that it belongs to the prohibited (personal) differentiation criteria,<sup>5</sup> and potentially admissible derogations from this prohibition must be considered exceptions that require narrow interpretation.<sup>6</sup> That such concerns an exception to the prohibition of different treatment on grounds of age is confirmed by the case law of the CJEU.<sup>7</sup>

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- 3 The first phrase of this provision of the Directive reads as follows (NB: structural changes to the text by DJP): “Notwithstanding Article 2(2), Member States may provide (i) that differences of treatment on grounds of age shall not constitute discrimination, (ii) if, within the context of national law, they are (iii) objectively and reasonably justified by a legitimate aim, (iv) including legitimate employment policy, labour market and vocational training objectives, and (v) if the means of achieving that aim are (vi) appropriate and (vii) necessary.”
  - 4 “[...] Article 6(1) of Directive 2000/78 gives Member States the option to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are ‘objectively and reasonably’ justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary. It imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification. No particular significance should be attached to the fact that the word ‘reasonably’ used in Article 6(1) of the directive does not appear in Article 2(2)(b) thereof.” See the CJEU Judgment in the case *The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07, dated 5 March 2009, Para. 67.
  - 5 Cf. Articles 10 and 19 of the TFEU and Article 1 of Directive 2000/78/EC. Cf. also Colm O’Cinneide, *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*, e-books, European Commission, November 2012, p. 14, accessible at <http://bookshop.europa.eu/en/the-evolution-and-impact-of-the-case-law-of-the-court-of-justice-of-the-european-union-on-directives-2000-43-ec-and-2000-78-ec-pbDS3212556/> (accessed in October 2013).
  - 6 Colm O’Cinneide, p. 43.
  - 7 “[...] Article 6 of Directive 2000/78 establishes a scheme of derogation specific to differences of treatment on

5. In the context of the prohibition under consideration, the exception entails that only the conditions that define the exception on an abstract level (and that are defined by EU law) outline the scope of the requirement of the implementation of equal treatment. A broadening of the exception will inevitably lead to a narrowing of the scope of the right to non-discriminatory treatment in an individual case (and *vice versa*). The scope of the exception itself, however, is inversely proportional to the number of conditions that define the exception. Consequently, each of the conditions that define the scope of the exception is important for the content of the right to non-discriminatory treatment in an individual case. Therefore, I believe that the following applies: the broader the scope of the exception, the narrower the scope of the requirement of equal treatment and thus the scope of the right to non-discriminatory treatment (and *vice versa*).
6. In EU law, the path of the constitutional review of the admissibility of an exception to the fundamental prohibition of discrimination on grounds of age (*inter alia*) regarding dismissal is defined by (1) the conditions determined by Directive 2000/78/EC and (2) the case law of the CJEU (i) which interprets the open-textured legal terms that define these conditions, (ii) as well as the guidance that the CJEU provides to national courts in preliminary review proceedings on how to review the proportionality of concrete derogations from the prohibition of differentiation in individual cases, and, finally, (iii) by the factors that [national courts] have to take into account in doing so. In such cases, the CJEU does not provide a final judgment regarding the legitimacy and the proportionality of a concrete interference. This is left to the national court. In cases where the CJEU assesses an action of the European Commission against a Member State on the basis of Article 258 of the TFEU, the CJEU itself replies to the question of whether the measure at issue has a legitimate aim and whether the means of achieving it that are under review are proportionate. Such was the situation in the case *Commission v. Hungary*, C-286/12, dated 6 November 2012.<sup>8</sup> When deciding on the right of an individual to non-discriminatory treatment on grounds of age regarding dismissal, it appears clear to me that in order to ensure the full effectiveness of EU law a national court must, for the purpose of reviewing the legitimacy and proportionality of a concrete interference with this right, align the circumstances of the individual case with the open-textured legal terms that define the individual conditions for the exception, thereby taking into account the case law of the CJEU and the guidance and relevant factors expressed therein. And only following such may it pass judgment regarding the legitimacy and proportionality

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grounds of age, on account of the recognised specificity of age among the grounds of discrimination prohibited by the directive. Recital 25 in the preamble to that directive makes clear that it is 'essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.'" See the CJEU Judgment in the case *The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, Para. 60.

- 8 In that case the CJEU itself passed judgment regarding the appropriateness and necessity of the challenged lowering of the age limit for compulsory retirement of judges, prosecutors, and notaries.

of the interference and thus the potential admissibility of the interference with the right to non-discriminatory treatment on grounds of age. The case law of the CJEU determines on an abstract level which circumstances are relevant for this review.<sup>9</sup>

7. I therefore advocated that the Constitutional Court, in essentially the same manner as any other national court reviewing the right of an individual to non-discriminatory treatment in concrete judicial proceedings, in the framework of 'its' strict test on the basis of which it assesses the (in)admissibility of an interference with the constitutionally guaranteed human right determined by the first paragraph of Article 14 of the Constitution, apply the interpretation of open-textured terms, guidelines, and factors from CJEU case law, or, simply put, the test that has developed in hitherto CJEU case law. As I understand it, already the principle of consistent interpretation requires it to do so. The strict test that the Constitutional Court applies is in any event "open" enough to enable the consideration of the case law of the CJEU in the substantive sense, whereby I am not only thinking of the interpretation of open-textured terms provided by CJEU judgments, but also further guidelines and factors, as all of these together define the conditions for a derogation from the requirement of equal treatment on grounds of age regarding dismissal (and thus the scope of the exception). In my opinion, all standpoints from CJEU judgments play the role of "criteria" for a review of the legitimacy of individual aims and the proportionality of the means of achieving a concrete legitimate aim in an individual case. In my understanding, such entails the only possible manner of ensuring that at the same time a review is carried out regarding whether the challenged regulation meets the minimum requirements of protection under EU law, below which protection in a Member State must not be lowered.<sup>10</sup> To sum up, firstly, each and every one of the conditions that define the scope of the exception to the prohibition of differentiation on such grounds, including CJEU case law in this field, is important for [determining] the scope of this exception, and, secondly, the scope of the exception is the factor that defines the substance of the right to non-discriminatory treatment on grounds of age regarding dismissal in an individual case. Finally, it is not unimportant that EU law directly protects the individual within the scope of Directive 2000/78/EC and

9 Cf. the analysis of the case law of the CJEU in this field in Elaine Dewhurst, *Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations*, *Common Market Law Review*, I. 50, No. [5] (2013), pp. 1334–1362. The author rightly draws attention to the difference in the amount of guidance that the CJEU provides in individual cases of differentiation on grounds of age, in particular with regard to the question of whether the differentiation concerns the general labour market or a specific organisation. She further rightly draws attention to the danger of different application of EU law in comparable cases in different Member States as well as within an individual Member State that arises from the CJEU's flexible approach (*Ibidem*, pp. 1345 *et seq.*).

10 Cf. recital 28 of the preamble to the Directive, from which it clearly follows that the Directive (only) lays down minimum requirements, and Article 8 of the Directive, that provides that Member States may introduce or maintain provisions which are more favourable for the protection of the principle of equal treatment than those laid down in this Directive.

the requirements it defines with regard to implementing the principle of equal treatment on grounds of age.<sup>11, 12, 13</sup>

8. With regard to the interpretation of the open-textured legal terms that define the conditions for an exception to the prohibition of discrimination on grounds of age as concerns (*inter alia*) dismissal, the case law that the CJEU has developed regarding the interpretation of the concepts of the appropriateness and necessity of the means that the national regulations prescribe for achieving legitimate aims is also important. These contents are important in EU law as they are applied to define (in constitutional law terminology) the path of the review of the proportionality of an interference with the right to non-discriminatory treatment (i.e. of the proportionality of the means for achieving a concrete legitimate aim that are under review). In other words, CJEU judgments identify all the viewpoints from which national courts must illuminate the interference under review in order to be able to assess its proportionality as objectively as possible. It thus follows from the case law of the CJEU that national legislation is appropriate for ensuring the attainment of the objective pursued only if it *genuinely* reflects a concern to attain it in a consistent and systematic manner.<sup>14</sup>
- <sup>15</sup> However, according to the case law of the CJEU, when reviewing the necessity of a measure from the viewpoint of the legitimate aim it pursues, it must also be clarified whether the *exceptions* to the age limit do not interfere with the consistency of the legislation in question by leading to a result that is contrary to that aim.<sup>16</sup> In addition, according to the case law of the CJEU, authorities have to find the right *balance*

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11 “[...] By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of European Union law must be disapplied.” See the CJEU Judgment in the case *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, C-555/07, dated 19 January 2010, Para. 54.

12 “In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.” See the CJEU Judgment in the case *Werner Mangold v. Rüdiger Helm*, C-144/04, dated 22 November 2005, Para. 77.

13 “[...] since this is a dispute between a public institution and an individual, if national legislation such as that at issue in the main proceedings does not satisfy the conditions set out in Article 6(1) of Directive 2000/78, the national court must decline to apply that legislation.” See the CJEU Judgment in the joined cases *Vasil Ivanov Georgiev v. Tehnicheski universitet - Sofia, filial Plovdiv*, C-250/09 and C-268/09, dated 18 November 2010.

14 “It must be observed, in accordance with settled case-law, that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.” See the CJEU Judgment in the joined cases *Gerhard Fuchs and Peter Köhler v. Land Hessen*, C-159/10 and C-160/10, dated 21 July 2011, Para. 85.

15 “It must be remembered that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.” See the CJEU Judgment in the case *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-341/08, dated 12 January 2010, Para. 53.

16 See the CJEU Judgment in the case *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Para. 53.

between the different interests involved, while ensuring that they do not go beyond what is appropriate and necessary to achieve the legitimate aim pursued.<sup>17</sup>

9. The majority Decision, as I understand it, does not reply to the questions that are relevant for the assessment of the proportionality of the interference according to the case law of the CJEU, as it fails to take into account the test that developed therein. Thus, for example, the exception to the statutory obligation of dismissal with regard to age determined by the third paragraph of Article 188 of the Fiscal Balance Act (Official Gazette RS, Nos. 40/12, and 105/12 – hereinafter referred to as the FBA) was not included in the assessment. In the context of the strict limitation of recruitment determined by Article 183 of the FBA, I believe that the third paragraph of Article 188 of the FBA is of particular importance in relation to the pursued objective of ensuring a balanced age structure of civil servants. In accordance with the wording of the third paragraph of Article 188 of the FBA, dismissal is namely a matter of assessment by the head [of a state authority] regarding the need to ensure an uninterrupted work process. By the nature of the matter, this assessment falls within the ambit of the autonomous decision-making of such [head of a state authority]. Precisely due to such, I find it hard to deny the importance of the exception defined in the third paragraph of Article 188 of the FBA in the assessment of the (in)consistency and necessity of the challenged regulation for achieving the objectives of ensuring an altered (balanced) age structure, especially since this circumstance moreover undermines the possibility of employing (younger) civil servants, which Article 183 of the FBA makes conditional upon the urgency of the need to carry out the functions [of the state authority in question] (*cf.* the first indent of the second paragraph of Article 183 of the FBA). It appears clear to me that the existence of the urgent need for recruitment is also excluded if the post in question is occupied at the discretion of the head in order to ensure “an uninterrupted work process”. With regard to the second identified objective – the prevention of disputes on whether an employee is able to perform his or her work after a certain age, I doubt that this objective must necessarily be attained by means of dismissals of civil servants who have fulfilled the conditions for an old age pension, for example, already at the age of 58. The joined cases *Gerhard Fuchs and Peter Köhler v. Land Hessen*<sup>18</sup> concerned the question of the retirement of prosecutors at the age of 65 years with the possibility to continue working until 68 years (if such was in the employer’s interest). In my opinion, the challenged means of achieving the objective of preventing disputes originating from a civil servant’s inability to carry out his or her work is manifestly disproportionate as it goes beyond what may (perhaps) have been necessary to achieve this objective. My personal experience with persons from this age group namely reinforces my conviction that I cannot presume merely on grounds of their age that such persons are in general less capable of performing

<sup>17</sup> See the CJEU Judgment in the joined cases *Gerhard Fuchs and Peter Köhler v. Land Hessen*, Para. 65; *Cf.* also the CJEU Judgment in the case *Félix Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05, dated 16 October 2007, Para. 71.

<sup>18</sup> The majority Decision refers to that CJEU Judgment with regard to this objective. *Cf.* note No. 46 of the reasoning of the Decision.

the work of a civil servant than persons who have not yet attained such age. Allow me to add that the objective of preventing disputes regarding the ability to perform work after a certain age derives from the supposition of the inability of older persons to work. However, this supposition is nothing but a prejudice related to age, and Directive 2000/78/EC is intended to protect individuals precisely from prejudice on grounds of their personal characteristics (*inter alia*, age).<sup>19,20</sup>

10. I would like to proceed to (and summarise) some of the dilemmas that I have faced with regard to the objectives of the challenged regulation. I fully agree with the standpoint from the majority Decision that ensuring sustainable public finances is the *main* objective of the challenged measure: in the field of employment it enables a reduction in the number of civil servants and in the public sector wage bill. That this objective was also in the foreground when the challenged regulation was adopted, as I understand it, is supported by its inclusion among provisional measures. Thereby the FBA once again<sup>21</sup> completely clearly stated that the measure is only important for the time of the economic crisis (regardless of its duration). In such a period, on the one hand, problems in ensuring resources for the wages of public sector employees naturally arise, while, on the other hand, ensuring them in the same amount may seriously threaten the financial balance (*inter alia*) of the social security system and thus the existence of the most vulnerable groups, which the state must not allow. However, it is precisely due to its inclusion among provisional measures, which entails that the enacted measure of dismissal is provisional, that the challenged measure deviates from the objective of pursuing intergenerational justice in the sense of the desire to attain a balanced distribution of employment posts between younger and older generations (by which differentiation on grounds of age is justified in the majority Decision). I namely see no purpose in pursuing intergenerational justice that is only provisional. However, I agree with the majority Decision that the objective of ensuring the sustainability of public finances was objectively justified. We are namely facing a situation in which due to harsh conditions the need to prevent serious threats to the financial balance is being emphasised in the state, while the threat of insufficient coverage of social and other benefits in such circumstances inevitably requires that a (new) balance between the competing interests of social, economic, and fiscal policies be struck. For me, it was in particular the *necessity* of finding a new

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19 “As regards the second objective, the Commission points out that the argument concerning the replacement of older judges by younger judges and the improvement of the efficiency of the public justice service assumed to result therefrom is not only a ‘pure and simple generalisation’, rejected by the Court in *Fuchs and Köhler*, but also a form of prejudice based on age. Directive 2000/78, however, precisely seeks to protect individuals against such prejudices.” See the Judgment in the case *Commission v. Hungary*, Para. 30.

20 Therefore, it is rightly emphasised that the concern regarding an employee’s ability to perform certain types of work could be better dealt with under the first paragraph of Article 4 of the Directive. Cf. the Supreme Court of the United Kingdom, the Judgment in the case *Seldon v. Clarkson, Wright & Jakes*, [2012] UKSC 16, dated 25 April 2012 (per Lady Hale), Para. 57.

21 The first paragraph of Article 1 of the FBA explicitly states that ensuring sustainable public finances and reducing budgetary expenditures is the purpose of the amendment of the acts listed in [that provision].

balance between the competing interests (*inter alia*) with regard to social policy in the Republic of Slovenia that illuminated the importance of achieving the objective of sustainable public finances from a special viewpoint. As I understand it, the factual context in which the challenged measure was adopted is hence different from the one in the joined cases *Gerhard Fuchs and Peter Köhler v. Land Hessen*, from which follows the standpoint of the CJEU that while budgetary considerations can underpin the chosen social policy of a Member State, they cannot in themselves constitute a legitimate aim that could justify different treatment on grounds of age within the meaning of the first paragraph of Article 6 of Directive 2000/78/EC.<sup>22</sup> On the basis of these premises and taking into account that the sustainability of public finances is the *main* objective of the challenged regulation, due to the specific circumstances of the case at issue, it became clear that the Constitutional Court should have solicited the position of the CJEU regarding this issue that is difficult for society and individuals alike, before reaching a decision in the case at issue. Such namely concerns the scope of Directive 2000/78/EC, which, as can be inferred from the arguments at the beginning [of the reasoning of the majority Decision], is binding upon the Constitutional Court. In my opinion, therefore, a preliminary question should have been submitted to the CJEU in accordance with Article 267 TFEU regarding the interpretation of the concept of a legitimate aim in circumstances where reducing the public sector wage bill is not only one of the (possible) policies, but an expression of the urgent response to the need to ensure the financial balance of public finances in order (*inter alia*) to prevent threats to the coverage of social security benefits.<sup>23</sup>

*Dr Dunja Jadek Pensar*

<sup>22</sup> Cf. the CJEU Judgment in the joined cases *Gerhard Fuchs and Peter Köhler v. Land Hessen*, Paras. 73 and 74.

<sup>23</sup> It follows from the case law of the CJEU that the legitimate aims stated in the first paragraph of Article 6 of the Directive are listed as examples. Cf. the CJEU Judgments in the case *Commission v. Hungary*, Para. 40, and the CJEU Judgments cited therein.

**DECISION**

At a session held on 3 July 2014, in proceedings to review constitutionality initiated upon the request of the Information Commissioner, the Constitutional Court

*decided as follows:*

1. Articles 162, 163, 164, 165, 166, 167, 168, and 169 of the Electronic Communications Act (Official Gazette RS, Nos. 109/12 and 110/13) are abrogated.
2. Following the publication of this Decision in the Official Gazette of the Republic of Slovenia, the service providers referred to in the first paragraph of Article 163 of the Electronic Communications Act must immediately destroy all data that they are retaining on the basis of the challenged provisions.

*Reasoning***A**

1. On the basis of the sixth indent of Article 23a of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), the Information Commissioner submitted a request for the review of the constitutionality of Articles 162 through 169 of the Electronic Communications Act (hereinafter referred to as the ECA-1), which entered into force on 15 January 2013. By the challenged provisions, the Republic of Slovenia transposed into its legal order Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, 13 April 2006 – hereinafter referred to as the Data Retention Directive).<sup>1</sup>

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<sup>1</sup> Such follows from the content of the statutory provisions and especially from the second paragraph of Article 2 of the ECA-1 and the purpose of the legislature expressed in the draft act (Gazette of the National Assembly, dated 1 October 2012, EPA 667-VI).

2. The applicant is the supervisory authority for supervision of the implementation of the provisions on the obligatory retention of data in conformity with the provisions of Section XIII of the ECA-1 (Article 169 of the ECA-1). It claims that it is conducting an inspection procedure with regard to the conduct of one of the Slovene mobile phone service providers, in conformity with the provisions of the ECA-1. Since in this procedure it doubted the constitutionality of the provisions on the basis of which the service provider had been retaining the traffic, location, and other therewith related data (hereinafter referred to as traffic data) of its users on the basis of the first paragraph of Article 163 of the ECA-1, the applicant submitted the request for the review of the constitutionality of the challenged provisions.
3. The fundamental allegation contained in the request for the review of the constitutionality of the challenged provisions is that, on the basis of the Data Retention Directive, the Republic of Slovenia imposed on service providers the obligation to retain as a precautionary measure data on all users, i.e. regardless of whether the users themselves gave rise to reasons for such an interference with their rights. Such retention of data allegedly entails an inadmissible interference with the right to the protection of personal data (Article 38 of the Constitution), communication privacy (Article 37 of the Constitution), and consequently also with the right to freedom of movement (Article 32 of the Constitution), the right to freedom of expression (Article 39 of the Constitution), and with the principle of the presumption of innocence (Article 27 of the Constitution). The applicant is of the opinion that, in conformity with the established constitutional case law, these measures do not pass the test of proportionality. It stresses that traffic data enjoy the same protection as the content of communications and that they are protected by Article 37 of the Constitution. It is also of the opinion that the interferences with [the mentioned human] rights are not proportionate because empirical data do not prove that the purpose of such retention of data could be achieved by such interference with the mentioned rights. Only a significantly higher percentage of serious criminal offences being investigated can allegedly justify the primacy of the public interest over the interests of every single individual with regard to enjoying privacy, moving and communicating freely (without being monitored), expressing his or her opinions, etc. The applicant is of the opinion that the measure is not even appropriate, because there exists a series of technical circumventions that prevent the retention of data. In the opinion of the applicant, the awareness of users that their communications are being monitored also has an influence on the exercise of other rights (especially the freedom of expression). Due to self-censorship, an individual who knows that he is being monitored will act differently than he or she would otherwise. The applicant is of the opinion that due to the retention of location data, the regulation is additionally invasive, because it interferes with the freedom of movement. It also alleges a violation of Article 3a of the Constitution, which in its view lies in the fact that the Data Retention Directive has allegedly been incorrectly transposed into the Slovene legal order, because it also allows the retention of traffic data for the prevention, investigation, detection, and prosecution of criminal offences that cannot be qualified as serious

criminal offences, and because it allows data to be used for the purpose of providing for the needs of the intelligence service and defence forces.

4. In its reply to the request [for the review of constitutionality], the National Assembly in fact concurs that the retention of data determined by Article 164 of the ECA-1 significantly interferes with the privacy of individuals; however, it does not concur with the standpoint of the applicant that the state does not need such data. It draws attention to the fact that the retention of data is an important tool for the detection and investigation of criminal offences, the defence of the state, national security, and constitutional regulation, and that such data must most often be obtained for a past period of time, which is precisely what the obligatory precautionary retention of data enables. The National Assembly draws attention to the provisions of the challenged regulation that reduce the possibility of abuses, namely: ten-year retention of data regarding any accessing of traffic data; service providers must retain data and protect them as confidential in conformity with the law regulating confidential data; sanctions are determined for any violation of security rules; and access to data is only possible on the basis of a court order.
5. In its opinion, the Government draws attention to the fact that the applicant, although it explicitly challenges the provisions of a national regulation, substantively alleges that the Data Retention Directive is inconsistent with the mentioned human rights. The Government does not concur with the standpoint that the retention itself of traffic data is not an important tool for the prosecution of criminal offences. It refers to the Evaluation Report on the Data Retention Directive, dated 18 April 2011,<sup>2</sup> from which it allegedly follows that retained traffic data such as envisaged by the Data Retention Directive have an important role in the investigation of criminal offences. An equal conclusion allegedly also follows from the analysis with regard to the use of electronic communications traffic data for the period 2010–2012 that was prepared by the Police. From that analysis it allegedly follows that traffic data have an important role in the collection of evidence in the framework of the investigation of criminal offences, because they indicate individual facts, circumstances, relations, dynamics, and patterns that significantly contribute to the collection of fundamental evidence for directly proving the suspicion that a [concrete] criminal offence has been committed (uncovering the planning of criminal offences, the identification of persons and connections in a criminal association, etc.). The Government warns that the detection of certain criminal offences would not even be possible without the analysis of data retained beforehand (e.g. sexual abuses of children committed over the Internet). It also stresses that access to traffic data is an important tool for combating terrorism and international organised crime, as well as for the functioning of the [Slovene] Intelligence and Security Agency with the purpose of safeguarding the security of the state and its constitutional regulation. The Government explains that service providers retain traffic data in two separate databases: in the so-called “com-

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2 Report from the Commission to the Council and the European Parliament, Evaluation Report on the Data Retention Directive (Directive 2006/24/EC), dated 18 April 2011, COM (2011) 225 final.

mercial” database and the “retentional” database. The latter is smaller in scope, because from the “commercial” database only those data that are exhaustively determined by Article 164 of the ECA-1 are transferred thereto. Allegedly, the only consequence of the challenged regulation is a longer period of the retention of data. The Government is of the opinion that the challenged regulation does not interfere with the right to the freedom to act and the freedom of movement, and with the freedom of expression, as determined by Articles 32 and 39 of the Constitution. On the contrary, the regulation allegedly does interfere with the right to communication and information privacy determined by Articles 37 and 38 of the Constitution, as well as with the general right to privacy determined by Article 35 of the Constitution; however, these interferences are allegedly proportionate. The same allegedly applies to the alleged violation of the presumption of innocence.

6. In its reply, the applicant underlines that the allegations of the Government regarding the alleged benefits of the obligatory retention of data are generalised. It alleges that the Government does not explain what is essential: whether due to the entry into force of the obligatory retention of traffic data there was a significant change in the detection of criminal offences in comparison with the period when the regulation had not yet been in force. It is of the opinion that the analysis submitted by the Government is methodologically inappropriate and that it pursues wrong aims. It refers to the study of the Max Planck Institute for Foreign and International Criminal Law from 2011, from which the conclusion allegedly follows that the retention of traffic data does not contribute to a higher number of criminal offences being investigated. It also draws attention to statistical data submitted by the Government, from which it follows that only a small share of the data needed by the Police are older than 6 months. It also underlines that the perpetrators of the most serious (especially organised) criminal offences have the knowledge and means to efficiently conceal [their] electronic traces. One consequence of that is the fact that the immensely vast database containing data on the entire population will only serve to aid in the search for a handful of the most ignorant and careless perpetrators of criminal offences; for such reason, the [disputed] interferences entail a manifestly disproportionate measure.

## B – I

7. The challenged provisions are contained in Section XIII of the ECA-1, entitled “Retention of data”. The legislature envisaged such regulation as determined by this Section only in order to transpose into the national legal order the requirements of the Data Retention Directive.<sup>3</sup> In fact, the Slovene legislature first transposed the obliga-

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3 See the explanation of Section XIII of the ECA-1 (Retention of data) in the draft act (Gazette of the National Assembly, dated 1 October 2012): “[...] From the viewpoint of the clarity of the regulation, because what is at issue is the implementation of two different directives (the Directive on Privacy and Electronic Communications and the Data Retention Directive), a new Section is introduced in the ECA-1 that only refers to the implementation of the Data Retention Directive, as was in fact already ensured by Section X of the existing ECA (i.e. ‘The protection of the privacy, confidentiality, and safety of electronic communications and the retention of data regarding electronic communications traffic’). [...]”

tions stemming from the Data Retention Directive already by the adoption of the Act Amending the Electronic Communications Act (Official Gazette RS, No. 129/06 – hereinafter referred to as the ECA-A),<sup>4</sup> which entered into force on 27 December 2006. The regulation of the obligatory retention of data, as a consequence of the implementation of the Data Retention Directive (except for the time limit for the retention of data being shortened from two years to the now applicable 14 or 8 months),<sup>5</sup> has already been in force in a virtually unchanged form for more than 7 years.

8. The challenged provisions impose on service providers the obligation to retain data related to the use of certain telecommunication services (telephone services in fixed and mobile networks, Internet and e-mail access, as well as Internet phone service access). On the basis of the data that are being retained, it is possible to determine who communicated with whom, when, for how long, where, and how (Article 164 of the ECA-1 and Article 5 of the Data Retention Directive). The obligation to retain data also includes unsuccessful phone calls. The content of communications is not being retained (the third paragraph of Article 163 of the ECA-1 and the first paragraph of Article 3 of the Data Retention Directive). Data related to publicly accessible phone services are being retained for 14 months following the day of a particular communication, whereas other data are being retained for 8 months. In exception, a longer period of retention can be determined (the fifth and sixth paragraphs of Article 163 of the ECA-1 and Articles 6 and 12 of the Data Retention Directive). At the end of the retention period, service providers must destroy the data, except those data regarding which an order for accessing the data has been issued and that have been transmitted to the competent authority (the seventh paragraph of Article 163 of the ECA-1 and Article 7 of the Data Retention Directive). What is determined (in general) is the level of protection of the retention of data and the related measures that service providers must adopt themselves or in cooperation with others. The role of the Information Commissioner is also determined; the Information Commissioner can submit preliminary opinions with regard to the general act that determines in detail the manner of the protection of the retention of data (Article 165 of the ECA-1) and supervises, with certain limitations, the implementation of the provisions of Section XIII of the ECA-1 (Article 169 of the ECA-1). Service providers must retain data (if they create or process such when providing public communications services related thereto) for the purposes of obtaining data in a public communications network determined by the law that regulates criminal procedure, for the purposes of ensuring national security and the constitutional system, and the security, political, and economic interests of the state as determined by the law that regulates the Slovene Intelligence and Security Agency, as well as the defence of the state as determined by the law that regulates the defence of the state (the first paragraph of Article 163 of the ECA-1 and in a certain part also Article 1 of the Data Retention Directive). A record of any access to data and transmission of data must be ensured for ten years (the fifth

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4 See Article 92 of the ECA-A, which introduced the new Articles 107a through 107e.

5 The fifth paragraph of Article 163 of the ECA-1.

paragraph of Article 166 of the ECA-1). Service providers must not disclose to the affected persons (or third persons) the fact that any data will be or has been accessed or transmitted, nor may they disclose the court order itself (the fourth paragraph of Article 166 of the ECA-1). This Section also includes special provisions with regard to the definition of the terms that are used in this Section (Article 162 of the ECA-1), the costs of the retention of data (Article 167 of the ECA-1), and data referring to the orders for accessing and transmitting data (Article 168 of the ECA-1).

9. In fact, the applicant explicitly challenges all the provisions of Section XIII of the ECA-1, however, as is evident from the third paragraph of this reasoning, it substantively challenges only those provisions that impose on service providers the obligation to retain certain data in public communications networks (also) for the purposes and in the scope envisaged by the Data Retention Directive. [Therefore], the Constitutional Court also carried out a review [of constitutionality] in such scope.
10. Substantively, the applicant in fact alleged that the Data Retention Directive is inconsistent with human rights. The Constitutional Court was not able to decide on the constitutionality of the challenged regulation until the Court of Justice of the European Union, which has exclusive competence to assess the validity of the mentioned Directive, decided on its validity. Therefore, by Order No. U-I-65/13, dated 26 September 2013, the Constitutional Court stayed the proceedings to review the constitutionality of the challenged provisions of the ECA-1 until the Court of Justice of the European Union adopted a decision in the joined cases Nos. C-293/12 and C-594/12, which when the Constitutional Court decided to stay the proceedings were already in the final phase of decision-making.
11. By its Judgment in the joined cases *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others* and *Kärntner Landesregierung and others*, C-293/12 and C-594/12, dated 8 April 2014 (hereinafter referred to as the Judgment in the joined cases C-293/12 and C-594/12), the Court of Justice of the European Union declared the Data Retention Directive invalid. It established that by its adoption, the legislature of the European Union exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7 and 8, as well as the first paragraph of Article 52 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26 October 2012, p. 391 – hereinafter referred to as the Charter).

## B – II

12. By declaring the Data Retention Directive invalid, the obligation of Member States to transpose the requirements from this Directive into the national legal order ceased. Nonetheless, the protection of traffic data still remains a subject of regulation under European Union law. Articles 5 and 6 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on Privacy and Electronic Communications) (OJ L 201, 31 July 2002) impose on Member States the obligation to ensure the confidentiality of communications and related traffic data, if they are not necessary for achieving the purpose

of the transfer of communications or if an individual did not give his or her consent for such processing of the mentioned data. Article 15 of this Directive enables that “Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, [...] of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, *inter alia*, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.”

13. Therefore, European Union law does not prohibit the retention of traffic data for purposes such as are determined by the first paragraph of Article 163 of the ECA-1. Consequently, a Member State may decide to adopt such a measure. If it does, however, it must respect the requirement of the proportionality of the measure, in conformity with the limitations referred to in the mentioned provision of the Directive. From such a perspective, the Slovene legislature is entitled to determine the obligatory retention of traffic data also for the purposes of safeguarding national security, defence, and public safety, as well as [for the purposes of] preventing, investigating, detecting, and prosecuting criminal offences. In conformity with the mentioned provision of the Directive, such interference with fundamental rights must entail a necessary, appropriate, and proportionate measure within a democratic society. Also in conformity with the established constitutional case law, there has to exist a constitutionally admissible aim in order for an interference with any human right – and thus also with the right to information privacy determined by the first paragraph of Article 38 of the Constitution – to be admissible, and in addition, such interference must also be in conformity with the principles of a state governed by the rule of law, namely with that of these principles that prohibits excessive interferences by the state (the general principle of proportionality – Article 2 of the Constitution).<sup>6</sup> The admissibility of the limitation of the right to the protection of personal data is thus also, in conformity with the Constitution, substantively regulated in the same manner as follows from Article 15 of the mentioned Directive.

### B – III

14. On the basis of the challenged regulation, as a precautionary measure service providers non-selectively retain, for a determined period of time, exhaustively determined traffic data on all communications related to fixed network phone service, mobile phone service, Internet access, Internet e-mail service, and Internet phone service. The

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6 Cf. Decision of the Constitutional Court No. U-I-18/02, dated 24 October 2003 (Official Gazette RS, No. 108/03, and OdlUS XII, 86).

Government alleges that these data indicate individual facts, circumstances, dynamics, and patterns of individuals' lives. With regard to the definition [of personal data] in point 1 of Article 6 of the Personal Data Protection Act (Official Gazette RS, No. 94/07 – official consolidated text – hereinafter referred to as the PDPA-1), which determines the system of protection of personal data, personal data is any data relating to an individual, irrespective of the form in which it is expressed. An individual is an identified or identifiable natural person to whom personal data relates; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, where the method of identification does not incur large costs or disproportionate effort or require a large amount of time (point 2 of Article 6 of the PDPA-1). Therefore, on the basis of the challenged regulation, service providers are retaining data that include, from the viewpoint of privacy, information regarding identifiable individuals, who must thus enjoy the protection of personal data as guaranteed by Article 38 of the Constitution. The Constitutional Court does not deal with the question of whether absolutely all traffic data that are determined by the challenged regulation are in any event personal data in the sense of the definition mentioned above.<sup>7</sup> What is key is that from these data (combined) it is possible to draw details from individuals' lives, and they must thus enjoy protection from the viewpoint of the right to privacy. Or, as stated by the Court of Justice of the European Union in the Judgment in the joined cases C-293/12 and C-594/12 (paragraph 27): "Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them."

15. The retention of such data (also for the purposes envisaged by the challenged regulation) entails, with regard to the established constitutional case law and also the case law of the Court of Justice of the European Union,<sup>8</sup> an interference with the right to the protection of personal data guaranteed by Article 38 of the Constitution, Article 8 of the Charter,<sup>9</sup> and also Article 8 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).<sup>10</sup>
16. From the established constitutional case law it follows that the first paragraph of Article 38 of the Constitution guarantees the protection of personal data as a special as-

7 See, for instance, the Opinion on the Concept of Personal Data of 2007 of the Article 29 Working Group on Data Protection.

8 See the Judgment in the joined cases *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, C-92/09 and C-93/09, dated 9 November 2010.

9 See the second sentence of paragraph 29 of the Judgment in the joined cases C-293/12 and C-594/12.

10 See, in particular, the Judgments of the European Court of Human Rights (hereinafter referred to as the ECtHR) in *Leander v. Sweden*, dated 26 March 1987, *Amann v. Switzerland*, dated 16 February 2000, *Kopp v. Switzerland*, dated 25 March 1998.

pect of privacy. The purpose of the protection of personal data is to ensure respect for a special aspect of human privacy – so-called information privacy. As the Constitution regulates this right specifically, it has a special place and importance in the general protection of the privacy of an individual. It also has an important place on the level of the European Union. Article 8 of the Charter also in a declaratory manner elevated the right to the protection of personal data to the level of a fundamental human right. In conformity with the established constitutional case law, any collecting and processing of personal data entails an interference with the right to the protection of privacy, i.e. with the right of individuals to keep information regarding themselves [private], because they do not want others to be acquainted therewith. The fundamental value foundation of this right is the realisation that individuals have the right to retain information regarding themselves to themselves and that as a starting point it is they who can decide how much information concerning themselves they will reveal and to whom.<sup>11</sup> However, the right to information privacy is not unlimited and absolute. Therefore, individuals must accept the limitations of information privacy, i.e. allow interferences therewith that are in the prevailing public interest and if the constitutionally determined conditions are fulfilled. [Such] an interference is admissible under the conditions determined by the third paragraph of Article 15 and Article 2 of the Constitution. In such context, the Constitutional Court must assess whether the legislature followed a constitutionally admissible aim, and if it did, also whether the limitation is in conformity with the principles of a state governed by the rule of law, namely with that principle that prohibits excessive interferences by the state (the general principle of proportionality).<sup>12</sup> In the law it must be precisely determined which data may be collected and processed, and for what purpose they may be used; supervision over the collection, processing, and use of personal data must be envisaged, as well as protection of the confidentiality of the collected personal data. The purpose of the collecting of personal data must be constitutionally admissible. Only data appropriate and urgently necessary for the implementation of the statutorily defined purpose may be collected.<sup>13</sup> When what is at issue is the processing of personal data for the purposes of police work, the legislature must weigh the measure by which it interferes with a sensitive area of the privacy of an individual without his or her consent in an especially meticulous manner.<sup>14</sup> The same also applies to the processing of personal data by other authorities of the state for the purposes of the defence of the state, national security, and the constitutional system.

17. The Constitutional Court has already explained numerous times that substantively similar requirements to those included in Article 38 of the Constitution are also included in the Convention for the Protection of Individuals with regard to the

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11 See Paragraph 12 of the reasoning of Decision of the Constitutional Court No. U-I-98/11, dated 26 September 2012 (Official Gazette RS, No. 79/12).

12 *Cf.* Decision of the Constitutional Court No. U-I-18/02.

13 As stated already in Decision No. U-I-411/06, dated 19 June 2008 (Official Gazette RS, No. 68/08, and OdlUS XVII, 43).

14 See Decision No. U-I-312/11, dated 13 February 2014 (Official Gazette RS, No. 15/14).

Automatic Processing of Personal Data (Official Gazette RS, No. 11/94, MP, No. 3/94 – hereinafter referred to as the CPI). In addition to the fact that personal data must be obtained and processed fairly and lawfully, the CPI requires that measures be taken that will ensure that personal data will be retained for specified and legitimate purposes and that they will not be used in a way incompatible with those purposes, as well as that only data that are adequate, relevant, and not excessive in relation to the purposes for which they are retained will be processed (Article 5 in relation to Article 4 of the CPI).<sup>15</sup>

18. The first condition for the admissibility of an interference with the right determined by the first paragraph of Article 38 of the Constitution is thus the existence of a constitutionally admissible objective. The fundamental purpose of the Data Retention Directive, due to which the legislature instituted the challenged regulation, was determined by the first paragraph of Article 1 [of the Directive],<sup>16</sup> namely “[...] to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.” Similarly, also the first paragraph of Article 163 of the ECA-1 determines that “[service providers] must retain, for the purposes of obtaining data in a public communications network determined by the law that regulates criminal procedure, for the purposes of ensuring the national security and the constitutional system, and the security, political, and economic interests of the state, as determined by the law that regulates the Slovene Intelligence and Security Agency, as well as the defence of the state, as determined by the law that regulates the defence of the state, the data determined by Article 164 of this Act, if they create or process it when providing public communications services related thereto.” The prosecution of serious forms of criminal offences, the defence of the state, and the safeguarding of the security of the state with the purpose of ensuring the protection of human rights and fundamental freedoms, as well as other fundamental legal values from illegal attacks against them are constitutionally admissible aims. In order for the state to be able to protect human rights and fundamental freedoms on its territory (Article 5 of the Constitution), it must primarily foster the existence and efficient functioning of the institutions of a state governed by the rule of law also in such a manner that it combats the most serious forms of criminal offences, ensures the defence of the state, the national security, and the constitutional system.
19. Therefore, the legislature did have constitutionally admissible aims for interfering with the constitutionally protected right to information privacy determined by the first paragraph of Article 38 of the Constitution. From this point of view, the interference is not inadmissible.
20. The challenged measure is also appropriate for achieving the mentioned aims, because they can in fact be achieved by the measure. Undoubtedly, in certain situations the retention and subsequent use of traffic data can entail an appropriate

<sup>15</sup> As stated, for instance, already in Decision No. U-I-98/11.

<sup>16</sup> See also recitals Nos. 4, 5, 7 through 11, 21, and 22 in the preamble to the Data Retention Directive.

means for the investigation, detection, and prosecution of serious criminal offences. The same applies to the purposes of the defence of the state and the safeguarding of the security of the state. Such proceeds from the statements of Member States, as follows from the Evaluation Report of the European Commission<sup>17</sup> and other documents published on its website,<sup>18</sup> as well as from the analysis that was submitted by the Government in the proceedings at issue. The Government alleges that these data play an important supporting role in the collection of evidence in the framework of the investigation of criminal offences, because they indicate individual facts, circumstances, relations, dynamics, and patterns that significantly contribute to the collection of fundamental evidence directly proving the suspicion that a [concrete] criminal offence has been committed. Also the Court of Justice of the European Union assessed that with regard to the increasing importance of electronic communications, the data that had to be retained on the basis of the now invalid Directive provided national authorities competent for criminal prosecution additional possibilities with regard to detecting serious criminal offences and that in this regard they are a valuable means for [conducting] criminal investigations.<sup>19</sup> Although from the materials submitted by the Government and the documents of the Commission it is not clearly evident whether what is at issue is the use of data that otherwise in the absence of obligatory retention as envisaged by the Data Retention Directive and the now challenged regulation would not be accessible to prosecuting authorities and other competent authorities of the state, it is at the same time also not possible to conclude that these data are manifestly inappropriate for achieving the stated aim. Likewise, it is not evident that the measure is inappropriate even if in certain instances due to technical circumvention or specific types of use of these communications services (e.g. falsifying the number calling, the use of unregistered prepaid mobile services, the use of a service for the anonymisation of traffic over the Internet, etc.) it is possible to cover the digital traces behind the real user or achieve anonymous use of a mobile and fixed network phone service, as well as of Internet access, which is what the applicant otherwise draws attention to. A measure is inappropriate only when the means for achieving the aim does not have a sensible connection with that aim and when the stated aim cannot be achieved in any event by the chosen measure, not only that it cannot be achieved only to a certain degree.<sup>20</sup> However, the fact that the constitutionally admissible aim can only be achieved to a certain degree by the chosen measure can significantly influence the assessment of the proportionality of such measure.

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17 Report from the Commission to the Council and the European Parliament, Evaluation Report on the Data Retention Directive (Directive 2006/24/EC), dated 18 April 2011.

18 See, e.g., Evidence for the necessity of data retention in the EU, accessible at: [ec.europa.eu/dgs/home-affairs/pdf/policies/police\\_cooperation/evidence\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/pdf/policies/police_cooperation/evidence_en.pdf) (accessed 2 July 2014).

19 Paragraph 49 of the reasoning of the Judgment in the joined cases C-293/12 and C-594/12.

20 See Decision No. U-I-201/93, dated 7 March 1996 (Official Gazette RS, No. 24/96, and OdlUS V, 27). Cf. also with paragraph 207 of the reasoning of the Judgment of the Federal Constitutional Court of the Federal Republic of Germany No. 1 BvR 2156/08, 1 BvR 263/08, 1 BvR 586/08, dated 2 March 2010.

21. Even if a measure is both appropriate and useful, such does not mean at the same time that it is necessary, i.e. that in order to achieve the pursued aim no other less invasive measures that would interfere less with the human rights of individuals are available.<sup>21</sup> In the framework of the test of the necessity of a measure, the Constitutional Court assesses whether an interference is at all necessary in the sense that the aim cannot be achieved without (any) interference at all or whether the aim can be achieved without the (concrete) interference that is being assessed by means of some other interference that would be milder in nature.<sup>22</sup>
22. For such reason, it is necessary to assess whether the legislature could also achieve the purpose for which such personal data was retained also in a manner that would interfere less invasively with the right determined by the first paragraph of Article 38 of the Constitution. Due to the fact that with regard to the manner and scope of the retention of data the challenged regulation is actually a transposition of the requirements from the Data Retention Directive and was thus determined in a manner such as was determined by the now no longer valid Data Retention Directive, the underlying reasons that guided the Court of Justice of the European Union in its invalidation are key also to the assessment of the challenged Act.
23. First of all, it has to be underlined that combating serious criminal offences, especially organised crime and terrorism, the defence of the state, and ensuring national security and the constitutional system, are of fundamental importance for the functioning of a state governed by the rule of law. However, such an aim, although of fundamental importance, cannot in itself justify an unlimited interference with human rights.
24. The challenged regulation provides for the precautionary (in advance) and indiscriminate retention of traffic data [generated by] certain electronic communications. A consequence of such regulation is that service providers retain, for a determined period, the traffic data of all users of phone services in fixed and mobile networks, data on accessing the Internet and e-mail, and data on the use of phone service over an Internet protocol, such as determined by Article 164 of the ECA-1. By the precautionary and indiscriminate retention of data created daily, service providers are creating vast databases that are being retained for 14 or 8 months and from which, at any moment, very detailed conclusions can be drawn concerning facts regarding the private life of every single individual that uses these services.<sup>23</sup> With regard to the fact that the modern manner of communicating predominantly entails the use of the mentioned electronic communications services,<sup>24</sup> such a measure in fact entails a very invasive interference with the (information) privacy of the entire population, both with regard to the scope of the persons affected by the

21 In the framework of the assessment of the proportionality of a measure (or the necessity of a measure in a democratic society), the ECtHR underlines that the adjective “necessary” is not synonymous with “indispensable” and at the same time it also cannot be interpreted as flexibly as, for instance, the expressions “admissible”, “ordinary”, “useful”, “reasonable”, or “desirable” (the Judgment in *Handyside v. United Kingdom*, dated 7 December 1976).

22 As stated, e.g., in Decision No. U-I-77/08, dated 8 July 2010 (Official Gazette RS, No. 61/10).

23 See Paragraph 14 of the reasoning.

24 See paragraphs 72 and 73 of the opinion of Advocate General Pedro Cruz Villalón in the joined cases C-293/12 and C-594/12, dated 12 December 2012, and the Judgments of the ECtHR to which he refers.

measure and with regard to the data that are being retained. The interference with the [mentioned] right is also exacerbated by the fact that by the creation of such an extensive database of personal data on the entire population, the risk that unauthorised persons will access the retained data or that the data will be used for unlawful purposes, despite the obligations imposed on service providers by, *inter alia*, Article 165 of the ECA-1, increases substantially.<sup>25</sup> Such a regulation substantially interferes with the human rights and fundamental freedoms of individuals also due to the fact that the affected persons are not informed of the retention and the potential subsequent use of their data, which can in the minds of these persons generate a feeling of constant surveillance.<sup>26</sup> Such an intangible feeling of constant surveillance can also influence the exercise of other rights, above all the right to free expression and public communication, as guaranteed by Article 39 of the Constitution and Article 11 of the Charter.<sup>27</sup>

25. By the nature of the matter, the precautionary and non-selective retention of data necessarily entails that it predominantly interferes with the rights of those persons who are not and will not be even indirectly connected with the purposes for which these data were primarily collected. Both the Data Retention Directive and the Slovene legislature did not limit the retention to those data that have some reasonable and objectively verifiable connection with purpose that [the legislature] intends the measure to achieve. The non-selective and precautionary retention of traffic data necessarily entails that it will interfere predominantly with the rights of that part of the population that did not give rise to any reasons for such an interference. As also the Court of Justice of the European Union stressed,<sup>28</sup> by the unlimited measure also data regarding communications that would otherwise have to enjoy special protection are retained. Namely, the regulation does not allow for anonymous use of means of communication in all those instances when confidential and untraceable use of the means of communication is necessary to achieve its purpose (e.g. phone services for assistance in emotional distress). Similarly, the challenged regulation, as well as the Data Retention Directive, did not limit the retention of data to a certain period of time, geographical area, or circle of persons who might have a certain connection with the purpose pursued by the measure.<sup>29</sup>
26. The question regarding the length of time personal data is retained is also important for the assessment of whether the interference at issue is necessary to achieve a constitutionally admissible aim. The retention and processing of personal data for a longer period of time than is necessary in order to achieve the purpose does not fulfil the criterion of pro-

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25 *Ibidem*, paragraph 75.

26 Namely, service providers must not reveal to the persons to whom [the relevant] data refer that they were transmitted (the fourth paragraph of Article 166 of the ECA-1).

27 As stated already in the Judgment of the Federal Constitutional Court of the Federal Republic of Germany No. 1 BvR 2156/08, 1 BvR 263/08, 1 BvR 586/08 and paragraph 37 of the reasoning of the Judgment in the joined cases C-293/12 and C-594/12.

28 See paragraph 58 of the reasoning of the Judgment in the joined cases C-293/12 and C-594/12.

29 *Ibidem*, paragraph 59.

portionality.<sup>30</sup> In fact, in the fifth paragraph of Article 163 of the ECA-1, the legislature envisaged a different length of time for the retention of data regarding publicly accessible phone services (14 months), on the one hand, and all other data (8 months), on the other. However, the reasons why the legislature decided to require retention for such duration and why it determined a different period of retention for the mentioned data are not evident from either the reply of the National Assembly nor the opinion of the Government. The analysis already mentioned above that was submitted by the Government only includes the generalised claim that if the duration of retention was shortened, “a new adaptation of investigative procedures would be necessary.” With regard to the fact that different data are collected that have, by the nature of the matter, a different utility value with regard to the duration of retention, the legislature should have taken that into consideration and correspondingly differentiated the duration of retention with regard to the usefulness of the data or with regard to the persons concerned.<sup>31</sup> From the mentioned documentation it is also not evident why a shorter period of retention (than was, for instance, determined by certain Member States)<sup>32</sup> does not suffice to achieve its purpose. With regard to the measure that includes such a broad range of different data without objective criteria being determined more precisely for such retention, it is also not possible to carry out a subsequent test of whether the measure only refers to what is truly necessary in order to achieve its purpose. Such measure does not fulfil the criterion of necessity nor the criterion of proportionality in the narrower sense, because it is not possible to weigh whether the correspondingly longer period of retention and the degree of interference with the privacy of individuals related thereto are proportionate to ensuring public safety or some other interest pursued by such measure.

27. The now invalidated Data Retention Directive limited the purpose of such retention only to the investigation, detection, and prosecution of serious criminal offences. The challenged regulation does not include such a limitation. Also in the regulations referred to by the challenged regulation (the first paragraph of Article 163 of the ECA-1), the legislature did not limit the processing of personal data only to certain acts (serious criminal offences) for which it would assess that due to their weight the retention of data or access to these data justify the interference with the privacy of individuals.<sup>33</sup>

30 Decision of the Constitutional Court No. U-I-312/11, dated 13 February 2014 (Official Gazette RS, No. 15/14). See also the Judgment of the ECtHR in *S. and Marper v. United Kingdom*, dated 4 December 2008. As stated also by Article 6 of the Directive on Privacy and Electronic Communications and point e) of Article 5 of the CPI. See also Paragraph 24 of the reasoning in Decision [of the Constitutional Court] No. U-I-411/06. Article 6 of the Directive on Privacy and Electronic Communications determines the principle that traffic data that is processed must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication.

31 Cf. with paragraphs 63 and 64 of the Judgment in the joined cases C-293/12 and C-594/12.

32 E.g. the six-month time limit determined by the Federal Republic of Germany in the (now in fact abrogated) Article 113a of the Telecommunications Act (*Telekommunikationsgesetz*).

33 Cf. the first paragraph of Article 149b of the Criminal Procedure Act (Official Gazette RS, No. 32/12 – official consolidated text and 47/13 – hereinafter referred to as the CrPA) and the second paragraph of Article 150 of the CrPA, where the legislature determined a catalogue of criminal offences with regard to which the measures determined by the first paragraph of Article 150 of the CrPA can be ordered.

Also for such reason, the measure disproportionately interferes with the right determined by the first paragraph of Article 38 of the Constitution.

28. By determining, in the first paragraph of Article 163 of the ECA-1, the obligatory retention of traffic data, the legislature substantially interfered with the right to the protection of personal data and at the same time it did not determine in detail the circumstances on the basis of which such interference would be limited to only what is truly necessary to achieve the aim. The challenged provision thereby interfered disproportionately with the right to the protection of personal data determined by the first paragraph of Article 38 of the Constitution. Consequently, the first paragraph of Article 163 of the ECA-1, which explicitly determines the obligation to retain traffic data, is unconstitutional. The other challenged provisions of Section XIII of the ECA-1 are directly connected with this provision and do not have an independent meaning. For such reason, the Constitutional Court abrogated the challenged provisions of Section XIII in their entirety (point 1 of the operative provisions).
29. Since the challenged provisions had to be abrogated already due to the inconsistency with the right to the protection of personal data determined by Article 38 of the Constitution, the Constitutional Court did not assess the other alleged unconstitutionality.
30. In order to prevent further disproportionate interferences with the right to the protection of personal data determined by the first paragraph of Article 38 of the Constitution, the Constitutional Court determined, on the basis of the second paragraph of Article 40 of the CCA, the manner of the implementation of this Decision. On the basis of this Article, service providers that are retaining traffic data in conformity with the first paragraph of Article 163 of the ECA-1 must immediately upon the publication of this Decision in the Official Gazette of the Republic of Slovenia destroy these data (point 2 of the operative provisions).

### C

31. The Constitutional Court reached this decision on the basis of Article 43 and the second paragraph of Article 40 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The Constitutional Court adopted the Decision unanimously.

*Mag. Miroslav Mozetič*  
*President*

**DECISION**

At a session held on 14 June 2001 in proceedings to review constitutionality initiated upon the petition of Nova stranka, Ljubljana, represented by its co-president Gorazd Drevenšek and secretary Blaž Babič, the Constitutional Court

*decided as follows:*

1. The provisions of the second paragraph of Article 254 and the third paragraph of Article 292 of the Rules of Procedure of the National Assembly (Official Gazette RS, Nos. 40/93, 80/94, 3/95 – corr., 28/96, 26/97, 46/2000, 3/01, 9/01, and 13/01) and the part of the second sentence of the second paragraph of Article 292 of the Rules of Procedure of the National Assembly that reads as follows: “except in the case referred to in the second paragraph of Article 254 of these Rules of Procedure or if, within 7 days of the adoption of the law, it receives a request from the National Council that the National Assembly decide again on the law in question” are abrogated.
2. Since the Act Regulating the Transformation of Duty-Free Shops at Road Border Crossings with Member States of the European Communities, Acting within the Framework of the European Union, into Border Shops, and the Special Supervisory Measures Relating to these Shops (Official Gazette RS, No. 13/01) have not been promulgated and published in accordance with the Constitution, they have not entered into force and may not be applied.
3. Point 2 of these operative provisions shall be implemented in the manner determined in Paragraphs 50 to 54 of the reasoning of this Decision.
4. This Decision takes effect on the day following its service on the National Assembly.

*Reasoning***A**

1. The petitioner challenges the procedure for the adoption of the Act Regulating the Transformation of Duty-Free Shops at Road Border Crossings with Member States of the European Communities, Acting within the Framework of the European Union, into Border Shops, and the Special Supervisory Measures Relating to these Shops

(hereinafter referred to as the ATDFSEU). The petitioner alleges that the challenged act was adopted in a procedure which is contrary not only to the Constitution but also to the Referendum and Public Initiative Act (Official Gazette RS, Nos. 15/94, etc. – hereinafter referred to as the RPIA). The petitioner alleges a violation of Article 1 of the Constitution (principle of democracy), Article 2 of the Constitution (principle of a state governed by the rule of law) and Article 3 of the Constitution (principle of the people's sovereignty), Article 44 of the Constitution (participation in the management of public affairs), the second paragraph of Article 90 of the Constitution (legislative referendum) and Article 91 of the Constitution (promulgation of laws), as well as a violation of the second and third paragraphs of Article 21 of the RPIA. The petitioner challenges the third paragraph of Article 292 of the Rules of Procedure of the National Assembly (hereinafter referred to as the RPNA) and proposes that the Constitutional Court initiate proceedings to review the constitutionality of the second paragraph of Article 254 of the RPNA in accordance with the principle of correlation. The petitioner proposes that the implementation of the ATDFSEU be suspended until a final decision is reached by the Constitutional Court.

2. The petitioner alleges that the challenged provisions of the RPNA are constitutionally disputable because they render it either impossible or considerably more difficult for all authorised persons to submit an initiative or request to call a subsequent legislative referendum since they reduce the statutory time limit for submitting such. The petitioner believes that it is first necessary to review the constitutionality of the mentioned provisions of the RPNA, since the essential violations of the procedure for the adoption of the ATDFSEU actually result from the provision of the third paragraph of Article 292 of the RPNA which provides that, in the event that the National Assembly decides again on a law because of a suspensive veto, the law be sent for promulgation immediately. In the petitioner's opinion, the above provisions of the RPNA, and therefore also the procedure for the adoption of the ATDFSEU, entail a violation of the constitutional right to participate in the management of public affairs referred to in Article 44 and the second paragraph of Article 90 of the Constitution.
3. The petitioner states that on 28 February 2001 it submitted an initiative to collect signatures of voters in order to lodge a request to call a subsequent legislative referendum regarding the ATDFSEU. It states that the initiative was submitted on the basis of Article 21 of the RPIA within seven days of the adoption of the law, and that the initiative included the required amount of signatures and the text of the referendum question, together with a statement of reasons. It explains that the ATDFSEU was promulgated on 22 February 2001 and published in the Official Gazette on 28 February 2001. Its initiative was rejected by Act of the President of the National Assembly No. 005-02/97-8/8, dated 2 March 2001, on the grounds that the statutory deadline for submitting the initiative had been missed.
4. The petitioner opposes the position adopted in the decision to reject its initiative to call a referendum, i.e. that even if the National Council exercises its suspensive veto and the National Assembly then decides again on the law and adopts it, the seven-

day period for submitting an initiative to call a referendum referred to in Article 21 of the RPIA begins to run as of the “first” adoption of the law by the National Assembly and not as of the day on which the National Assembly again decides on the law on the basis of the suspensive veto. In the petitioner’s opinion, this position is inconsistent with all the principles of human rights law and the principle of interpretation of the law in good faith. The petitioner points out that, when interpreting the law, no interpretation that restricts human rights is admissible.

5. The petitioner believes that its initiative to call a referendum regarding the ATDF-SEU was submitted in due time, i.e. within seven days of the adoption of the law, which was adopted after the National Assembly decided again thereon because the National Council had exercised its suspensive veto. It believes that there are no grounds for drawing a distinction between the two ways of adopting a law, and that the disputed position of the National Assembly is not acceptable in terms of the grammatical, teleological, or systematic methods for interpreting the law. In the petitioner’s opinion there is only one way to adopt a law, to which the legal order attaches specific legal consequences. The petitioner claims that the essence of the institution of the suspensive veto is the suspension of the effects of the adoption of a law. It adds that the institutions available to the National Council which allow it to participate in the legislative procedure are not mutually exclusive and may also be cumulative; therefore, in expressing its disagreement with a certain law adopted by the National Assembly, the National Council may first use a milder instrument (a suspensive veto) and, if that is not sufficient, it may subsequently use a stricter instrument (a request to call a subsequent legislative referendum). The petitioner states that the disputed position of the National Assembly, according to which the seven-day period for submitting an initiative (and therefore for lodging a request) to call a referendum begins to run as of the first adoption of the law by the National Assembly, does not allow for such logical interpretation.
6. The petitioner further believes that the distinction between two ways of adopting a law is also contrary to the principles of legal precision and predictability and trust in the law, since such a distinction is by no means based on the nature of things and may therefore be unclear to the average addressee of the legal norm. In the petitioner’s view the applicable statutory regulation of the interventions involving referendum procedures is unsatisfactory and insufficient, and the resulting legal gap allows the National Assembly to act arbitrarily; therefore, the legislature should be obliged to provide for an appropriate statutory regulation of such interventions. The petitioner further states that it has initiated proceedings for the judicial review of administrative acts in order to protect its rights relating to the initiative to call a referendum on the ATDFSEU; however, in the petitioner’s opinion this is clearly a legally ineffective legal remedy. It states that it has brought a legal action against the order on the promulgation and the publication of the ATDFSEU, which was rejected, and a legal action against Act of the President of the National Assembly No. 005-02/978/8, dated 2 March 2001, which was dismissed; moreover, it lodged two appeals against the two Administrative Court decisions, on which the Supreme Court has yet to decide.

7. Pursuant to the first paragraph of Article 28 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA), on 28 May 2001 the Constitutional Court sent to the National Assembly the petition of Nova stranka and Order of the Constitutional Court No. U-I-104/01, dated 28 May 2001, by which it initiated not only proceedings for the review of the constitutionality of the second paragraph of Article 254 and the third paragraph of Article 292 of the RPNA, but also proceedings for the review of the constitutionality of the ATDFSEU, and gave the National Assembly 14 days to reply. The President of the National Assembly failed to send the response of the National Assembly in accordance with Articles 299 and 300 of the RPNA within the mentioned time limit, which expired on 11 June 2001. On 7 June 2001 the Constitutional Court received the data and explanations of the National Assembly sent by the National Assembly's Secretariat for Legislation and Legal Affairs, referring to Article 301 of the RPNA, and following a consideration by the Commission for the Rules of Procedure.
8. In these explanations the National Assembly states that the provision of the third paragraph of Article 292 of the RPNA has been applied unamended since its entry into force and has thus far not been challenged. In the discussions during the drafting of the RPNA, the opinion was expressed that the main procedural issues relating to a referendum should be regulated by a special law. The National Assembly states that, according to the Constitution, the National Council does not have the role of a lower chamber, and is an indirect participant in the legislative procedure; this is why, during reconsideration as a result of a suspensive veto of a law that has already been adopted, the National Assembly only votes on the law in question but discusses it no further. As regards the provision of the second paragraph of Article 254 of the RPNA, the National Assembly states that it was included in the RPNA during the third reading of the draft RPNA for practical reasons, so that it would not be necessary to wait for seven days to promulgate and publish the law. It states that the RPIA was adopted in 1994, i.e. after the RPNA, which is why the RPIA applies to all the referendum-related issues according to the rule that the more recent and special law prevails and therefore the second paragraph of Article 254 of the RPNA is no longer applied.
9. In the National Assembly's opinion, the regulation provided for in the third paragraph of Article 292 of the RPNA is not directly connected with the referendum issue, as it only regulates the promulgation of laws in relation to the reconsideration procedure. This procedure is regulated by the provisions of Articles 205 to 207 of the RPNA as a special procedure, and is regulated in the chapter regarding the legislative procedure because it refers to the laws and "does not mean that it refers to the legislative procedure, i.e. when the law is being made". In the opinion of the National Assembly, the regulation provided in the third paragraph of Article 21 of the RPIA is independent from the mentioned regulation in the RPNA; however, the two regulations may be implemented simultaneously and in accordance with the Constitution. In the event that the National Council requires the National Assembly to decide again on the law, the National Assembly believes that it must first decide and only then can the procedure determined by the RPIA regarding an initiative

to collect signatures [for a request to call a referendum] be carried out with regard to the law which was upheld by the National Assembly during the reconsideration procedure; in this context, the time limit for collecting signatures begins to run upon the elimination of the constitutional impediment by the National Assembly, i.e. by the National Assembly rejecting the suspensive veto, provided that the initiative to collect the voters' signatures has already been submitted within the statutory time limit of seven days of the adoption of the law. The National Assembly states that such an interpretation is also consistent with the position of the National Council, in that it enables the National Council to lodge a request for reconsideration within the constitutional time limit of seven days as well as to lodge a request for a subsequent legislative referendum on the basis of the RPIA within the statutory time limit of seven days, which runs concurrently. In the opinion of the National Assembly, the provision of the third paragraph of Article 292 of the RPNA does not prevent the exercise of the right to a legislative referendum, as the procedure is carried out directly on the basis of the RPIA and not on the basis of the RPNA. The National Assembly then adds that the draft of the new RPNA no longer includes the provision of the current second paragraph of Article 254 of the RPNA, and that the current provision of Article 292 of the RPNA has been amended so as to include the situation which arises on the basis of the RPIA.

10. The National Assembly states that the employed interpretation of the provision of the second paragraph of Article 21 of the RPIA does not deny any of the statutorily determined initiators the right to exercise their constitutionally guaranteed right to participate in the management of public affairs and to initiate a legislative referendum, since they all had the opportunity to initiate either a preliminary referendum or a subsequent referendum within seven days of the adoption of the law; however, the petitioner, Nova stranka, did not avail itself of the opportunity. Furthermore, in the National Assembly's opinion, the suspensive veto cannot entail the commencement of a special fourth stage in the legislative procedure, since the regular legislative procedure consists of three stages, and the wording of the law may no longer be changed after the veto has been exercised.
11. The National Assembly further states that it is clear from the provision of the first paragraph of Article 91 of the Constitution that "the adoption" means the adoption of the law during the legislative procedure, i.e. at the last stage, by a vote on the draft law as whole, and that the above provision must also be taken into account when interpreting Article 21 of the RPIA. In this context, the National Assembly refers to the position of Dr Kaučič<sup>1</sup> that it would be reasonable if the time limit for submitting a request or initiative for a subsequent legislative referendum began to run after the expiry of the time limit for exercising the veto, as it may happen that a law is not adopted during the reconsideration procedure and, consequently, a subsequent

1 Kaučič, I.: *Referendum in sprememba ustave* [Referendum and Constitutional Amendment], Ljubljana 1994, p. 155, and Kaučič, I.: *Ustavna zasnova referendumu* [Constitutional Concept of Referendum], *Pravnik*, No. 1-3/94, Ljubljana, pp. 24–25.

legislative referendum in relation thereto may no longer be possible; and it adds that this inevitably clashes with the constitutional provision on the obligatory eight-day time limit for promulgation. In the National Assembly's opinion, a systematic interpretation of the RPIA results in the finding that the seven-day time limit that begins to run as of the adoption of the law refers to the adoption of the draft law as a whole during the third stage of the legislative procedure.

12. The National Assembly believes that the RPIA neither concerns the cases involving laws in relation to which the suspensive veto has been exercised nor does it establish rules to be applied thereto, and thus it is necessary to interpret the issue of the mutual effect of both instruments. In this context the National Assembly states that, according to the petitioner's interpretation, two time limits would have been available for submitting an initiative to collect signatures; however, such a significant instrument could only be dependent on completely certain, clearly defined, and predictable circumstances such as the adoption of a law by the National Assembly during the last stage of the legislative procedure. A different interpretation of the time limits would give rise to several questions (until the expiry of the time limit, the initiators would not know whether such time limit continues to apply or whether it will begin to run anew; it is unclear whether "the first time limit" is merely interrupted or whether it will begin to run again after the law has been adopted during reconsideration procedure; it is unclear how the initiatives already submitted within "the first time limit" are to be treated; etc.). In the opinion of the National Assembly, such an unclear regulation could result in an unequal position of different initiators and in different treatment of laws as the subjects of a referendum. The National Assembly believes that the interpretation offered by the petitioner is therefore contrary to the principles of a state governed by the rule of law (Article 2 of the Constitution) and that the interpretation of the National Assembly supports the clear, logical, and uniform exercise of the constitutional right to a legislative referendum as it makes the starting point of the seven-day time limit for initiating a subsequent legislative referendum dependent on an objective fact which is ever present and always clearly evident. The National Assembly adds that the issue of time limits should have already been clearly and expressly regulated by the RPIA, as the exercise of constitutional rights requires a clear statutory regulation.
13. The National Assembly also mentions the constitutional obligation of the President of the Republic to promulgate laws within eight days of their adoption. In the opinion of the National Assembly, a constitutional impediment to the promulgation only exists if the suspensive veto has been exercised; if the law is adopted during the reconsideration procedure, the said constitutional impediment is eliminated and the President of the Republic must therefore immediately promulgate the law in question. The National Assembly believes that an initiative to call a subsequent legislative referendum submitted in due time, in contrast, entails statutory grounds to suspend the promulgation.
14. The National Assembly adds that the proposed amendment to the RPIA is currently in the legislative procedure, which will allow for additional discussion and improve-

ments to be made to the currently applicable regulation of the referendum. The National Assembly repudiates all the statements made by the petitioner and believes that the procedure for adopting the ATDFSEU was in accordance with both the Constitution and the law, and that it did not constitute a violation of the petitioner's right to a referendum, because the petitioner had the opportunity to submit an initiative for a preliminary referendum and a subsequent legislative referendum within seven days of the adoption of the law.

15. On 14 June 2001, the Constitutional Court received the response of Nova stranka to the statements of the National Assembly, in which the petitioner insists on its statements and claims, and opposes the interpretation offered by the National Assembly.

#### **B – I**

16. By an order dated 28 May 2001, the Constitutional Court initiated proceedings to review the constitutionality of the third paragraph of Article 292 and the second paragraph of Article 254 of the RPNA, initiated proceedings to review the constitutionality of the procedure for the adoption of the ATDFSEU and, at the same time, suspended the implementation of the mentioned provisions of the RPNA and ATDFSEU until a final decision is reached. The Constitutional Court decided to assign the case priority status. Pursuant to Article 30 of the CCA, the Constitutional Court also initiated proceedings to review the constitutionality of the part of the second sentence of the second paragraph of Article 292 of the RPNA which reads as follows: “except in the case referred to in the second paragraph of Article 254 of these Rules of Procedure or if, within 7 days of the adoption of the law, it receives a request from the National Council that the National Assembly decide again on the law in question”. As both parties had the opportunity to express their views on the issue regulated by the cited provision of the RPNA, since the latter refers or relates to the other two challenged provisions of the RPNA and regulates the same subject matter, the Constitutional Court immediately proceeded to decide on the merits of this part of the case.

#### **B – II**

17. The RPNA is a legal act that regulates the organisation and activities of the legislative body. In the part relating to the legislative procedure and the part relating to the relationship between the National Assembly and other state authorities, the RPNA is a general legal act by nature with an external effect, i.e. a regulation, and, despite it not formally being a law, it has the status of a law in the hierarchy of legal acts (see, for example, Decisions of the Constitutional Court No. U-I-40/96, dated 3 April 1997, Official Gazette RS, No. 24/97, and OdlUS VI, 46, and No. U-I-84/96, dated 21 October 1999, Official Gazette RS, No. 95/99, and OdlUS VIII, 224). If it became evident that the RPNA actually makes it impossible or considerably more difficult to exercise any of the constitutional rights or to respect constitutionally guaranteed legal positions, it would be inconsistent with the Constitution in this regard. In the case at issue the petitioner claims that there has been a violation of the constitutionally

guaranteed right to a referendum, i.e. relating to the exercise of the right to initiate a subsequent legislative referendum. The review of the Constitutional Court was therefore focused on the question as to whether the challenged provisions of the RPNA make it impossible or considerably more difficult to effectively conduct a subsequent legislative referendum.

18. Several provisions of the Constitution play a crucial role in defining the constitutional right to a referendum. The basic starting point are Articles 2 and 3 of the Constitution, which provide that Slovenia is a democratic republic and that, in Slovenia, power is vested in the people, who exercise this power both directly and through elections. Pursuant to Article 44 of the Constitution, every citizen has the right, in accordance with the law, to participate either directly or through elected representatives in the management of public affairs. The principles enshrined in the mentioned constitutional provisions are also manifested in the provision of Article 90 of the Constitution, which regulates the legislative referendum. Article 90 of the Constitution reads as follows: “(1) The National Assembly may call a referendum on any issue that is the subject of regulation by law. The National Assembly is bound by the result of such referendum. (2) The National Assembly may call a referendum referred to in the preceding paragraph on its own initiative, however it must call such referendum if so required by at least one third of the deputies, by the National Council or by forty thousand voters. (3) The right to vote in a referendum is held by all citizens who are eligible to vote in elections. (4) A proposal is adopted in a referendum if a majority of those voting have cast votes in its favour. (5) Referenda are regulated by a law to be adopted by the National Assembly by a two-thirds majority vote of deputies present.”
19. A referendum is a form of direct democracy and holds an important place in the Constitution. The term “referendum” is defined in the Constitution in relatively broad and non-restrictive terms. Moreover, the required two-thirds relative majority for the adoption of the law regulating referenda attests to the importance that the Constitution attaches to them. In interpreting the statutory implementation of this constitutional right, account must be taken of the above-mentioned starting point, meaning that a restrictive approach is not acceptable and the statutory regulation must, in the event of doubt, be interpreted and applied in favour of the right to a referendum.
20. The Constitution therefore only regulates the legislative referendum in general terms, referring to a detailed regulation to be provided for by law. The provisions of the fifth paragraph of Article 90 of the Constitution cannot, however, be understood as a statutory reservation by which the Constitution would allow for this constitutional right to be restricted by law. The law may only regulate the manner in which the constitutionally guaranteed right to a referendum is to be exercised. The constitution-framers have left the decision on what type of legislative referendum it will regulate to the legislature, and it is not to be understood from the Constitution that the regulation has to include all possible and known types of legislative referendum (as held in Decision of the Constitutional Court No. U-I-47/94, dated 19 January 1995, Official Gazette RS, No. 13/95, and OdlUS IV, 4). This does not, however, entail that the legislature is free to regulate the referendum issue entirely at its own discre-

tion. By selecting and defining the types of referendum through which the constitutional right referred to in Articles 44 and 90 of the Constitution will be exercised, the legislature is obliged to regulate each of the referendum types it includes in the legal order in such a way that it will be possible to effectively conduct them in practice, and that the effective exercise of the constitutionally guaranteed right to a referendum will be ensured. Owing to the nature of a referendum, which is a demanding and complex legal activity, all questions arising in connection with the exercise of this constitutional right must be precisely and clearly defined.

21. The RPIA entails the statutory implementation of the provision of Article 90 of the Constitution. The RPIA regulates both the preliminary and subsequent legislative referendum. Pursuant to Article 9 of the RPIA, in a subsequent legislative referendum the voters confirm a law that has already been adopted by the National Assembly. Upon the adoption of a law and on its own initiative, the National Assembly may decide to call a subsequent legislative referendum on the adopted law (Article 20 of the RPIA); the authorised referendum initiators (one third of the deputies, the National Council, and 40,000 voters) may, however, lodge a request to call a referendum within a specified time limit following the adoption of the law: one third of the deputies or the National Council may lodge the request within seven days after the law has been adopted (first paragraph of Article 21 of the RPIA), whereas the 40,000 voters may do so within a thirty-day period that begins to run after the law has been adopted; in the event of the latter, an initiative to lodge a request to call a referendum must be submitted to the voters (second paragraph of Article 21 of the RPIA) no later than seven days after the law has been adopted. An initiative [for the collection of signatures for a request] to call a referendum may be submitted by any voter, political party, or other association of citizens and must be supported by the signatures of at least two hundred voters; such initiative must also meet all the other prescribed requirements in terms of both form and substance (Article 13 of the RPIA ff.).
22. The third paragraph of Article 21 and Article 24 of the RPIA provide that the National Assembly must suspend the publication of a law in the event that an initiative or request to call a referendum is submitted. Pursuant to the third paragraph of Article 21 of the RPIA, in the event that an initiative for the voters to lodge a request to call a referendum has been submitted, the publication of the law is suspended until the expiry of the time limit for lodging the request; if the request of the voters to call a subsequent legislative referendum is not lodged within this time period, the National Assembly submits the law for publication. If a request to call a referendum has been lodged (by any of the authorised initiators) and the referendum is then called, the law, pursuant to Article 24 of the RPIA and provided that it has been confirmed in the referendum, shall be sent for publication immediately after the National Assembly has received a report on the result of the referendum. Hence it follows, *a contrario*, that in the event that the law has not been confirmed in the subsequent legislative referendum it is not sent for publication. This entails that, in the event of a request or initiative to call a subsequent legislative referendum, the law may not be sent for publication until the referendum procedure is concluded.

23. The suspension of the publication of a law is an important legal consequence of a submitted request or initiative for a subsequent legislative referendum. Only by preventing the publication of the law until the referendum procedure has been concluded (and thereby preventing its entry into force) can the effectiveness of a subsequent legislative referendum as a method by which the electorate decides directly on the confirmation or non-confirmation (i.e. rejection) of a law be ensured. More specifically, the point of a subsequent legislative referendum lies in the fact that the electorate decides on a law which has already been adopted by the legislature, but will only enter into force after its promulgation, publication, and the expiry of the *vacatio legis*. A subsequent legislative referendum would lose its meaning if the relevant law entered into force prior to the referendum being conducted. A request to call a subsequent legislative referendum is a request that the people themselves directly and ultimately decide whether a law that was adopted by the legislature should exist or not. The existence of a certain law is thus dependent on the will of the electorate, their voting, i.e. deciding in the referendum, and no longer only on the voting, i.e. deciding, of the deputies as the representatives of the people in the legislative body. In this regard, Pitamic spoke of “the people’s veto”.<sup>2</sup> A law that has not been confirmed in a referendum, has not been made at all and does not exist. This is an expression of the principle of popular sovereignty, according to which power is vested in the people, who may, when disagreeing with their chosen representatives through whom they indirectly exercise their power, assume their original right to decide on public affairs. A decision adopted directly by the voters in a referendum has an overriding power over the decisions taken by their chosen representatives and it is the will of the electorate that determines whether or not a law will be made.

### B – III

24. The provisions of the second and third paragraphs of Article 292 and the second paragraph of Article 254 of the RPNA regulate the question of when the President of the National Assembly should send a law to the President of the Republic for promulgation. The second paragraph of Article 292 of the RPNA determines the general rule, according to which a law shall be sent for promulgation on the eighth day after it has been adopted. In addition to this general rule, two exceptions are provided for, both of which are related to the exercise of the suspensive veto by the National Council. A special rule applies if the President of the National Council notifies the President of the National Assembly that the National Council will not discuss the text of the adopted law; in the event of such, the law is immediately sent for promulgation (second paragraph of Article 254 of the RPNA). The other special rule applies if the National Council has exercised the suspensive veto; if, at a request of the National Council, the National Assembly decides again on the law and the law is then adopted, the law is sent for promulgation immediately (the third paragraph of Article 292 of the RPNA).

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2 Pitamic, L.: *Država* [The State], Družba sv. Mohorja, Ljubljana, 1927, as published by Cankarjeva založba, Ljubljana, 1996, p. 80.

25. In order to review the constitutionality of the above-mentioned provisions of the RPNA in terms of whether they make it impossible or considerably more difficult to conduct a subsequent legislative referendum as a form of the constitutionally guaranteed right to directly participate in the management of public affairs and, in this context, the right to a referendum, the following questions must first be solved: what are the promulgation and the publication of a law and what is the relationship between them; what is the adoption of a law; what is the effect of the suspensive veto and what is the relationship between the National Council and the National Assembly during the procedure for the adoption of a law; how is the relationship between the persons authorised to lodge a request to call a legislative referendum or the electorate that decides in the referendum and the National Assembly as the legislature defined; what is the relationship between the suspensive veto and subsequent legislative referendum. The question at issue is how to define legal positions of individual participants (direct or indirect) in the legislative procedure in the broader sense, i.e. in the context of the process of drafting a specific law. The Constitution defines the position of the National Assembly as the legislature, the position of the National Council, the institution of suspensive veto, the institution of legislative referendum and the promulgation and publication of laws. The statutory regulation (and the regulation in the rules of procedure) governing the legislative procedure in the broader sense of the word, i.e. the process of drafting a law, must be such as to respect the constitutionally guaranteed legal positions of all the relevant subjects, who are directly or indirectly involved in the process of drafting the law (the National Assembly, the National Council, the authorised initiators of a legislative referendum, and the electorate), and the relationships between them, and to ensure effective exercise of their entitlements, rights, and powers, which arise from the Constitution, in the context of the process of the making of the law (adoption of a law, suspensive veto, subsequent legislative referendum, promulgation, and publication of a law).

#### B – IV

26. Given that Article 21 of the RPIA refers to the publication of a law, while the challenged provisions of the RPNA refer to the promulgation of a law, the relationship between the promulgation and the publication of a law is relevant to the review of the above-mentioned provisions of the RPNA. Are the regulation in the RPIA and the regulation in the RPNA contradictory, or are they independent of each other as they regulate two different issues? The question must be answered as to how to proceed with the constitutional review of a regulation according to which, in the event where a request to call a subsequent legislative referendum has been lodged (irrespective of whether or not a suspensive veto was used in the procedure for the adoption of the law), the law in question is sent for promulgation (in compliance with the provisions of the RPNA) and, at the same time, its publication is suspended (in compliance with the provisions of the RPIA).
27. The promulgation of laws is listed in the first paragraph of Article 107 of the Constitution as one of the powers of the President of the Republic, whereas the first

paragraph of Article 91 of the Constitution provides that: “Laws are promulgated by the President of the Republic no later than eight days after they have been adopted”. As regards the publication of laws, account must be taken of Article 154 of the Constitution, which provides that regulations must be published prior to their entry into force, that a regulation enters into force on the fifteenth day after it has been published unless otherwise determined in the regulation itself, and that state regulations are published in the official gazette of the state. Pursuant to the Official Gazette of the Republic of Slovenia Act (Official Gazette RS, No. 57/96 – hereinafter referred to as the OGA), the official gazette of the state in which state regulations are published is the Official Gazette of the Republic of Slovenia (Article 1), which is issued by the government office in charge of legislation (Article 2) and published by the public company the Official Gazette of the Republic of Slovenia (Article 3). Article 9 of the OGA provides that regulations and other acts are published by order of the body which issued such act, i.e. laws are published by order of the National Assembly. Pursuant to Article 5 of the OGA, the director of the public company determines the numbering and sequence in which the regulations and other acts will be published, if they are duly submitted for publication.

28. It can therefore be established that the promulgation of a law and the publication of a law are legally relevant actions that follow the adoption of the law and entail a necessary condition for the law to enter into force. The promulgation of a law and the publication of a law are two activities which are, however, interdependent and interconnected. The promulgation is an act by which it is established that the law in question has been made through the participation of all the constitutionally determined participants; it is an act by which it is established that the law has been adopted by the authorised body in the prescribed procedure, that the law has actually been made, and that the law therefore exists. The publication is the act of making the law externally identifiable and is a necessary condition for the law's entry into force in that it enables the addressees to get familiar with the law and its substance before it enters into force and becomes binding for them.<sup>3</sup> Pursuant to the regulation currently in force, laws are promulgated by the President of the Republic and published in the Official Gazette of the Republic of Slovenia and the National Assembly, or rather the President of the National Assembly, submits laws for promulgation and orders their publication. A law may not be promulgated or published if there are impediments preventing it from entering into force. It is not possible to promulgate and publish a law that has not yet been made and does not exist, or a law with regard to which it is unclear whether it has been made. It is also clear from the provisions of the Constitution which provide that the President of the Republic promulgates laws that only existing laws are promulgated. This means that the provision of the first paragraph

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3 Cf. Pitamic, L.: *Država* [The State], pp. 249–253; Pavčnik, M.: *Teorija prava* [Theory of Law], Cankarjeva založba, Ljubljana, pp. 158, 160; several authors: *Pravo* [The Law], lexicon of Cankarjeva založba, Ljubljana, 1987, pp. 241, 163; Rupnik, J., Cijan, R., Grafenauer, B.: *Ustavno pravo Republike Slovenije* [Constitutional Law of the Republic of Slovenia], Maribor, 1996, pp. 178, 186–187.

of Article 91 of the Constitution may be construed to require the President of the Republic to promulgate the law in question by no later than the eighth day after it has been adopted, on the condition that there are no constitutional impediments in relation to the making of the law and it is certain that the law has been made.

29. After the National Assembly has adopted a law with a prescribed majority, either in a regular, fast-track, or shortened procedure, there are two further impediments for such to become a law: the possibility of a suspensive veto exercised by the National Council and the possibility of a subsequent confirmatory legislative referendum. If the National Council exercises its suspensive veto, the National Assembly must again decide on the law; the law, which requires a larger majority to be adopted, may or may not be adopted during this reconsideration procedure. In regulating the question of when the law is to be sent for promulgation, the RPNA takes account of the above possibility, and thus a suspensive veto is treated as an impediment to the promulgation of the law: only after the National Council has announced that it will not discuss the law (and will also not exercise the suspensive veto), or in the event that the National Council has exercised its suspensive veto, may the law be submitted for promulgation, but only after the National Assembly has adopted the law during the reconsideration procedure. The RPNA does not, however, consider the possibility of a subsequent legislative referendum to be an impediment to the promulgation of a law. It is therefore possible that a law is sent for promulgation regarding which an initiative or request to call a referendum might be submitted, i.e. a request that the electorate make the final decision on a law that has already been adopted by the National Assembly, but which might not be confirmed by the electorate.

#### B – V

30. The provision of the second paragraph of Article 254 of the RPNA provides that, in the event that the National Council announces that it will not discuss the law (and will thus not exercise its veto), the law is sent for promulgation immediately, i.e. prior to the expiry of the time limit for submitting an initiative or request to call a subsequent legislative referendum referred to in Article 21 of the RPIA. The above-mentioned provision of the RPNA is included in the chapter titled “The Relations of the National Assembly towards the National Council”. It is evident that the RPNA was not intended to regulate issues relating to a referendum. This is the substance of the RPIA, which was adopted later. Given that even the Constitution does not regulate the legislative referendum in detail, it is understandable that the legislature, when formulating the provisions of the RPNA, was unable to take into account the institution of the subsequent legislative referendum. However, as soon as the legislature adopted the RPIA, in which it provided for a subsequent legislative referendum, thereby implementing the constitutional right to a referendum, it should also have adapted the provisions of the RPNA accordingly. Through the RPIA, which was adopted at a later point in time (like the RPNA, the RPIA is adopted by a two-thirds relative majority), the legislative body provided for a subsequent legislative referendum as one of the ways in which the constitutional right referred to in Article 90 in

conjunction with Article 44 of the Constitution and grounded in the fundamental principles of the constitutional order referred to in Articles 1 and 3 of the Constitution is to be exercised. The subsequent legislative referendum is therefore accorded constitutional protection. Already from the definition of this type of referendum there follows the requirement that a certain time limit be determined for submitting a request or initiative to call a referendum after the law has been adopted. It would be contrary to the very essence of this type of referendum if there was no interval between the adoption of the law and the law being sent for promulgation that corresponded to the time limit set by the RPIA for submitting a request or initiative [to call a referendum]. The National Assembly states that after the RPIA had been adopted the provision of the second paragraph of Article 254 of the RPNA ceased to be applied; however, it did not abrogate this provision in the process of adopting several subsequent amendments to the RPNA, and the doubts regarding the validity of this provision have never been resolved. The regulation as provided in the second paragraph of Article 254 of the RPNA is inconsistent with the Constitution as it fails to take into account the institution of the subsequent legislative referendum, thereby making it possible to send a law, which may or may not be made, for promulgation prior to the expiry of the time limit for submitting an initiative or request to call a referendum. It was therefore abrogated by the Constitutional Court.

31. Since the Constitutional Court abrogated the above-mentioned provision of the RPNA, the general rule, according to which a law is sent for promulgation on the eighth day after it has been adopted, also has to be applied in the case at issue and it must be interpreted in accordance with the first paragraph of Article 91 of the Constitution, taking into account all the constitutionally guaranteed legal positions of the specific subjects entitled to participate in the process of drafting the law. This entails that a law is promulgated if there are no constitutional impediments to its promulgation and publication in relation to its drafting. A subsequent legislative referendum, designated by the legislature as one of the ways in which the right referred to in Article 90 of the Constitution is to be exercised, also entails a constitutional impediment to the promulgation of the law. That which cannot be promulgated also may not be sent for promulgation. The President of the Republic cannot promulgate as a law something which might never become a law, because it will not be confirmed by the people in a referendum. More specifically, promulgation is an act that establishes that the law in question was made with the participation of all the constitutionally entitled subjects and that it therefore exists.

## **B – VI**

32. When reviewing the constitutionality of the provision of the third paragraph of Article 292 of the RPNA, the Constitutional Court first had to clarify the nature of the relationship between a suspensive veto and a subsequent legislative referendum. This is inextricably linked to the question of what is deemed to be the moment a law is adopted, from which point the seven-day time limit for submitting an initiative or request to call a referendum referred to in Article 21 of the RPIA begins to run.

33. The first paragraph of Article 97 of the Constitution determines the suspensive veto to be one of the powers at the disposal of the National Council and it is specified in more detail by the provision of the second paragraph of Article 91 of the Constitution: “The National Council may within seven days of the adoption of a law and prior to its promulgation require the National Assembly to decide again on such law. In deciding again, a majority of all deputies must vote for such law to be adopted unless the Constitution provides for a higher majority for the adoption of the law under consideration. Such new decision by the National Assembly shall be final.” The reconsideration of a law is regulated by the provisions of Articles 205 to 207 of the RPNA, which constitute a special section in the chapter titled “Legislative Procedure”. Reconsideration of a law by the National Assembly due to a suspensive veto of the National Council’s is a part of the legislative procedure in the broader sense of the word, i.e. the whole process leading to the adoption and making of a law. If the suspensive veto is exercised after the National Assembly adopted a law, either in a regular, fast-track, or shortened procedure, this entails that the National Assembly must again decide on whether or not to adopt the law. It is evident from the wording of the relevant provisions and, in particular, the definition of the suspensive veto in the Constitution and the RPNA that, during a reconsideration which is a result of a suspensive veto, the National Assembly decides on the adoption of a law. In that case, a larger majority of deputies is required to adopt the law than when the law was “first” adopted. If the required qualified majority in the National Assembly is not achieved, the constitutionally determined conditions for such a law (adopted by a majority which does not suffice once the suspensive veto has been exercised) to be adopted by the National Assembly, i.e. to be made, have not been met. If the National Assembly does not adopt the law during the reconsideration, such a law does not exist and has therefore not been adopted by the National Assembly. The Constitutional Court agrees with the finding of the National Assembly that the National Council is only an indirect participant in the legislative procedure and that, during the reconsideration resulting from the suspensive veto, the National Assembly (taking into account the applicable regulation in the RPNA) only decides on whether the law, without amending the existing wording, will be adopted or not, and hence neither the substance of the law may be changed nor may the National Council propose any amendments. This does not, however, entail that the law has already been adopted after it was “first” decided on by the National Assembly since, in the event that a suspensive veto is exercised, the position of the National Assembly is the same as it was prior to when the draft law was “first” decided on, i.e. prior to the adoption of a decision as to whether or not to adopt such a law.
34. The Constitutional Court has already taken a position with regard to the suspensive veto, its relationship to when the adoption of the law is “first” decided on by the National Assembly, and the significance of the reconsideration procedure in the National Assembly, in particular in Decision No. U-I-84/96, dated 21 October 1999 (Official Gazette RS, No. 95/99, and OdlUS VIII, 224). In the reasoning of the mentioned decision the Constitutional Court stated *inter alia* that, by requiring that the National

Assembly decide again on a law, the National Council becomes involved in the procedure of deciding on a law. The Court pointed out that, after the suspensive veto has been exercised, the National Assembly decides again on the law as a whole and may neither partly change it nor return it to the stage of the first or second reading; if the law is not adopted during the reconsideration procedure, the legislative procedure is concluded. The Court further explained that exercising the suspensive veto actually entails asking the deputies whether they agree that the law in question be adopted.

35. If the required larger majority of deputies to the National Assembly is achieved during the reconsideration of a law following a suspensive veto, the law is adopted, but if such majority is not achieved, the law is not adopted. As soon as the suspensive veto has been exercised, it is no longer clear (as is the case before the “first” voting on the law) whether the required majority will be achieved and the law will be adopted or not. In the event that the suspensive veto is exercised, the law would have to be adopted during the repeated, i.e. “second”, vote in order for it to be deemed to have been adopted by the National Assembly. If one takes both the wording of Article 21 of the RPIA and the definition of a subsequent legislative referendum into account, the only possible interpretation is that, in the event that a suspensive veto has been exercised by the National Council and the National Assembly has adopted the law during the reconsideration procedure, the period for submitting an initiative or request to call a referendum referred to in Article 21 of the RPIA begins to run as of the day on which the law is adopted during its reconsideration by the National Assembly following the suspensive veto. In this context, the Constitutional Court did not review whether any other statutory regulation of this issue in the RPIA would be consistent with the Constitution as this was not the subject matter of these proceedings. The Constitutional Court has therefore not taken a position as to which statutory implementation of the constitutional right to a referendum by the RPIA (including the provision regulating the time limit for submitting an initiative or request [to call a referendum]) would be consistent with the Constitution, but has only found that, given the applicable statutory implementation of this right in the RPIA, only the above-mentioned interpretation is acceptable. In this context, the Constitutional Court states that the RPIA does not specifically regulate the situation wherein the suspensive veto was exercised by the National Council and the National Assembly adopts the law during the reconsideration procedure, and it does not regulate the issue of when, in the event of such, the time limit for submitting an initiative or request to call a referendum begins to run; in such a situation (i.e. where this issue is not specifically regulated in the RPIA), the statutory implementation of the constitutional right to a referendum cannot be interpreted restrictively, but only in favour of exercising the right to a referendum, and in the event of doubt, a decision must be reached in favour of those who submitted an initiative or request to call a referendum.
36. The purpose of a subsequent legislative referendum is that the electorate either confirms or rejects a specific law that has been adopted by the National Assembly, and for which it is clear that it would have entered into force if there had not been a referendum. In a subsequent legislative referendum, the electorate does not decide

on a law for which it is not yet clear whether it will be adopted. This is the principal characteristic of a preliminary referendum. If we accepted the interpretation that an initiative or request to call a subsequent legislative referendum must in any case be submitted within seven days of the first adoption of the law, this would entail that such an initiative or request would, in the event that a suspensive veto were exercised within the same time limit, lose its meaning since the initiative for a subsequent legislative referendum would be “transformed” into an initiative for a preliminary referendum, because it would refer to a law which the National Assembly had yet to decide on, i.e. a law for which it is not yet known whether it will be adopted by the National Assembly. It is true that, after the suspensive veto has been exercised, the National Assembly may only adopt the law as a whole, with the wording unchanged, and thus the electorate and the authorised referendum initiators may become familiarised with the substance of the law to be adopted. The electorate is therefore aware of the issue covered by the law but, and this is of crucial importance, it does not know whether or not such law will be adopted.

37. The interpretation that the time limit for submitting an initiative or request to call a subsequent legislative referendum begins to run as of the “first” adoption by the National Assembly, even if the suspensive veto has been exercised, is also not acceptable in terms of the Constitution due to the constitutionally defined position of the National Council. As regards the legislative procedure, the National Council has two institutions at its disposal through which it may intervene in the procedure for the adoption of a law: the suspensive veto and the legislative referendum. It is not possible to agree with the National Assembly’s position that the National Council must make use of both institutions in the same seven-day time limit after the “first” adoption of the law. The Constitution does not provide a basis for such a position. There is no constitutional or statutory provision that requires the National Council to choose between the two institutions. If the National Council first exercises the suspensive veto as a milder means and is not successful (i.e. the National Assembly does not change its decision during the reconsideration procedure, and adopts the law with the required larger majority), the National Council must have the opportunity to lodge a request to call a referendum as a more serious means to challenge the decision of the National Assembly if it disagrees with the adopted law.<sup>4</sup> This does not, however, entail that the National Council could not immediately avail itself of the possibility of a subsequent legislative referendum without previously having exercised its suspensive veto. The decision as to whether the National Council uses either or both instruments in order to intervene in the legislative procedure in the broader sense must depend entirely on the National Council itself. In order for the expression “after the adoption of the law” in Article 21 of the RPIA to be consistent with the Constitution, it must be interpreted in the sense that, if a suspensive veto has

4 Cf. Igličar, A.: *Zakonodajno odločanje* [Legislative Decision-Making], Ljubljana, 1994, p. 86; Ribičič, C.: *Podoba parlamentarnega desetletja* [The Image of a Parliamentary Decade], Ljubljana, 2000, p. 64; Kocjančič, R., Ribičič, C., Grad, F., Kaučič, I.: *Ustavno pravo Slovenije* [Constitutional Law of Slovenia], Ljubljana, 1998, p. 179.

been exercised, the law may only be deemed to have been adopted if it was adopted after its reconsideration in the National Assembly, which means that the period for submitting an initiative or request to call a referendum referred to in Article 21 of the RPIA begins to run upon the adoption of the law after its reconsideration in the National Assembly. The interpretation and application of this provision regarding the starting point of the time limit in question may not differ for specific authorised referendum initiators and must apply equally to all of them.

38. The third paragraph of Article 292 of the RPNA, which stipulates that if the suspensive veto has been exercised and the law has been adopted during the repeated voting, such law shall be immediately sent for promulgation, is inconsistent with the Constitution, since it allows for the law to be sent for promulgation before the expiry of the time limit for submitting an initiative or request to call a referendum referred to in Article 21 of the RPIA, i.e. prior to it becoming clear whether the law will be confirmed. For this reason, the Constitutional Court abrogated this provision. The provision of Article 292 of the RPNA is included in the chapter titled “The Relations of the National Assembly towards the President of the Republic”. It is, however, the same situation *mutatis mutandis* as that referred to in the second paragraph of Article 254. Therefore, the reasons for abrogating the provision of the third paragraph of Article 292 of the RPNA are *mutatis mutandis* equal to those referred to in Paragraph 30 of this reasoning. The situation following the abrogation of the said provision must be considered *mutatis mutandis* in the same way as explained in Paragraph 31 of this reasoning.
39. This also entails that, taking into account the applicable regulation of the legislative referendum in the RPIA as a statutory implementation of the constitutional right to a referendum, an initiative or request to call a referendum must in any event (if the law has been adopted, in a regular, fast-track, or shortened procedure, during the “first” voting of the National Assembly, and the veto has not been exercised, or the veto has been exercised and the law has been adopted after its reconsideration) be submitted within seven days of the adoption of the law: if the suspensive veto has not been exercised, within seven days of the “first” adoption of the law, and if the suspensive veto has been exercised, within seven days after the “second” adoption of the law by the National Assembly. It is not true that such an interpretation puts the authorised referendum initiators in an unequal position, depending on whether or not the National Council has exercised a veto on a specific law. The time limit of seven days following the adoption of the law applies in both cases. If an initiative or request for a referendum is submitted after the “first” adoption of the law, and then a suspensive veto is also exercised in due time, the initiative or request for a referendum becomes irrelevant, since the National Assembly must decide again on the law in question and it is unclear until that point as to whether or not the law will be adopted. It is only after the law has been adopted during the reconsideration procedure that the authorised initiators may submit an initiative or request [to call a referendum]. It is their own choice as to whether or not they will submit (again) such an initiative or request. A different interpretation of the provisions on the starting point of the time limit would bring the subsequent legislative referendum (which is optional) close to a mandatory referendum, which is not

provided for by the applicable regulation of referenda in the RPIA (as an enactment of the constitutional provisions regarding referenda and participation in the management of public affairs), since such would entail that it is certain prior to the adoption of the law in the National Assembly that, if the law is adopted, a referendum on this law will be held. The provision of Article 20 of the RPIA, which provides that when adopting a law the National Assembly itself may decide to call a referendum, does not also entail that the National Assembly is bound by such decision, which was adopted during the “first” adoption of the law, in the event that a suspensive veto has subsequently been exercised with regard to the law; similarly as the [first] adoption of the law, such prior decision to call a referendum becomes irrelevant; if it intends to call a referendum, the National Assembly will (again) be required to adopt a decision thereon after the adoption of the law on the basis of the suspensive veto.

40. The Constitutional Court further deems that the National Assembly’s claim that all the statutorily determined initiators also had the opportunity to initiate a preliminary referendum, but failed to do so, is irrelevant in the case at issue because the preliminary referendum and the subsequent referendum are two independent institutions, and thus the efficient implementation of each must be ensured (taking into account that they were determined by the legislature as the manner in which the constitutional right referred to in Articles 90 and 44 of the Constitution is to be exercised), without the subsequent legislative referendum being conditional upon whether or not the possibility of a preliminary referendum was also used.

#### **B – VII**

41. As the Constitutional Court abrogated the provisions of the second paragraph of Article 254 and the third paragraph of Article 292 of the RPNA, it also abrogated the part of the second sentence of the second paragraph of Article 292 of the RPNA that refers to the two aforementioned provisions of the RPNA and is devoid of meaning without the aforementioned provisions of the RPNA. More specifically, this provision does not regulate any independent issue but only constitutes a part of the purely technical formulation of the legal regime determined by the third paragraph of Article 292 and the second paragraph of Article 254 of the RPNA. In this context, the Constitutional Court refers to the reasoning provided in Paragraph 31 that the provision requiring that a law be sent for promulgation on the eighth day following its adoption must be interpreted in accordance with the Constitution, taking into account both the first paragraph of Article 91 of the Constitution and all the constitutionally guaranteed legal positions of specific subjects entitled to participate in the law-making process.

#### **B – VIII**

42. The Constitutional Court also reviewed the constitutionality of the procedure for the adoption of the ATDFSEU. The Constitutional Court acknowledged the petitioner’s legal interest for the review of the constitutionality of the procedure for the adoption of a specific law, irrespective of whether or not it demonstrated legal interest to challenge the

aforementioned regulation in terms of its substance. The Constitutional Court considered that the legal interest to challenge a regulation through the constitutional review of its adoption is demonstrated by the party claiming that one of its constitutional rights was violated during that procedure. Such is the case here. More specifically, the petitioner claims that during the procedure for the adoption of the ATDFSEU it was prevented from effectively exercising the right to submit an initiative to call a subsequent legislative referendum, which is guaranteed by Article 90 in conjunction with Article 44 of the Constitution, in the manner provided by the RPIA on the basis of Article 90 of the Constitution.

43. There is no dispute between the parties with regard to the facts relating to how the procedure for the adoption and entry into force of this law was carried out or the order in which specific actions occurred. The ATDFSEU was adopted by the National Assembly on 31 January 2001. On 7 February 2001, the law at issue was considered by the National Council, which adopted a decision requiring the National Assembly to decide again on the law; this decision was submitted to the President of the National Assembly on the same day. Such entails that the National Council exercised its suspensive veto. On 21 February 2001, the National Assembly again decided on the ATDFSEU and adopted it with the required larger majority. On 22 February 2001, the ATDFSEU was sent to the President of the Republic for promulgation and was promulgated on the same day; on 28 February 2001, the ATDFSEU was published in the Official Gazette of the Republic of Slovenia. On 28 February 2001, Nova stranka (the petitioner in the case at issue) submitted an initiative for the voters to lodge a request to call a subsequent legislative referendum on the ATDFSEU. By Act of the President of the National Assembly No. 005-02/97-8/8, dated 2 March 2001, its initiative to call the referendum was rejected. Nova stranka brought an action before the Administrative Court against not only the order for the promulgation and publication of the ATDFSEU but also the Act of the President of the National Assembly, by which its initiative was rejected. The Administrative Court rejected the first action and dismissed the second one. Nova stranka lodged two appeals against the two Administrative Court decisions, upon which the Supreme Court has yet to decide.
44. The Constitutional Court finds that the ATDFSEU was sent for promulgation and publication immediately after it had been adopted following its reconsideration by the National Assembly due to the suspensive veto being exercised. The law was therefore sent for promulgation and publication prior to the expiry of the time limit for submitting an initiative or request to call a subsequent legislative referendum referred to in Article 21 of the RPIA. The Constitutional Court abrogated the provision of the third paragraph of Article 292 of the RPNA, which included this rule, as it found that it was inconsistent with the Constitution. Since the Constitutional Court abrogated the said provision of the RPNA, while reviewing the constitutionality of the procedure for the adoption of this specific law, i.e. the ATDFSEU, it found that this law had not been promulgated and published in accordance with the Constitution and that, accordingly, the law had not entered into force and may not be applied, and it substantiated this finding on the same grounds on which the aforementioned abstract rule had been abrogated and which are stated in Paragraphs 32 to 40 of this reasoning.

45. The Constitutional Court has the power to review the constitutionality of laws (the first indent of the first paragraph of Article 160 of the Constitution and the first indent of the first paragraph of Article 21 of the CCA) and, pursuant to the third paragraph of Article 21 of the CCA, it also has the power to review the constitutionality of the procedures by which these acts were adopted. The case at issue, where the Constitutional Court only reviews the constitutionality of the procedure for the adoption of a law, is specific because the law itself is not being challenged and therefore the constitutionality of its substance is not being reviewed.
46. The Constitutional Court emphasises that it did not review the constitutionality of the substance of the ATDFSEU in these proceedings. The Court did find, however, that during the procedure for the adoption of this law in the broader sense of the word, i.e. while it was being made, the constitutionally guaranteed position of the electorate or the initiator of a referendum with regard to the exercise of their constitutionally enshrined rights regarding a referendum as a way for voters to directly participate in the management of public affairs had been violated. This violation was a result of the fact that the ATDFSEU had been sent for promulgation and publication prior to the expiry of the time limit for submitting an initiative or request to call a subsequent legislative referendum.
47. The Constitutional Court furthermore emphasises that, in these proceedings, it neither reviewed nor decided on the question of whether the initiative to call a referendum submitted by Nova stranka on 28 February 2001 had met all the formal and substantive requirements determined by the RPIA, which must be fulfilled in order for the submitted initiative to call a referendum to be considered, the time limit for the collection of the voters' signatures to be set, and a referendum to be called in the event that a request of 40,000 voters is lodged. The President of the National Assembly decides on this issue and his decision is an individual act which is subject to judicial control in proceedings for the judicial review of administrative acts and, after all legal remedies have been exhausted and under the conditions determined in the CCA, it may also be subject to constitutional judicial control in the context of the constitutional complaint (a similar decision was adopted, for example, in the orders of the Constitutional Court Nos. U-I-346/98-9, dated 26 October 2000, OdlUS IX, 255, and Up-70/01, dated 27 March 2001). However, initiators of a subsequent legislative referendum cannot exercise their right to a subsequent legislative referendum, including eventual judicial protection, if the National Assembly sends a law for promulgation and publication prior to the expiry of the time limit for submitting an initiative or request to call a referendum. In such instances, the persons entitled to initiate a subsequent legislative referendum can also not obtain effective protection in proceedings for the judicial review of administrative acts initiated due to violations relating to the initiative or request to call a referendum by applying the provisions of the second paragraph of Article 69 of the Judicial Review of Administrative Acts Act (Official Gazette RS, Nos. 50/97, etc.). Only the Constitutional Court may interfere with a law, which is a general legal act.

48. Pursuant to the first paragraph of Article 161 of the Constitution and Article 43 of the CCA, the Constitutional Court may abrogate any law which is unconstitutional. This also applies in the event that the unconstitutionality of a law is the result of a violation of the Constitution during the procedure for the adoption of such a law. However, in the case at issue an abrogation of the law would not be a necessary or proportionate sanction and it would not be in accordance with the purpose for which constitutional judicial protection was sought. The Constitutional Court finds that, in the case at issue, no allegation was made that the Constitution had been violated during the law-making process prior to the law's adoption by the National Assembly. The violation occurred with regard to the exercise of the right to a referendum during the period before the expiry of the time limit for submitting an initiative or request to call a referendum because the law had been sent for promulgation and publication prior to the expiry of the time limit for submitting an initiative or request. To abrogate the law in such a case (which would entail that, in order to adopt this law, the legislature must carry out the entire legislative procedure from the beginning, starting with the draft law, i.e. including those stages in the procedure where no violation of the Constitution was established) would therefore entail a disproportionate interference with the legislative procedure, given the principle of the separation of powers referred to in Article 3 of the Constitution. Furthermore, by abrogating the law, the petitioner's intention would not be achieved, i.e. to ensure the effective exercise of the right to a referendum; in the case at issue this entails that, provided that all the prescribed conditions are or will be met, a subsequent legislative referendum on the ATDFSEU is to be called and conducted, in which the electorate will be able to directly decide on whether the law adopted by the legislature should be confirmed or rejected.
49. The Constitutional Court imposed the sanction determined by Point 2 of the operative provisions of this Decision on the basis of the second paragraph of Article 40 of the CCA. If the Constitutional Court may abrogate a law, by applying an *a maiori ad minus* interpretation, it may also impose a milder sanction if such is more appropriate (a similar decision was reached, for example, in Decision of the Constitutional Court No. U-I-114/95, dated 7 December 1995, Official Gazette RS, No. 8/96, and OdlUS IV, 120). The Constitutional Court's decision that the ATDFSEU had not been promulgated and published in accordance with the Constitution and that, accordingly, it had not entered into force and may not be applied in fact abrogated that part of the ATDFSEU drafting process in which the violation of the petitioner's constitutionally protected rights occurred and restored the situation to what it had been before the promulgation and publication of the law. In the past, the Constitutional Court imposed a similar sanction in a similar case which also related to the exercise of the right to subsequent legislative referendum (Decision of the Constitutional Court No. U-I-84/99, dated 6 July 2000, Official Gazette RS, No. 66/2000, and OdlUS IX, 190).
50. Since the suspension of the implementation of the ATDFSEU and this Decision of the Constitutional Court resulted in a very specific situation, the Constitutional Court, on the basis of the second paragraph of Article 40 of the CCA, also determined the manner in which this Decision is to be implemented. By stipulating the

manner of implementation, the Constitutional Court avoided the dilemmas which could have arisen owing to this Decision and the suspension of the implementation of the ATDFSEU, particularly those regarding the starting point of different time limits. In this context, the Constitutional Court took particular account of the fact that the legislature itself can no longer adapt the substance of the law to the new circumstances, which have arisen due to the suspension of the law and the passing of time. The Constitutional Court notes that its powers are limited, and that its options are restricted as a result; therefore, adhering to the principle of the separation of powers, the Constitutional Court only intervened where necessary (where the suspension of the law would cause an untenable situation, leading to the unconstitutionality or infeasibility of the regulation concerned) and only to the extent required. The way in which implementation is determined is therefore not necessarily optimal; however, the Constitutional Court's room for manoeuvre in determining the manner of implementation is not and may not be the same as that of the legislature when regulating legal relations. The specific and problematic nature of the situation which may have arisen if the ATDFSEU had entered into force is also a result of how the legislature acted during the procedure for the adoption of the ATDFSEU and, in particular, owing to the incomplete and inadequate statutory regulation of referenda.

51. The finding that the law had not entered into force entails that no legal consequences could have arisen on the basis thereof, and so any declaratory decision which may have been issued on the basis of Article 16 of the ATDFSEU is therefore non-existing. Restoration of the position to what it had been prior to the promulgation and publication of the law, in the case at issue the ATDFSEU, means that the procedure regarding the referendum pursuant to the Constitution and the RPIA, which entails a constitutional "impediment" to the promulgation, publication, and entry into force of the ATDFSEU, can (and must) be carried out and concluded. Thus far no final decision has been issued regarding the initiative of Nova stranka for the voters to lodge a request to call a referendum on the ATDFSEU. Any further developments will be dependent on such decision. If Article 273 of the General Administrative Procedure Act (Official Gazette RS, Nos. 80/99, etc.) is applied *mutatis mutandis*, then the President of the National Assembly may, prior to the conclusion of the proceedings for judicial review of administrative acts, change his decision and uphold the initiative of Nova stranka submitted on 28 February 2001 to lodge a voters' request to call a subsequent legislative referendum on the ATDFSEU.
52. If in deciding on the initiative of Nova stranka it becomes evident that, even despite the fact that the time limit for submitting an initiative began to run from the moment the law has been adopted after its reconsideration by the National Assembly as a result of the suspensive veto, the initiative fails to meet all the formal and substantive requirements determined in the RPIA, then there will exist no further impediments to the promulgation, publication, and entry into force of the ATDFSEU. If it is demonstrated that the initiative meets all the prescribed requirements, the time limit for collecting signatures must be set. Owing to the aforementioned specific situation in the case at issue, the thirty-day period referred to in Article 21 of the RPIA,

which commenced upon the adoption of the ATDFSEU by the National Assembly, has already expired; therefore, taking into account the meaning of the provision of the second paragraph of Article 21 of the RPIA, the Constitutional Court has determined the manner in which this Decision is to be implemented, i.e. in the event that such situation arises, the thirty-day period for collecting signatures must be set so that it will begin to run as of the service of the decision regarding the initiative. If no request to call a referendum is lodged by 40,000 voters within this period, such entails that there are no impediments to the promulgation, publication, and entry into force of the ATDFSEU. If such a request is lodged by the voters in accordance with the RPIA, a referendum will have to be called and conducted pursuant to the RPIA. If the ATDFSEU is confirmed in the referendum, there will be no further impediments to its promulgation, publication, and entry into force.

53. In all the aforementioned cases where there are no impediments to the entry into force of the ATDFSEU, the law will be sent for promulgation and publication and all the legal effects resulting therefrom will arise. Pursuant to the general rule referred to in the first paragraph of Article 154 of the Constitution and taking into account the provision of Article 20 of the ATDFSEU which determines when this act will enter into force, the ATDFSEU will enter into force on the fifteenth day following its publication. The ATDFSEU sets several time limits as fixed dates. Of central importance is the setting of the time limit in which the currently applicable regime governing duty-free shops ceases to apply (31 May 2001) and the new regime governing duty-free shops enters into force (1 June 2001); all the other time limits depend on these two. By its Order No. U-I-104/01, dated 28 May 2001, the Constitutional Court suspended the implementation of the ATDFSEU, thereby preventing this time limit from expiring and the consequences that would have resulted therefrom from occurring. By issuing this Decision, the effects of the interim suspension will cease and thus the Constitutional Court, taking into account both the provision of Article 155 of the Constitution and the intention of the legislature (whose intention was not a retroactive effect of the law), has determined as a manner of implementation of this Decision how the time limits determined by the ATDFSEU are to run. The Constitutional Court emphasises that it did not undertake a substantive assessment of the regulation of time limits in the ATDFSEU, but has only postponed the expiry of the time limits determined by the legislature. The time limits in the ATDFSEU, which are set as fixed dates, shall expire as follows: - the time limit set as 1 May 2001 shall expire on the 10<sup>th</sup> day following the entry into force of the law; - the time limit set as 31 May 2001 shall expire on the 30<sup>th</sup> day following the day referred to in the first indent; - the time limit set as 1 June 2001 shall expire on the day following the day referred to in the second indent; - the time limit set as 31 July 2001 shall expire two months after the day referred to in the second indent; - the time period set as 31 August 2001 shall expire three months after the day referred to in the second indent.
54. Although this Decision will be published pursuant to Article 42 of the CCA in order for everyone to be able to familiarise themselves therewith, due to the principle of legal certainty (as one of the principles of a state governed by the rule of law referred to in

Article 2 of the Constitution) the Constitutional Court has nevertheless determined that this Decision shall be implemented as follows: if the ATDFSEU is published, a copy of part of this Decision, i.e. its operative provisions and points 50 to 55 of its reasoning, shall be published below the law in the same volume of the Official Gazette.

55. On the grounds that dictated that this case be considered as a priority case in the proceedings before the Constitutional Court, the Constitutional Court made the effects of its Decision dependent on its service on the National Assembly, and not on its publication in the Official Gazette of the Republic of Slovenia (Article 43 of the CCA).

### C

56. The Constitutional Court adopted this Decision pursuant to the third paragraph of Article 21, Articles 30, 40, and 43 of the CCA, and the sixth indent of Article 52 of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia (Official Gazette RS, No. 49/98), composed of: Franc Testen, President, and Judges Dr Janez Čebulj, Dr Zvonko Fišer, Lojze Janko, Milojka Modrijan, Dr Ciril Ribičič, Dr Mirjam Škrk, Dr Lojze Ude, and Dr Dragica Wedam-Lukić. Point 1 was adopted by seven votes against two; Judges Fišer and Škrk voted against. Judge Fišer announced a dissenting opinion. Points 2 and 3 were adopted by six votes against three; Judges Fišer, Modrijan, and Škrk voted against and announced dissenting opinions. Point 4 was adopted unanimously.

*Franc Testen*  
*President*

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#### DISSENTING OPINION OF JUDGE DR FIŠER

1. Hereinafter I shall briefly elaborate on the reasons that led me to vote against Points 1 to 3 of the [operative provisions of the] Decision in the case at issue (the abrogation of specific provisions of the RPNA, and the decision that the ATDFSEU was not promulgated and published in accordance with the Constitution, and therefore had not entered into force and must not be applied). My view of the entire case does not concern the decision as such, but perhaps more the (indirect) message it may convey. Although Point 4 of the [operative provisions of the] Decision (which provides that the Decision will enter into force on the day following its service on the National Assembly) was not, in my opinion, disputable, it is by no means irrelevant.
2. I have already stated in my dissenting opinion dated 11 June 2001 to the Order, under the same reference number, dated 28 May 2001, by which the Constitutional Court decided to initiate proceedings in order to establish whether specific provisions of the RPNA and the ATDFSEU were unconstitutional, that I do not agree with the Court initiating these proceedings regarding the act in question since, in my opinion, the petitioner lacks legal interest for such. There is nothing to add here, and I refer to the aforementioned opinion only to the extent that this is still necessary. A

logical consequence of the aforementioned opinion is that I was unable to uphold Point 2 of the [operative provisions] of this Decision.

3. I agree with the initial finding that the provisions of the RPNA that should regulate the situation (or rather: situations, and this is quite different) that arises in the event that the National Assembly has passed (“adopted”) a law but there exists the possibility of exercising a veto or submitting an initiative or request to call a referendum are not only inappropriate and unclear but, most notably, incomplete. However, this does not entail that based on the interpretation supported by the majority in the Decision these provisions are unconstitutional.

This interpretation is based on the position that the provisions of the RPNA must be interpreted in a manner that opens the door as widely as possible to (potential) subsequent interferences with the adopted decision of the National Assembly (I am referring, in particular, to referenda since a veto has not been directly considered in the case at issue). This interpretation of a referendum as an expression of the popular sovereignty *par excellence* was intended to be Constitution-friendly. I cannot agree that this is the case.

I believe that without good reason such position fails to observe the relation between the rule and the exception. The legislative procedure follows its usual, regular course which is concluded by the adoption of the law in the National Assembly, its promulgation and publication; there is no need for me to describe it in more detail here. This procedure is the rule applicable to the vast majority of cases. Only in specific cases and under precisely defined conditions, i.e. in exceptional circumstances, may it be interrupted by a suspensive veto of the National Council and various requests or initiatives to call a referendum. It is inadmissible to treat the rule and the exception equally, let alone accord the exception preferential treatment.

In the past, a practice was established in the National Assembly with regard to how requests or initiatives to call a referendum should be treated, especially those called at the request of at least forty thousand voters. The aforementioned practice may have not been ideal (this is, of course, a euphemism, as this practice actually caused a number of disputes, several of which were eventually brought before the Constitutional Court) and could be improved. Despite such it was, in my opinion, acceptable in that it observed the proper relation between the rule and the exception. Through this practice, stability and predictability were introduced into the nonideal system, which is why it is not possible to consider this practice to be unconstitutional.

4. By opening and emphasising the possibilities for intervening in the legislative procedure, which is only possible after the National Assembly voted on a law, the structure of this procedure is being changed. Already at the time of discussing the veto, which may be exercised by the National Council, the interpretation was rejected that would lead to a situation in which such further decision-making would entail a kind of a fourth stage in the legislative procedure. However, this risk is not, by any means, the only one: to open the doors widely to interferences with a previously adopted law through decision-making in a referendum could have similar consequences. The decision, with which I cannot agree, has given rise to almost unimaginable possibilities

of new ways to interfere with an adopted law, which have the potential to make the situation completely unclear and difficult to manage.

It is not beneficial to the work of parliament if its attention, which should be focused mainly on the stages of making a law, the work in parliamentary bodies, and discussions and decision-making processes regarding laws in the regular legislative procedure, is directed towards the possibilities available to affect the adopted decision *in extremis*. A referendum is a blunt instrument that either confirms or annuls a matter in its entirety, but it cannot make any changes to its substance, whereas the parliamentary decision-making process must be a creative process with a keen sense for nuanced distinctions where required.

5. The legislative procedure becomes even more complex and lengthy because of the possibility that a referendum may interfere greatly with a law that has already been passed by the National Assembly. In the event of such, it is necessary to consider the rational limits of such interferences. It is beyond doubt that the legislative procedure is vital and that it must not only be clearly defined but also appropriately structured in order to allow various ideas, doubts, and concerns as well as principled objections by the opposition to be expressed. Ultimately, however, a decision must be reached and if the procedure leading to such a decision is too complicated, parliament becomes inefficient and its fundamental function (adopting regulations) is jeopardised.
  6. Referenda have an important and prominent position in our legal system; however, their significance must not be exaggerated or even absolutised. This is even more true if we are aware of the fact that the regulation of the referendum is subject to numerous criticisms. It is difficult, in my view, to accept that the signatures of as many as two hundred voters are sufficient to submit an initiative for collecting signatures to call a referendum. Simply by providing notification of his or her intention on time, the initiator can delay the entry into force of a law for a considerable length of time. Furthermore, it is a fact that no issue is excluded *a priori* from the possibility of being decided upon in a referendum, which is clearly excessive and, for a modern state that seeks (and demands) efficiency, verging on the suicidal. I also believe that there would be nothing wrong with determining a quorum of voters that must participate in the referendum in order for the referendum decision to be valid, or determining a majority by which a referendum can be passed. In short, the regulation of decision-making in referenda currently in force does not include the absolutely necessary precautionary measures required to prevent referenda from being used speculatively. Last, but not least, the Constitutional Court has also played its part in the referendum controversy (not always appropriately) in the past.
- Taking all of the above into account, I would not be surprised if new ideas emerged according to which the referendum might instead be used as a means to interrupt and impede the legislative decision-making process or as a further way in which to exert pressure on the legislature, and not as an institution for expressing the genuine will of the people. I do not want such ideas to form through references, albeit indirectly, to a decision of the Constitutional Court.

Although it might at first sight appear that the importance and power of referenda increase by having a broad possibility to use them, this is not in fact the case. In fact, the institution of referenda will lose credibility with each case where serious doubts arise as to whether a referendum has been proposed or used in order for voters to decide on a matter or merely to exert pressure on the legislature and obstruct it by threatening to hold a referendum or pursue any other further stage in the procedure concerned.

*Dr Zvonko Fišer*

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#### **DISSENTING OPINION OF JUDGE MODRIJAN**

I voted against Points 2 and 3 of the operative provisions of the Decision as I believe that, in this particular case, the petitioner failed to demonstrate legal interest for challenging the Act Regulating the Transformation of Duty-Free Shops at Road Border Crossings with Member States of the European Communities, Acting within the Framework of the European Union, into Border Shops, and the Special Supervisory Measures Relating to these Shops (ATDFSEU). In its petition, the petitioner claims that the procedure for the passing of the ATDFSEU was inconsistent with the Constitution and the RPIA because its initiative to call a subsequent legislative referendum had been rejected by Act of the President of the National Assembly No. 005-02/97-8/8, dated 2 March 2001. The petitioner disagrees with the decision that its initiative to call a referendum was not submitted in good time. It believes that, in the event that the National Council requires the National Assembly to decide again on a law (i.e. by exercising the suspensive veto), the seven-day period referred to in Article 21 of the RPIA begins to run from the date on which the National Assembly decides again on the law and not from the date on which the law is "first" adopted by the National Assembly. Since the aforementioned act of the President of the National Assembly removed the possibility of holding a subsequent legislative referendum on the ATDFSEU, for which the initiative was submitted, the procedure for the passing of the ATDFSEU was contrary to the Constitution and the RPIA.

In the case at issue the petitioner actually challenges the Act of the President of the National Assembly that is an individual act. Individual legal acts are only reviewed by the Constitutional Court in the special constitutional complaint procedure. In its Order No. U-I-346/98-9, dated 26 October 2000, the Constitutional Court adopted the position that a decision of the President of the National Assembly is an individual act and must be served on the person who submitted the initiative for voters to request the calling of a referendum. The initiator is guaranteed judicial protection in proceedings for the judicial review of administrative acts. If the initiator believes that, by adopting such a decision, the President of the National Assembly has violated the law or even interfered with the initiator's constitutional rights, it can therefore initiate the appropriate proceedings before the competent administrative court. The person who initiated the appropriate proceedings may also propose that

the court suspend the implementation of the challenged act or order that the legislative procedure be suspended until the court decision has been issued. Only after the legal remedies have been exhausted may the initiator file a constitutional complaint pursuant to Article 50 of the CCA. This provides the person who submitted an initiative for voters to request the calling of a referendum with the appropriate judicial protection. Only if in the aforementioned procedures it becomes evident that, by issuing a decision, the President of the National Assembly has violated the law or the constitutional rights of the initiator would the latter be allowed to lodge a petition to review the constitutionality of the legislative procedure for the adoption of the law, the individual aspects of which were the subject of the initiative or request to call a referendum.

Given the aforementioned Order of the Constitutional Court (which was actually adopted with regard to an initiative for voters to call a preliminary legislative referendum, although this does not change the situation), in the case at issue I advocated a rejection of the petition. The petitioner initiated proceedings for judicial review of administrative acts that were still pending and it could have filed a constitutional complaint after all legal remedies would have been exhausted. If it became evident in such proceedings that the President of the National Assembly violated a constitutional right, the petitioner could lodge a petition to review the constitutionality of the legislative procedure for the adoption of the ATDFSEU as has already been stated in the aforementioned Order of the Constitutional Court.

It is true that, in terms of the substance of the ATDFSEU, judicial protection in proceedings for the judicial review of administrative acts would be an ineffective legal remedy after the ATDFSEU enters into force; however, this question is irrelevant in the case at issue. The petitioner did not comply with the applicable RPIA in that it failed to submit an initiative for voters to call a subsequent legislative referendum within the prescribed seven-day period after the “first” adoption of the ATDFSEU. A suspensive veto and an initiative to call a referendum are two different institutions which, in my view, are independent of each other and must be lodged within seven days after the adoption of a law. If the National Council exercises its suspensive veto, it might be possible that the time limit for submitting the initiative to call a referendum would be interrupted (the law does not regulate such a situation) and then it would continue to run or begin to run anew, but only after the National Assembly would have adopted the ATDFSEU by an absolute majority in the repeated vote. If such were the case and the President of the National Assembly had sent the ATDFSEU for promulgation and publication before the decision on the initiative to the voters to call a referendum had become final, I would not have had any doubts regarding the existence of the petitioner’s legal interest prior to the exhaustion of judicial protection. In the case at issue, however, the National Council exercised its suspensive veto on the seventh (last) day after the “first” adoption of the ATDFSEU, whilst the petitioner failed to simultaneously submit the initiative to the voters. If the National Council had not lodged its veto, the petitioner would have missed the statutory time limit and not have been able to lodge the initiative to the voters (not

even if this Decision of the Constitutional Court had already entered into force). Therefore, I believe that the Constitutional Court should not have recognised the petitioner's legal interest to challenge the ATDFSEU as the petitioner was "speculating" and did not adhere to the applicable RPIA despite having the opportunity to do so. In the case at issue, the petitioner's exercise of his constitutional rights was not violated by the promulgation and publication of the ATDFSEU.

*Milojka Modrijan*

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#### **DISSENTING OPINION OF JUDGE DR ŠKRK**

1. In the case at issue, I have already voted against Points 3, 4, 5, and 6 of the Order, dated 28 May 2001, by which the Constitutional Court accepted the petition to initiate proceedings to review the constitutionality of the Act Regulating the Transformation of Duty-Free Shops at Road Border Crossings with the Member States of the European Communities, Acting within the Framework of the European Union, into Border Shops, and the Special Supervisory Measures Relating to these Shops (Official Gazette RS, No. 13/01 – hereinafter referred to as the ATDFSEU) and suspended the implementation of the third paragraph of Article 292 and the second paragraph of Article 254 of the Rules of Procedure of the National Assembly (hereinafter referred to as the RPNA) and the aforementioned Act until the final decision of the Constitutional Court. I have not given a dissenting opinion to the aforementioned Order. However, practically the same reasons for which I voted against the aforementioned Order have also led me to vote against all the three points of the operative provisions of the Decision, dated 14 June 2001, which relate to the substance of the case. I have only voted in favour of Point 4 of the operative provisions, which is procedural in nature and determines the entry into force of the decision (the day following the service on the National Assembly).
2. As regards the interpretation and the resulting abrogation of the allegedly disputed provisions of the RPNA, I join points 3, 4, and 5 of the dissenting opinion of Judge Dr Zvonko Fišer in their entirety, especially his position that, when taking into account the hitherto practice of the National Assembly, these provisions cannot be said to be unconstitutional. That is why I voted against Point 1 of the operative provisions of the Decision and, therefore, against Points 2 and 3 of the operative provisions. As regards the role of referenda in our present legal system I join point 6 of the dissenting opinion of Dr Zvonko Fišer. In addition to this, I have some doubts about the case at issue concerning the regulation of referenda currently in force, which I present in the following points.
3. In reviewing the legal consequences of the request lodged by Nova stranka, Ljubljana, which was, in the opinion of the Constitutional Court, lodged in due time, the Constitutional Court has, both formally and substantively, treated the ATDFSEU as a completely "ordinary" law, i.e. it did not undertake to review its substance after the

procedural violations were found. In formal terms, the Constitutional Court had every reason to do so. In this regard, the Constitutional Court based its interpretation on the previous Decision No. U-I-47/94, dated 19 January 1995 (Official Gazette RS, No. 13/95, and OdlUS IV, 4), by which the Constitutional Court abrogated *inter alia* Article 10 of the RPIA (Paragraph 2 of the reasoning of Decision No. U-I-47/94). In the opinion of the Constitutional Court, the provisions of Article 10 of the RPIA entail a limitation to the constitutional right to a referendum referred to in Article 90 of the Constitution (legislative referendum) in conjunction with Article 44 of the Constitution (participation in the management of public affairs). The third indent of the abrogated article provided that no legislative referendum may be called regarding the “laws to be adopted in order to implement ratified treaties”. I fully accept Decision of the Constitutional Court No. U-I-47/94 and do not and cannot have any doubts regarding its principled reasons. It is manifestly clear to me that the Constitutional Court is also bound by this when deciding on the admissibility of limiting the constitutional right to a referendum.

4. In view of the legal consequences that the present decision had for the ATDFSEU in the regulation of Slovenia’s international relations, I would further like to draw attention to another aspect. In its extensive reasoning and thorough assessment of human rights in its Decision No. U-I-47/94, the Constitutional Court did not refer to the control exerted through legislative referenda over those laws that oblige the state to implement treaties. The message of the Constitutional Court was then clear. Taking into account the exercise of the constitutional right referred to in Article 44 of the Constitution, the voters also have the right to request a referendum on any issue regulated by law. The Constitutional Court, as a relatively young court of a newly independent state, has opted for dualism in its case law regarding the assumption of obligations under international law. In other words, the Constitutional Court treats laws and decrees on the ratification of treaties as the state’s domestic regulations. As a result, the Constitutional Court does not consider the laws and regulations passed by the state in order to meet its obligations arising from international law separately. I would, however, like to point out that the Constitutional Court has been gradually developing a doctrine of the constitutionality of obligations arising from treaties in relation to international and domestic law, only fully establishing it as a system in case Rm-1/97, dated 5 June 1997 (Official Gazette RS, No. 40/97, and OdlUS VI, 86) when, during the ratification process, it reviewed the Europe Agreement Establishing an Association between the European Communities and their Member States, Acting within the framework of the European Union, of the one Part, and the Republic of Slovenia, of the other Part (hereinafter referred to as the Association Agreement). In relation to its powers pursuant to the first paragraph of Article 160 of the Constitution (subsequent control of the constitutionality of treaties), the Constitutional Court stated the following in Paragraph 13 of the reasoning in case Rm-1/97: “If upon such review the Constitutional Court finds that a provision of the treaty is contrary to the Constitution, it may abrogate the law on the ratification; however, this decision of the Constitutional Court is only effective within the domestic legal system. It does not af-

fect the state's obligations under international law, which remain unchanged in such an event." Such development of the case law of the Constitutional Court regarding Slovenia's obligations under international law towards the other subjects of international law is not, in my opinion, entirely irrelevant to the present case U-I-104/01.

5. The ATDFSEU regulates relations that refer to Slovenia's EU accession process. The Association Agreement, which is an agreement under international law entered into by Slovenia, the European Communities, and EU Member States, serves as the direct legal basis of the ATDFSEU. The EC and Member States only conclude such treaties with states which are undergoing the EU accession process. It is well known in actual and legal circles that Slovenia has officially requested to join the states acting within the framework of the EU (Member States) and that it seeks to join them in the first round of enlargement. The whole association process to date, including the constitutional amendment regarding the property rights of aliens (Article 68), has been carried out by the legislative and executive branches of power irrespective of the direct "will of the people", i.e. without deciding by way of a referendum. The ATDFSEU interrupted this process. Thus far, none of these legal facts or procedures have been challenged through referendum control by anyone in the country, at least not successfully or with the assistance of the Constitutional Court.
6. The direct legal basis for the ATDSFEU is the provision of Article 94 of the Association Agreement regulating customs, or rather the Joint Declaration to the same Article which provides that "before July 1998, in accordance with international commitments, the Parties will take the necessary steps to implement the Recommendation adopted by the Customs Cooperation Council on 16 June 1960". As is evident from the legislative materials in question, Slovenia's interpretation of this provision or the substance of the aforementioned Joint Declaration initially differed from that of the other party to the agreement. With regard to the operation of duty free shops, it was stated at the session of the Committee of the National Assembly of the Republic of Slovenia for Finance and Monetary Policy held in 1997 that "neither the Joint Declaration to the Association Agreement nor the Recommendation of the Customs Cooperation Council refer to the closure of existing duty free shops – they only include a negatively formulated obligation to abstain from opening new shops of this kind". (Gazette of the National Assembly, No. 38, 2 August 1997, pp. 41–42). The Committee held the position that duty free shops located at international border crossings were compatible with Slovenia's associated country status, as defined by the Association Agreement (*Ibidem*, p. 43). Three years later when, during the same legislative procedure, the first reading of the Draft Act regulating the Transformation of the Activities of Duty Free Shops Located on Land Border Crossings with Austria, Italy and Hungary was held, it was repeated, under the heading Status Assessment and Reasons for Adopting the Act, that the EU and the Republic of Slovenia have a different interpretation of the Joint Declaration to Article 94 of the Association Agreement; it was added, however, that the EU insists that, by entering into the aforementioned agreement, Slovenia has "assumed a political obligation to abolish duty free shops within the time limit fixed in the Joint Declaration. In this sense, the

European Union included the issue of duty free shops in the system of negotiations for Slovenia's accession to the European Union and, in addition, included the abolition of duty free trade among the short-term priorities of the Accession Partnership in 2001" (Gazette of the National Assembly, No. 62, 4 August 2000, p. 12). According to the majority decision of the Constitutional Court, the procedure resulted in the ATDFSEU being adopted unconstitutionally.

7. Another question which arises is whether Slovenia, in its EU accession negotiation process, has actually assumed only a political obligation to abolish duty free shops. Had this been true, the resolution of this question would have fallen within the sphere of the executive branch of power, which is primarily authorised and responsible for managing relations with other countries and international organisations. In such a case, the room for manoeuvre provided by domestic law to the legislature and the Constitutional Court as a guardian of constitutionality would have been considerably different. I cannot, however, agree with the position that the abovementioned case simply meant that Slovenia had a political obligation to close down its duty free shops. Given that the case concerning duty free shops involved two different interpretations of a provision of a treaty, i.e. the Joint Declaration to Article 94 of the Association Agreement, it is first necessary to consider that Article 113 of the Agreement itself provides for a procedure to follow in the event of a dispute between the parties relating to the application or interpretation of the Agreement. Such dispute may be submitted for resolution to the Association Council, or it may be submitted for arbitration if it is not possible to resolve it under the remit of the Association Council. As far as I am aware, Slovenia has not availed itself of the procedure relating to the interpretation of the disputed provision governing duty free shops, and has instead continued its negotiations for its accession to the EU's institutional mechanisms. Such entails that Slovenia, by so doing, implicitly agreed with the interpretation of the Joint Declaration relating to duty free shops held by the other party to the agreement, i.e. the European Communities and their Member States acting within the framework of the EU. This again entails that Slovenia assumed an obligation under international law to restructure its duty free shops. This finding additionally strengthened my decision that I cannot support the substantive part of this Decision.
8. As mentioned previously, I have joined point 6 of the dissenting opinion of Judge Dr Zvonko Fišer regarding the assessment of referenda in our legal system as performed by the Constitutional Court in this Decision. I cannot imagine what consequences under international law of the harmonisation of Slovene legislation with European Community law with the goal of ensuring that Slovenia's legislation will be gradually brought into line with that of the Community (Article 70 of the Association Agreement) could occur if further domestic law procedures are carried out in accordance with the scenario drafted by the Constitutional Court in this Decision.

*Dr Mirjam Škrk*

Decision No. **U-II-1/10**, dated 10 June 2010

### DECISION

At a session held on 10 June 2010 in proceedings pursuant to the first paragraph of Article 21 of the Referendum and Public Initiative Act (Official Gazette of the Republic of Slovenia, No. 26/07 – official consolidated text), initiated upon the request of the National Assembly, the Constitutional Court

*decided as follows:*

**Unconstitutional consequences would occur due to the rejection of the Act on Amendments and Modifications of the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (Gazette of the National Assembly, No. 149/09, EPA 735-V) in a referendum.**

### *Reasoning*

#### **A**

1. The National Assembly adopted the Act Amending the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (hereinafter referred to as the ARSCOSS-B) on 8 March 2010 in a shortened legislative procedure. On the basis of Article 90 of the Constitution and Article 12 of the Referendum and Public Initiative Act (hereinafter referred to as the RPIA), on 12 March 2010 a group of thirty-one National Assembly deputies filed a request that a subsequent legislative referendum on the ARSCOSS-B be called. At a session held on 18 March 2010, the National Assembly reached the decision that unconstitutional consequences could occur due to the suspension of the implementation or the rejection of the ARSCOSS-B and it requested that the Constitutional Court decide on this matter pursuant to the first paragraph of Article 21 of the RPIA. Enclosed with the request [of the National Assembly] is the request of the group of deputies to call a legislative referendum, the opinion of the Legislative and Legal Service of the National Assembly, dated 16 March 2010, the opinion of the Government, dated 18 March 2010, and a transcription of the session of the National Assembly at which the decision was reached.

2. According to the National Assembly, the unconstitutional consequences which could occur due to the requested legislative referendum is that by the suspension of the implementation or the rejection of the ARSCOSS-B a situation could arise that would be inconsistent with the Articles 2, 8, 14, and 22 and the second paragraph of Article 120 and the second paragraph of Article 153 of the Constitution.
3. The National Assembly claims that the purpose of the ARSCOSS-B is in particular the elimination of the unconstitutionality found by the Constitutional Court in Decisions No. U-I-284/94, dated 4 February 1999 (Official Gazette of the Republic of Slovenia, No. 14/99, and OdlUS VIII, 22), and No. U-I-246/02, dated 3 April 2003 (Official Gazette of the Republic of Slovenia, No. 36/03, and OdlUS XII, 24). In these two decisions the Constitutional Court found the Aliens Act (Official Gazette of the Republic of Slovenia, No. 1/91 etc. – hereinafter the AA) and the Act Regulating the Status of Citizens of Other Successor States of the former SFRY in the Republic of Slovenia (Official Gazette of the Republic of Slovenia, No. 61/99 and 64/01 - hereinafter the ARSCOSS) unconstitutional from the perspective of Articles 2 and 22 and of the second paragraph of Article 120 of the Constitution. The National Assembly points out that the first decision of the Constitutional Court was adopted eleven years ago and the second seven years ago; therefore, any delay in the implementation of those decisions would mean that the unconstitutional situation would continue. In this context, the National Assembly refers to Order of the Constitutional Court No. U-II-3/03, dated 22 December 2003 (OdlUS XII, 101) and Decision of the Constitutional Court No. U-II-2/09, dated 9 November 2009 (Official Gazette of the Republic of Slovenia, No. 91/09).
4. In addition to eliminating the unconstitutionality found by these constitutional decisions, the National Assembly states that the ARSCOSS-B also regulates several other issues not covered by the decisions of the Constitutional Court but which are closely related to these unconstitutionality and which should therefore be considered when regulating, in a comprehensive and non-discriminatory manner, the status of the citizens of other republics of former SFRY [Socialist Federal Republic of Yugoslavia, hereinafter Yugoslavia] whose registered permanent residence status illegally ceased once the AA became applicable to them. The ARSCOSS-B also regulates the issuance of permanent residence permits for the children of citizens of other republics of former Yugoslavia who were born in the Republic of Slovenia after 25 June 1991, because otherwise these children would be in a worse position than their parents. If the Act did not regulate the status of the children, there would be, in the opinion of the National Assembly, a violation of Articles 2 and 14 of the Constitution and the United Nations Convention on the Rights of the Child (Official Gazette of the SFRY, No. 15/90, Act on Notification of Succession concerning UN Conventions and Conventions Adopted by the International Agency for Atomic Energy, Official Gazette RS, No. 35/92, MP, No. 9/92 - hereinafter the CRC), and, due to the disparity of the statutory regulation with the CRC, consequently also with Article 8 and the second paragraph of Article 153 of the Constitution. A second group of persons who are regulated by the ARSCOSS-B although not covered by the decisions of the

Constitutional Court, are the citizens of other republics of former Yugoslavia who at the time of Slovenia attaining independence had registered permanent residence status in the Republic of Slovenia, but this residence status ceased once the AA became applicable to them and they were only subsequently granted citizenship of the Republic of Slovenia, without having first obtained a permanent residence permit. If the Act did not regulate the status of these persons, they would allegedly be unduly disadvantaged in comparison with those who had obtained a permanent residence permit, which would entail a violation of Articles 2 and 14 of the Constitution.

5. The National Assembly is of the opinion that the ARSCOSS-B implements the decisions of the Constitutional Court in a manner consistent with the Constitution and that all the provisions of the Act are important for this implementation. Since the implementation of the decisions of the Constitutional Court in a manner consistent with the Constitution is an obligation arising from the principles of a state governed by the rule of law (Article 2 of the Constitution), according to the National Assembly, the subject of a requested referendum cannot be a statutory regulation implementing the decisions of the Constitutional Court. The National Assembly also believes that unconstitutional consequences could occur simply due to the fact that the activities necessary to call a referendum or to prepare for holding such would delay the enforcement of the ARSCOSS-B.
6. The Government of the Republic of Slovenia also states that unconstitutional consequences would occur due to the suspension of the enforcement of the ARSCOSS-B or due to its rejection in a referendum. Allegedly, (as Constitutional Court Decision No. U-I-246/02 states) it is contrary to Articles 2 and 22 and the second paragraph of Article 120 that the ARSCOSS does not recognise permanent residence status to the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992, from that date onwards, that it does not regulate the acquisition of a permanent residence permit for the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992 and against whom the measure of the forcible removal of an alien pursuant to Article 28 of the AA was pronounced, and that it does not provide criteria for interpreting the undefined legal term of “actual presence [in Slovenia]”, which is a condition for obtaining a permanent residence permit. As the ARSCOSS does not provide a deadline for applying for a permanent residence permit (the Constitutional Court annulled the three-month period in Decision No. U-I-246/02) and it does not grant a permanent statutory basis for the issuance of supplementary decisions, Article 2, the second paragraph of Article 3, Article 87, and the second paragraph of Article 120 of the Constitution were allegedly violated. Since it does not regulate the issuance of permanent residence permits to children of the erased persons who were born in the Republic of Slovenia after 25 June 1991, the ARSCOSS is allegedly inconsistent with Articles 2, 8, and 14 and the second paragraph of Article 153 of the Constitution. Articles 2 and 14 of the Constitution were allegedly infringed also because the ARSCOSS does not regulate the issuance of special decisions to citizens of other republics of former Yugoslavia who at the time of Slovenia

gaining independence had registered permanent residence status in the Republic of Slovenia that ceased to be valid when they were removed from the register of permanent residents and were later granted citizenship of the Republic of Slovenia, without having first been issued a permanent residence permit.

7. The government emphasizes that the purpose of the ARSCOSS-B is to fully remedy the injustices caused to the “erased” residents of the Republic of Slovenia in the part that refers to the revocation of their status eighteen years ago. In addition to the implementation of the decisions of the Constitutional Court, the Act should allegedly also eliminate certain deficiencies that have arisen in practice in the implementation of the ARSCOSS and which are also a result of erasure from the register of permanent residents. The ARSCOSS-B allegedly constitutes a legally appropriate and the only possible solution for regularizing the status of the persons who were illegally removed from the register many years ago. According to the Government, a referendum on these issues would ruin the entire system of checks and balances, because it would be a referendum on whether the implementation of the decision of the Constitutional Court is acceptable. The Government emphasizes that the rejection of the ARSCOSS-B in a referendum would create a situation which, pursuant to the provisions of RPIA, could not be reconciled with the Constitution for a full a year after the referendum.
8. In their reply, the proposers of the referendum state various objections concerning the ARSCOSS-B. In the introduction of their reply they emphasize that the ARSCOSS-B regulates the beneficiaries to a permanent residence permit differently [than in the original Act]. Instead of “citizens of other successor states of former Yugoslavia”, the new beneficiaries are “aliens who were citizens of other republics of former Yugoslavia on 25 June 1991”. This change is not reflected in the title of the Act, which still mentions the regulation of the status of citizens of other successor states of former Yugoslavia. This would allegedly lead to ambiguity in the legal order.
9. According to the proposers of the referendum, the National Assembly should have adopted the ARSCOSS-B by the regular and not by the shortened legislative procedure. The Act allegedly contains numerous solutions that go beyond the mere implementation of the decision of the Constitutional Court; therefore, using the shortened procedure was not founded and constituted a manifest abuse of the procedure. Also, the statement that the ARSCOSS-B will have no financial implications for the state budget is allegedly misleading and completely untrue and constituted a breach of the provisions of the Rules of Procedure of the National Assembly (Official Gazette RS, No. 92/07 – official consolidated text – hereinafter the RPNA) concerning the legislative process. The proposers of the referendum point out that high costs would occur first of all due to the resulting administrative and judicial procedures, and the subsequent payment of compensation and claims for various rights would cost taxpayers even more. Due to the long-term financial consequences of the Act, the referendum would be particularly legitimate and legally founded.
10. The ARSCOSS-B is, according to the proposers of the referendum, also questionable from the perspective of common human values and especially the fundamental values of the attainment of independence, since it does not exclude opportunists and

those who allegedly attacked the independent Republic of Slovenia with firearms from the group of persons entitled to material benefits. In this way, the Act creates new injustices and entails the humiliation and a gross violation of the human rights of everyone who helped co-create the independent Republic of Slovenia. The ARSCOSS-B allegedly constitutes a serious injustice also for all those new citizens who since independence have regularised their status in accordance with the regulations, and who now as taxpayers would have to pay compensation and other costs. It is allegedly legally absurd to grant permanent residence retroactively also to those persons who in the past did not want this status. Allegedly, everyone who fought for an independent Slovenia, including those who paid the highest price in pursuit thereof, was also put in a humiliating position.

11. In the opinion of the proposers of the referendum, the ARSCOSS-B is controversial also because it does not regulate the issuance of decisions in the same manner for all beneficiaries and therefore allegedly violates the second paragraph of Article 14 of the Constitution. The Act should provide for a mandatory review of all decisions that were already issued in order to retroactively equalize the conditions and the procedure. The decision of the Constitutional Court allegedly could not constitute the basis for the issuance of specific administrative decisions, and therefore an adequate Act should have been adopted before any decision was issued. The complementary decisions that have so far relied on Point 8 of the operative provisions of Constitutional Court Decision No. U-I-246/02 are allegedly legally questionable, and their issuance is allegedly contrary to the fourth paragraph of Article 153 of the Constitution. The proposers emphasize that they endorse the principle of individual treatment at all times; it should be determined in specific procedures whether an individual has been wronged. The correct solution would be, in the opinion of the proposers, to retroactively change the status of those persons who were not able to regularize such for reasons beyond their control. It is, however, allegedly absurd to grant status to those persons who did not want to regularize it or even wanted to forcibly prevent others from doing so.
12. The proposers of the referendum also believe that the ARSCOSS-B should contain provisions limiting compensation for damages or defining it as a fixed amount. As the Act does not limit the compensation for damages in any way, this is contrary to the established approach in other instances. Compensation for damages should be reserved for victims of war and the post-war revolutionary violence, for persons who suffered during the Second World War in concentration camps, and also for those who died in the War for Slovenia. Therefore, the totally unlimited possibilities regarding compensation for damages open to the “aggressors” and the “attackers” are allegedly “unlawfully scandalous”.
13. In the opinion of the proposers of the referendum, there is also a series of controversial and “unresolved” legal issues in the constitutional law doctrine. The proposers point out that Article 13 of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (hereinafter the BCC) and Article 81 of the AA have the nature of a constitutional act or even the nature of the Constitution

itself. On the basis of these provisions the citizens of other republics of former Yugoslavia had the undisputed duty to regularise their status, namely to request either citizenship or permanent residence status. Since these persons did not comply with the applicable law or neglected to use the legal options available to them, the competent national authorities allegedly acted properly when they concluded that those persons who had not submitted an application to regularize their status as citizen or alien did not want to live in the Republic of Slovenia.

14. The ARSCOSS-B is, in the opinion of the proposers of the referendum, allegedly also discriminatory and therefore unlawful and unacceptable, as upon the issuance of permanent residence permits it enables that a special decision be issued in accordance with which the beneficiary shall be deemed to have continuously resided on the territory of the Republic of Slovenia and there will be no determination of actual residence in Slovenia for a certain period. The proposers emphasize that in cases of the absence of an individual from the territory of the Republic of Slovenia longer than one year, no other circumstances than erasure from the register will be taken into account. The proposers also note that the concept of actual presence is defined unclearly and this could entail inequalities in the enforcement of the Act. The lack of precision and the looseness in terms of substance are also problematic with regard to the principle of the clarity of regulations and also with regard to the principle of legality. The condition of actual presence should be clearly defined in order for the competent administrative authorities to have clear guidelines when exercising their discretion.
15. In light of all of the above, the proposers of the referendum are of the opinion that the mentioned provisions and many other provisions of the ARSCOSS-B are unclear and imprecise and are therefore inconsistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), the principle of constitutionality and legality (Article 153 of the Constitution), and the principle of legality (the second paragraph of Article 120 of the Constitution). They propose that the Constitutional Court establish that no unconstitutional consequences would occur due to the suspension of the implementation, or the rejection of the ARSCOSS-B in a referendum, or subsidiarily, that unconstitutional consequences would occur due to the implementation of the ARSCOSS-B.

#### **B – I**

16. By adopting the ARSCOSS-B the legislature reacted to the unconstitutionality of the regulation in force that was established by the Constitutional Court in Decision No. U-I-246/02. By this decision the Constitutional Court established the unconstitutionality of the ARSCOSS, as it does not recognise permanent residence status to the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992 from that date onwards, as it does not regulate the status of those persons for whom the measure of the forcible removal of an alien was pronounced and as it does not define the criteria for determining the condition of actual presence for obtaining a permanent residence permit.

17. In Article 90 the Constitution regulates referenda “on any issue which is the subject of regulation by law (a legislative referendum)”. The National Assembly may call a referendum on its own initiative; however it must call a referendum if so required by at least one third of the deputies, by the National Council, or by 40,000 voters. The constitutional provisions concerning the legislative referendum are mainly of an organizational and procedural nature, their goal is the actualisation of the fundamental constitutional principle that citizens exercise power (also) directly (the second paragraph of Article 3 of the Constitution), and the realization of the human right defined in Article 44 of the Constitution concerning the right of citizens to direct and indirect participation in the management of public affairs. Since Article 90 of the Constitution entails the implementation of the human right determined by Article 44 of the Constitution, the right to decision-making in a referendum is also a human right. Statutory interferences must therefore be subject to the legal regime of Article 15 of the Constitution, which governs the exercise and restriction of human rights and fundamental freedoms. Pursuant to the second paragraph of Article 15 of the Constitution, the manner of the exercise of human rights and fundamental freedoms may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. As determined by the third paragraph of Article 15 of the Constitution, human rights and fundamental freedoms may be limited only by the rights of others and in such cases as are provided by the Constitution.
18. The Constitutional Court has already adopted the position that the first paragraph of Article 90 of the Constitution also sets out a substantive framework for the direct participation of citizens in the management of public affairs. In relation to this, it took the view that this provision, which provides that “[t]he National Assembly [...] call[s] a referendum on any issue which is the subject of regulation by law” means that a legislative referendum is permitted on all issues governed by law. In accordance with the first paragraph of Article 21 of the RPIA, upon receiving a petition from the National Assembly the Constitutional Court is competent to assess “whether the suspension of the implementation [of the] law due to a referendum or its non-implementation would truly affect such an important constitutional right that, due to this – upon weighing the affected constitutional values – it would be permissible to interfere with the constitutional right to decision-making in a referendum” (Constitutional Court Decision No. U-I-47/94, dated 19 January 1995, Official Gazette No. 13/95, and OdlUS IV, 4).
19. The Constitution and Constitutional Court decisions are not binding only upon the National Assembly as the legislative body, but also upon citizens when they exercise power directly by deciding on a particular law in a referendum (Constitutional Court Decision No. U-II-3/03). In a subsequent legislative referendum the voters decide to confirm or reject an adopted act as a whole (in accordance with the all or nothing principle – Article 9 of the RPIA). Individual legal issues cannot be separated out and the decision adopted in a referendum entails that the act as a whole is either confirmed or rejected. When judging on the basis of the first paragraph of Article 21 of the RPIA,

the Constitutional Court must assess on the basis of weighing the affected constitutional values from the aspect of the considerations of constitutional law whether it is permissible to infringe upon the right to a referendum. However, the Constitutional Court does not rule upon the suitability of a specific statutory regime, as it has no such competence either when assessing the constitutionality of laws or in the exercise of the competences determined by the first paragraph of Article 21 of the RPIA.

## B – II

20. The Constitutional Court first established the unconstitutionality of the statutory regulation concerning the legal status of the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents by Decision No. U-I-284/94. It established that the AA was inconsistent with the Constitution as it did not define the conditions for obtaining permanent residence permits for the citizens of other republics of former Yugoslavia who had not opted for Slovene citizenship or whose application for citizenship was rejected.<sup>1</sup> The position of the Constitutional Court was that the general regime of permits for temporary and permanent residence was not appropriate for the status of the citizens of other republics of former Yugoslavia, and this regime also could not be applied to these persons by means of statutory and legal analogy. Since the AA did not regulate the legal status of the citizens of other republics of former Yugoslavia in the transitional provisions in such a way as to take into account that they had permanent residence status in the Republic of Slovenia and were actually present in this territory, these persons found themselves in “a legally uncertain position”. From the transitional provisions of the AA these persons “could not grasp what kind of status is applicable to them as aliens and which provisions of the Act should apply to them”. The Constitutional Court ruled in Decision No. U-I-284/94 that, due to the undetermined legal status of the citizens of other republics of former Yugoslavia, the principle of legitimate expectation, which is one of the principles of a state governed by the rule of law (Article 2 of the Constitution), was violated. It also found a violation of the principle of equality determined by the second paragraph of Article 14 of the Constitution due to the unjustified distinction in the AA between the citizens of other republics of former Yugoslavia and the persons who lived in the territory of the Republic of Slovenia prior

1 The Constitutional Court wrote in the reasoning: “The said persons registered their permanent residence in the territory of Slovenia in conformity with the applicable laws and regulations and actually resided in the territory of Slovenia. Permanent residence and actual residence in the territory of the Republic of Slovenia are the essential circumstances which assign a special legal position to the persons concerned, which is why the provisions of the AA which regulate the acquisition of permanent or temporary residence are inappropriate for them. The legislature should have regulated the position of the persons concerned and/or their transition to the status of alien in a special manner in the transitional provisions of the AA or in a special statute. This is due to the fact that the provisions which regulate the different legal positions of aliens have as their starting point the assumption that an alien comes to the Republic of Slovenia with the intention of remaining in it for a shorter or longer time and that, in accordance with the provisions of the AA, he or she will gradually (from temporary residence permit to permanent residence permit) start to arrange his or her legal position of alien.”

to independence as resident aliens. Concerning the legal status of persons who were considered aliens even before the independence of Slovenia, AA namely determined that the permanent residence permits of all aliens who had permanent residence status in Slovenia at the date the AA came into effect would continue to be valid.

21. Therefore, the issue was that the citizens of other republics of former Yugoslavia were, on the one hand, treated unequally in comparison with aliens who were citizens of other states (the second paragraph of Article 14 of the Constitution), and on the other hand, this caused the said persons to find themselves in a legally uncertain position, which the Constitutional Court determined to be inconsistent with Article 2 of the Constitution in Decision No. U-I-284/94. However, in reality this entailed that individuals who had previously relied on the right to permanent residence in Slovenia were no longer able to feel secure against interferences by the state in this acquired right, which curtailed their right to safety determined by Article 34 of the Constitution.<sup>2</sup> As there was a change in the legal status of these persons without the necessary legal basis for the issuance of administrative decisions by the competent administrative bodies on this change in legal status, thus without there being an opportunity in the issuance proceedings for these persons to exercise the right to be heard (Article 22 of the Constitution), or to exercise their rights to legal remedies against such decisions (Article 25 of the Constitution) and to judicial protection (Article 23 of the Constitution), this as well constituted an infringement on their personal dignity, which is also protected by the Constitution in Article 34 and which fundamentally guarantees to every individual that in proceedings in which decisions are made concerning his or her rights, obligations, or legal interests, he or she is treated as a person and not as an object. The interference with the personal dignity and safety of these persons occurred precisely because the legislature failed to fulfil its constitutional duty determined by the Constitutional Court in Decision No. U-I-284/94 to be the obligation to regularize the status of these persons in accordance with Article 2 and the second paragraph of Article 14 of the Constitution.
22. The National Assembly responded to Decision No. U-I-284/94 quickly (and within the deadline determined by the Constitutional Court) by passing the ARSCOSS. This Act was adopted on 8 July 1999. By this Act it was possible for the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents to obtain a permanent residence permit. On this basis the Ministry of the Interior had issued 11,746 permits for permanent residence as of 10 February 2003.<sup>3</sup>

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2 For more on the importance of the human right to safety determined in Article 34 of the Constitution, see Constitutional Court Decision No. U-I-266/95, dated 20 November 1995 (Official Gazette RS, No. 69/95, and OdlUS IV, 116).

3 A letter from the Ministry of the Interior, Ref. No. 1312/02-016-S-507/02-2003, dated 19 February 2003. At the same time the Ministry communicated that 288 applications had been dismissed, 97 rejected, and that in 949 cases the procedure had been discontinued due to the withdrawal of the application or due to the fact that in the course of the procedure the alien had become a citizen of the Republic of Slovenia. According to the then data of the Ministry, 18,305 citizens of other republics of former Yugoslavia were removed from the register of permanent residents.

Article 19 of the Act Amending the Citizenship of the Republic of Slovenia Act (Official Gazette of RS, No. 96/02 – hereinafter the CRSA-Č) also determined that a person that had had registered permanent residence status as of 23 December 1990 and was actually present in the Republic of Slovenia from that date onwards had the possibility to obtain citizenship of the Republic of Slovenia under more favourable conditions.<sup>4</sup> In light of the above-mentioned, it can be established that the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents who were actually present in the Republic of Slovenia could have regularized their legal status on the basis of the ARSCOSS and even the CRSA-Č. This also ended the restriction of their human rights determined by the second paragraph of Article 14 and Article 34 of the Constitution. Even before the ARSCOSS came into force, these persons had the possibility to assert before the competent courts the unconstitutionality of any rights lost that were associated with permanent residence status in the Republic of Slovenia,<sup>5</sup> however, this certainly did not refer to the rights that pertain only to the citizens of the Republic of Slovenia.<sup>6</sup> Undoubtedly, the persons at issue who (at least after the ARSCOSS came into force) were actually present in Slovenia, had the possibility after Constitutional Court Decision No. U-I-284/94 and after the entry into force of the ARSCOSS to regularize their legal status and regain rights that they might have lost in connection with losing permanent residence status [in addition to Constitutional Court Decision No. Up-333/96, dated 1 July 1999 (OdlUS VIII, 286), see also Decisions No. Up-60/97, dated 15 July 1999 (OdlUS VIII, 292), No. Up-20/97, dated 18 November 1999 (OdlUS VIII, 300), and No. Up-152/97, dated 16 December 1999 (OdlUS VIII, 302)]. However, none of these rights could be asserted by those individuals against whom the measure of the forcible removal of an alien from the country was pronounced or who left the Republic of Slovenia for other reasons that were directly connected with their erasure from the register of permanent residents and were not actually present in the Republic of Slovenia at the date of the entry into force of the ARSCOSS. The regulation of the legal status of

- 4 According to the data of the Ministry of the Interior (letter Ref. No. 214-93/2010/2, dated 23 April 2010), as of 21 April 2010, of those persons removed from the register of permanent residents [in 1992], 4,117 had been granted citizenship of the Republic of Slovenia who prior to their acquisition of citizenship had not obtained a permanent residence permit in the Republic of Slovenia.
- 5 In Decision No. Up-336/98, dated 20 September 2001, (Official Gazette RS, No. 79/01, and OdlUS X, 225) the Constitutional Court decided the constitutional complaint in favour of a complainant whose right to a social security income supplement was denied by the Pension and Disability Insurance Institute and the courts for the period from 1 May 1996 to 18 July 1997 as, due to erasure from the register of permanent residents, the complainant did not have a permanent residence in the Republic of Slovenia. The decision of the Institute and all the decisions of the courts, including the decision of the Supreme Court, were issued prior to Constitutional Court Decision No. U-I-284/94. The Constitutional Court established a violation of the second paragraph of Article 14 and Article 22 of the Constitution on the basis of the reasons determined in Decision No. U-I-284/94.
- 6 Such was, for instance, the right to buy an apartment pursuant to Article 117 of the Housing Act (Official Gazette RS, No. 18/91 etc. – HA), which was granted only to those holders of the housing right who were Slovene citizens at that time.

these persons is exactly the issue that was at the forefront when the Constitutional Court reviewed the ARSCOSS in Decision No. U-I-246/02.

23. The Constitutional Court established in Decision No. U-I-246/02 that the ARSCOSS was unconstitutional (following the implementation of the Act Amending the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 64/01 – hereinafter the ARSCOSS-A), since it did not recognize permanent residence retroactively to those citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992, i.e. for the period from the date of erasure onwards. The Constitutional Court found in this decision that the ARSCOSS was unconstitutional also because it did not regulate the acquisition of permanent residence permits to those individuals against whom the measure of the forcible removal of an alien from the country was pronounced<sup>7</sup> and as for the purpose of retroactive recognition of permanent residence status it did not define the meaning of the notion of actual presence in the Republic of Slovenia, which would have to be proved by the citizens of other republics of former Yugoslavia in order to obtain a permanent residence permit, and, in particular, the Act should have defined the period of absence after which the condition of actual presence would no longer be satisfied. In relation to this, the status of these persons should not have been any worse than the status of persons who had the status of alien already before the independence of the Republic of Slovenia. The interpretation of the condition of actual presence as well should not be any stricter than the interpretation established in the jurisprudence relating to the acquisition of citizenship.<sup>8</sup> The Constitutional Court set a deadline of six months for the legislature to remedy the established unconstitutionality.
24. The Constitutional Court determined that the unconstitutionality established in Decision No. U-I-246/02 entailed an inconsistency with the principle of legal certainty as one of the principles of a state governed by the rule of law defined in Article 2 of the Constitution, which requires that the status of the said persons does not remain legally unregulated for a specific period. However, it is clear that concerning the persons who were forcibly removed from the country as aliens or who left the Republic of Slovenia for other reasons that were directly connected with their erasure from the register of permanent residents and were not able to return, it also entailed in terms of substance an inconsistency with Article 34 and with the second paragraph of Article 14 of the Constitution.

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7 In Decision No. U-I-284/94 the Constitutional Court already prohibited the application of this measure in cases concerning the citizens of other republics of former Yugoslavia.

8 With reference to the citizens of other republics of former Yugoslavia, the concept of actual living was used in Article 13 of the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (BCC). In accordance therewith, Article 40 of the Citizenship of the Republic of Slovenia Act (Official Gazette RS, No. 1/91 etc. – hereinafter referred to as the CRSA) determined actual presence in the territory of the Republic of Slovenia as one of the conditions for the acquisition of citizenship of the Republic of Slovenia.

25. Concerning the decision on the retroactive recognition of permanent residence status, i.e. from the date of the erasure from the register of permanent residents onwards, the Constitutional Court explicitly stated that a permanent residence permit in this case does not determine a new legal status for these persons, but only establishes, in accordance with the existing situation, the legal status which had already existed. This finding applied only to persons who were actually present in the Republic of Slovenia continuously after their erasure from the register and also obtained a permanent residence permit on the basis of the ARSCOSS. Considering the fact that a large number of these persons were able to regularize their legal status prospectively, the Constitutional Court determined in Point 8 of the operative provisions the manner of the implementation of the Decision precisely for these persons, namely that the permanent residence permits that were already issued to the citizens of other republics of former Yugoslavia establish permanent residence status retroactively, i.e. from the date of erasure from the register onwards. It also ordered the Ministry of the Interior to issue supplementary decisions on the establishment of permanent residence status from 26 February 1992 onwards as an official duty to all those citizens of other republics of former Yugoslavia who were removed on that day from the register of permanent residents and had already acquired a permit for permanent residence. On these grounds everyone that was actually present in the Republic of Slovenia could regularize their legal status prospectively on the basis of Point 8 of the operative provisions of Constitutional Court Decision No. U-I-246/02, subject to the condition of actual presence in Slovenia, and also retroactively even if the legislature had decided not to respond to the unconstitutionality established in Point 1 of the cited Decision. The state bodies competent for the implementation of a decision of the Constitutional Court must namely act in accordance with the part of the decision that prescribes the manner of its exercise until the legislature, if it decides to do so, regulates the issue in another manner that is consistent with the Constitution (see the position of the Constitutional Court in Order No. U-II-3/03).
26. A statutory regulation is, however, needed to remedy the established unconstitutionality determined by points 2 and 3 in conjunction with Point 1 of the operative provisions of Constitutional Court Decision No. U-I-246/02, as is apparent also from that decision. In order to regulate the legal status of persons who were forcibly removed from the country or of persons who left the Republic of Slovenia for other reasons that were directly connected with their erasure from the register of permanent residents, the retroactive recognition of their permanent residence status necessitates the constitution of a legal fiction<sup>9</sup> that is (and was) needed for the eventual assertion of rights pertaining to aliens that have permanent residence permits in the Republic of Slovenia. Therefore, such permits, except in that they serve to prove the existence of the right to permanent residence status in eventual proceedings for

9 "In law, a legal fiction is a synonym for a legal fact deemed to be true even though we know that it does not exist." M. Pavčnik, *Teorija prava, prispevek k razumevanju prava* [Theory of Law, A Contribution to Understanding Law], Third extended, revised, and supplemented edition, GV Založba, Ljubljana 2007, p. 422.

asserting the rights connected with permanent residence, cannot have any other legal consequences. As is clear from the cited decision of the Constitutional Court, in order to remedy the unconstitutional state of affairs the legislature must also define the notion of actual presence in the Republic of Slovenia, in particular the period of absence after which the condition of actual presence would no longer be satisfied, and specifically regulate the cases where the measure of the forcible removal of an alien from the country was pronounced.

27. It follows from the data provided by the Ministry of the Interior that some citizens of other republics of former Yugoslavia removed from the register of permanent residents, obtained a permanent residence permit on the basis of the AA or the Aliens Act (Official Gazette of the Republic of Slovenia, No. 64/09 – official consolidated text – hereinafter AA-1),<sup>10</sup> from which it is even possible to infer that some of these persons already regularized their legal status prospectively even in the absence of statutory regulation. It is also evident that at this moment only a small number of administrative proceedings and proceedings for the judicial review of administrative acts concerning the acquisition of permanent residence permits are pending and that the Ministry started to deal with these applications, in accordance with the decisions of the Constitutional Court, individually, as is shown in particular by the data on dismissed and rejected applications and on proceedings that were stayed. However, it cannot be inferred from the data of the Ministry of the Interior that the statuses of all the persons at issue have been regularized prospectively,<sup>11</sup> and in even fewer cases have their statuses been regularized retroactively<sup>12</sup> in accordance with the manner determined by Decision No. U-I-246/02. Above all it is very important, as follows from the petition of the National Assembly, that the Act also regulates some of the issues associated with erasure from the register of permanent residents which became apparent when implementing the ARSCOSS; among such, of particular importance are the issue of the equal treatment of persons who have acquired nationality without having previously obtained a permit for permanent residence, and the issue of the children of persons removed from the register of permanent residents.
28. The legislature failed to respond to Constitutional Court Decision No. U-I-246/02 for a long time. The Constitutional Court emphasized already in Order No. U-II-3/03 that due to a violation of the principles of a state governed by the rule of law determined by Article 2 and the principle of the separation of powers determined by Article 3 of

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10 4,388 persons had obtained such permits as of 21 April 2010.

11 The number of persons for whom this status is not regularized cannot be determined, even with the data obtained from the Ministry of the Interior. The Ministry otherwise pointed out (letter Ref. No. 214-93/2010/7, dated 17 May 2010) that out of the 25,671 persons who were (after all records were organized and coordinated, as mentioned in the letter) removed from the register of permanent residents, there is no data concerning 13,412 of these persons holding any regulated status in the Republic of Slovenia (neither citizenship, permanent residence permit, nor temporary residence permit). However, the Ministry also notes that, due to the method of keeping records, it is not possible to know with certainty that all these persons are still alive or how many of them actually emigrated.

12 According to the Ministry of the Interior, 6,387 retroactive supplementary decisions have been issued.

the Constitution, unconstitutional consequences (determined by the then applicable first paragraph of Article 16 of the RPIA to be a reason for the unconstitutionality of a request to call a subsequent legislative referendum) occurred already when the deadline for implementing Constitutional Court Decision No. U-I-246/02 expired unsuccessfully.<sup>13</sup> It also pointed out that any delay in the implementation of the said decision entails a continuation of the unconstitutional state of affairs, therefore the National Assembly must implement the decision as soon as possible. The Constitutional Court again found in Decision No. U-II-3/04, dated 20 April 2004 (Official Gazette of the Republic of Slovenia, No. 44/04, and OdlUS XIII, 29), that the unregulated status of these persons had lasted for more than twelve years, and that therefore any extension of the unconstitutional state of affairs, which may also occur in the form of the failure to adopt an Act which would finally resolve the issue of the permanent residence of these persons, already constitutes unconstitutional consequences (in terms of the first paragraph of Article 16 of the RPIA applicable at that time).

### B – III

29. The National Assembly responded to the unconstitutionality established in points 1, 2, and 3 of the operative provisions of Decision No. U-I-246/02 by passing the ARSCOSS-B.<sup>14</sup> In the proposed first paragraph of Article 1 of the ARSCOSS, the term used to describing the beneficiaries is no longer “citizens of other successor states of former Yugoslavia”, but “aliens who were citizens of other republics of former Yugoslavia on 25 June 1991”. Such a change is actually necessary because in this manner also the persons who before independence were citizens of the former Yugoslav republics and may have become third-country nationals or stateless persons after their erasure from the register of permanent residents are included among the beneficiaries due to the passage of time.<sup>15</sup> While this change is not reflected in the title of the ARSCOSS-B, this does not introduce any ambiguity in the legal order. In the

13 If the National Assembly does not respond to a Constitutional Court decision which determined the unconstitutionality of a statutory regulation by adopting a law, this does not only constitute a prolongation of the established unconstitutionality, but it also creates of itself a new unconstitutionality. When the Constitutional Court, pursuant to Article 48 of the Constitutional Court Act (Official Gazette of the Republic of Slovenia, No. 64/07 – official consolidated text – hereinafter the CCA), establishes the unconstitutionality of a law and orders the National Assembly to remedy the established unconstitutionality within a specified period, the National Assembly must adopt a new statutory regulation within that period in order to eliminate the unconstitutionality. Disregarding such Constitutional Court decision constitutes a violation of Article 2 and of the second paragraph of Article 3 of the Constitution, as was repeatedly emphasized by the Constitutional Court (for the first time already in Decision No. U-I-114/95, dated 7 December 1995, Official Gazette of the Republic of Slovenia No. 8/96, and OdlUS IV, 120). As long as the legislature does not respond to the identified unconstitutionality, this violation continues to exist.

14 The ARSCOSS-B amends the ARSCOSS (which was already amended by the ARSCOSS-A). The Act contains ten articles but the individual articles amend several articles of the ARSCOSS or add several new articles at the same time. For greater clarity, this decision hereinafter will not refer to the articles of the ARSCOSS-B, but to the “proposed” or “new” articles, paragraphs, and indents of the ARSCOSS.

15 The Constitutional Court uses the new terminology in this decision for reasons of clarity.

proposed second paragraph of Article 1 the Act grants a residence permit and permanent residence status at the address at which the particular individual was registered at the time of erasure, even for the period from the erasure until the permanent residence permit was obtained. For the persons who are not actually present in the Republic of Slovenia the Act therefore establishes a legal fiction of permanent residence status by recognizing a fictitious “permanent residence at the address where the [individual] was registered before [...] the erasure [...] for the period until the adoption of the ARSCOSS or until the deadlines that are to be established by this Act for the status regularisation expire”, as was explicitly called for by the Constitutional Court in Decisions No. Up-333/96 and No. Up-60/97.

30. In a manner consistent with the Constitution, the legislature eliminates the unconstitutionality found in Point 1 of the operative provisions of Decision No. U-I-246/02. In the reasoning of this decision (points 17 to 20 of the reasoning), the Constitutional Court stated that the issue of the permanent residence status of the erased persons can be regulated in a single manner only and that only this manner is consistent with the Constitution.<sup>16</sup> Therefore, the National Assembly could not regulate this issue in any other way other than to recognise permanent residence status retroactively to those individuals who obtain a permanent residence permit subject to the condition of actual presence in Slovenia. Concerning this, it should be noted that permanent residence status in the country is only possible on the basis of a permanent residence permit and that anyone who resides in the country must register their permanent residence.<sup>17</sup> It is therefore understandable that the legislature retroactively recognised the permanent residence status of the citizens of other republics of former Yugoslavia removed from the registry of permanent residents who are not actually present in the Republic of Slovenia by establishing the legal fiction that they had a permanent residence permit and were registered at their former address even during the period from their erasure from the register of permanent residents until they obtained a permit for permanent residence, certainly under the conditions expressly defined by the Act. As was already stated, this legal fiction is and was intended for eventual proceedings that could be initiated by individuals regarding the assertion of their rights conditional upon their permanent residence status, but cannot have any other legal consequences on its own, in particular, it cannot be used to retroactively establish legal relationships that could have existed had it not been for their erasure from the register of permanent residents.
31. The ARSCOSS-B eliminates, in a manner consistent with the Constitution, also the unconstitutionality found in point 2 of the operative provisions of Decision No. U-I-246/02, namely that the Act should regulate the possibility to obtain a permanent residence permit for those citizens of other republics of former Yugoslavia against

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16 “[T]he legislature could not have regulated the issue of the time effect of the legal regulation differently than that the mentioned persons who had acquired a permanent residence permit be retroactively recognized permanent resident status.” (point 20 of the reasoning)

17 The registration of residence is governed by the Residence Registration Act, Official Gazette of the Republic of Slovenia No. 59/06 - official consolidated text, and 111/07 – hereinafter the RRA).

whom the measure of the forcible removal of an alien was pronounced. This unconstitutionality is eliminated by the proposed first paragraph of the Article 1 in conjunction with the fifth indent of the third paragraph of the new Article 1.č of the ARSCOSS. On this basis, the condition of actual presence in the Republic of Slovenia is fulfilled even if the absence lasted for more than a year, if the person had been removed from the Republic of Slovenia pursuant to the provisions of the AA due to erasure from the register of permanent residents. The citizens of other republics of former Yugoslavia who were forcibly removed from the Republic of Slovenia due to the erasure may apply for a permanent residence permit, and the fact that they were forcibly removed from Slovenia is not taken into account when determining the condition of actual presence.<sup>18</sup> In the assessment of the Constitutional Court, the National Assembly could not eliminate the central part of this unconstitutionality in a different manner. Only statutory legislation providing that the forcible removal of an alien from the country due to erasure from the register of permanent residents does not affect the acquisition of permanent residence permits and the recognition of permanent residence status retroactively is constitutionally acceptable. The legislature has a greater margin of appreciation only when deciding the length of the period of absence due to the measure of the forcible removal of an alien from the country shall be disregarded when determining the condition of actual presence in Slovenia and after what period of time a certain action can be expected from an individual from which it can be concluded that he or she wanted to return to the Republic of Slovenia and to continue to permanently reside here. By the proposed third paragraph of Article 1.č of the ARSCOSS<sup>19</sup> the legislature has obviously also taken into account the fact that some persons removed from the registry of permanent residents could regularize their status prospectively after a certain period of time on the basis of the AA-1. Therefore, the regulation defined in the ARSCOSS-B is also in this part not unconstitutional in itself.

32. The third unconstitutionality determined by Decision No. U-I-246/02 refers to the uncertainty of the legal notion of “actual presence in the Republic of Slovenia”. The ARSCOSS prescribed the condition of actual presence for obtaining a permanent residence permit as an undefined legal notion after already seven years had elapsed

18 In accordance with the fifth indent of the third paragraph of the proposed Article 1.č of the ARSCOSS, the condition of actual presence in the Republic of Slovenia is fulfilled even if the absence lasted for more than a year and the absence is justified because “the person was forcibly removed from the Republic of Slovenia pursuant to Article 28 of the Aliens Act (Official Gazette of the Republic of Slovenia No. 1/91-I, 44/97, 50/98 - Constitutional Court Decision and 14/99 - Constitutional Court Decision), or Article 50 of the AA-1, unless the person was forcibly removed due to the accessory penalty of expulsion from the country due to a committed offence”.

19 This provision provides: “If the absence on the basis of the grounds referred to in the preceding paragraph, except for the grounds in the second indent, lasted longer than five years, it is considered that the condition of actual presence is fulfilled for a period of five years; for a period of an additional five years the condition is fulfilled only if the conduct of this person indicates that he or she tried during his or her absence to return to Slovenia and continue his or her actual presence in the Republic of Slovenia.”

since the erasure from the register of permanent residents and when the different statuses of the citizens of other republics of former Yugoslavia who had not acquired citizenship of the Republic of Slovenia became identifiable. It stems from the reasoning of the constitutional decision that the legislature should define what constitutes actual presence according to the ARSCOSS, and in particular it should define the period of absence after which the condition of actual presence is no longer satisfied. The Constitutional Court has explicitly mentioned certain limitations in the reasoning, namely that the status of these persons should not be any worse than the status of persons who had the status of alien already before the independence of the Republic of Slovenia,<sup>20</sup> and the interpretation of the condition of actual presence should not be any stricter than the interpretation established in the jurisprudence relating to the acquisition of citizenship as well. This entailed that the legislature was obliged to meet the requirement of equality before the law defined in the second paragraph of Article 14 of the Constitution.

33. The notion of actual presence in the Republic of Slovenia is defined in the proposed Article 1.č of the ARSCOSS. The Act defines actual presence as the individual having a centre of vital interests in the Republic of Slovenia. This is assessed in accordance with certain criteria, listed as examples – personal, family, economic, social, or other connections which indicate that an individual has real and lasting ties with Slovenia.<sup>21</sup> Such a connection, of course, cannot be attributed to someone who has left the Republic of Slovenia with a view to emigrating, which was already at the time of the erasure and is still today, pursuant to the AA-1 (the sixth indent of the second paragraph of Article 45), a reason for the validity of a permanent residence permit to cease. The term “or other connections” cannot imply whatever other connections, but this statutory provision must be interpreted by an *intra legem* analogy. This means that only those “other connections” of the individual may be relevant that are similar in terms of their quality and intensity to the circumstances explicitly established. The requirement of the cumulative fulfilment of these criteria, which the proposers of the referendum advocate, would be unconstitutional, because the Act

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20 The Constitutional Court found in Decision No. U-I-284/94 that the failure to regulate the status of these persons in comparison with the legal status of aliens also constitutes a violation of the principle of equality determined by the second paragraph of Article 14 of the Constitution (Paragraph 18 of the reasoning). Therefore, from the perspective of equality, an absence of up to one year should not entail that the condition of actual presence is not fulfilled. The AA in force at the time of the erasure from the register of permanent residents namely prescribed in the second indent of Article 20 that the permanent residence permit of an alien ceases to be valid if this person emigrates or stays abroad for more than one year and does not inform the competent authority of this fact.

21 The first paragraph of the proposed Article 1.č of the ARSCOSS states: “Actual presence in the Republic of Slovenia under this Act means that an individual has a centre of vital interests in the Republic of Slovenia which is to be assessed on the basis of his personal, family, economic, social, or other connections which indicate that the individual has real and lasting ties with Slovenia. A justified absence from the Republic of Slovenia due to the grounds determined by the third paragraph of this Article does not constitute an interruption of actual presence in the Republic of Slovenia.”

would without any reasonable grounds require that the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents have such connections in Slovenia permanently, while such a requirement does not apply for other aliens (the second paragraph of Article 14 of the Constitution). Therefore, it should be taken into account that the condition of actual presence is assessed by whether the individual has a “centre of vital interests” in Slovenia, i.e. that he or she has “real and lasting ties” with the Republic of Slovenia.<sup>22</sup> Personal, family, economic, social, or other connections are just circumstances which enable the competent authority to decide whether an individual fulfils this condition. Depending on the particular circumstances, only one circumstance might be sufficient to determine actual presence in a particular case, whereas in other cases the existence of two or more circumstances will have to be demonstrated for the fulfilment of the condition of actual presence. In any event, the Act requires, on the basis of the actions (filing an application) of applicants for permanent residence permits, individual consideration of these applications, which is in addition the case for all the procedures under the ARSCOSS, including the procedures pursuant to Point 8 of the operative provisions of Constitutional Court Decision No. U-I-246/02.

34. Besides the condition of actual presence, the ARSCOSS-B determines the period of time and the grounds on the basis of which the individual was justifiably absent from the territory of the Republic of Slovenia. The second paragraph of the proposed Article 1.č of the Act provides that the condition of actual presence in the Republic of Slovenia is fulfilled if the person left the Republic of Slovenia and the continuous absence did not last longer than a year, regardless of the grounds for this absence. An absence which lasted for more than a year does not affect the condition of actual presence if it was due to certain justified grounds.<sup>23</sup> However, the Act provides that

22 The conditions are the same as provided by the RRA for the determination of the notion of permanent residence (the third point of Article 3).

23 The third paragraph of the proposed Article 1.č of the ARSCOSS states: “The condition of actual presence in the Republic of Slovenia is fulfilled even if the absence lasted for more than a year and the absence is justified on the basis of the following grounds:

- If the person has left the Republic of Slovenia as a result of erasure from the register of permanent residents;
- If the person has left the Republic of Slovenia due to being sent to work, to study, or for health treatment by a legal entity from the Republic of Slovenia, or in the case of a minor, by his or her parents or guardians, or where he or she was employed on a ship with a home port in the Republic of Slovenia, for the period of the referral to work, study, or for medical treatment, or for the period of employment on a ship;
- If the person has left the Republic of Slovenia due to not being able to obtain a residence permit in the Republic of Slovenia due to non-fulfilment of the conditions and his or her application for the permit has been dismissed, rejected, or the proceedings were stayed;
- If the person was unable to return to the Republic of Slovenia due to war in some other country of the former Yugoslavia, or for medical reasons;
- If the person was forcibly removed from the Republic of Slovenia on the basis of Article 2 of the Aliens

even a justified absence could last only up to five years, while it could last for more than five years only if the person had actively tried to return to the Republic of Slovenia and to continue his or her actual presence there.

35. In the assessment of the Constitutional Court, the proposed legislative solutions concerning the condition of actual presence addresses the unconstitutionality found in Decision No. U-I-246/02 in a manner consistent with the Constitution. The provisions are not unclear or their substance imprecise, or at least no more than is the case for similar statutory provisions that otherwise govern the authorization of residence or the acquisition of citizenship. It cannot be asserted that these provisions are unconstitutional in relation to Articles 34 and 2 of the Constitution. The legislature met the constitutional requirements also in relation to the second paragraph of Article 14 because when defining the condition of actual presence it also considered the positions adopted by the Constitutional Court regarding the interpretation of this condition in the decisions concerning the relevant constitutional complaints, particularly in relation to the acquisition of citizenship.<sup>24</sup> Thus, in Decision No. Up-73/95, dated 27 February 1997 (OdlUS VI, 72), the Constitutional Court found that the right to the equal protection of rights (Article 22 of the Constitution) was violated due to the unlawful interpretation of the uncertain legal notion of “actual presence in Slovenia”, namely by stating that for the definition of actual presence “only the long-term interruption of the actual presence of the claimants in the Republic of Slovenia is relevant [...] and not the assertion in the claim concerning the impossibility of their return to Slovenia due to war circumstances [...]”. In Decision No. Up-77/94, dated 16 September 1997 (OdlUS VI, 188), the Constitutional Court found a violation of Article 22 of the Constitution because the complainant’s departure

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Act (Official Gazette of the Republic of Slovenia No. 1/91-I, 44/97, 50/98 - Constitutional Court Decision and 14/99 - Constitutional Court Decision) or Article 50 of the Aliens Act (Official Gazette of the Republic of Slovenia, No. 64/09 - official consolidated text), unless the person was forcibly removed due to the accessory penalty of expulsion from the country due to a committed offence;

- If the person was refused entry into the Republic of Slovenia, unless he or she was refused entry due to the accessory penalty of expulsion from the country due to a committed offence, or on the grounds defined in the first, second, fifth, or seventh indents of Article 10 of the Aliens Act (Official Gazette of the Republic of Slovenia No. 1/91-I, 44/97, 50/98 - Constitutional Court Decision and 14/99 - Constitutional Court Decision), on the basis of the reasons defined in the first, second, or sixth indents of the first paragraph of Article 9 of the Aliens Act (Official Gazette of the Republic of Slovenia, No. 61/99, 87/02, and 93/05), or for the reasons determined in points (d) or (e) of the first paragraph of Article 5 of Regulation (EC) No. 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ L No. 105, 13 April 2006)."

- 24 The first paragraph of Article 40 of CRSA gave the citizens of other republics who on the date of the plebiscite on the independence and sovereignty of the Republic of Slovenia, i.e. 23 December 1990, had a registered permanent residence in the Republic of Slovenia and were actually present in Slovenia the right to acquire citizenship by exceptional one-time opportunity naturalization. Concerning the part of the provision stating “and is actually present here,” the legislature used an undefined legal concept, the interpretation of which has been repeatedly examined by the Constitutional Court, especially with regard to violations of the right to the equal protection of the rights determined by Article 22 of the Constitution.

from the Republic of Slovenia together with the Yugoslav Army was considered in itself an interruption of actual presence in Slovenia, whereas not all the relevant facts which could confirm or reject such interpretation were established. Due to such an unconstitutional interpretation of the uncertain legal notion of “actual presence”, the competent bodies did not take into consideration the complainant’s statements in the application for citizenship that he resigned from the Yugoslav Army after one month “because he did not want to move from the Republic of Slovenia”. In Decision No. Up-199/95, dated 5 February 1998 (OdlUS VII, 100), it found a violation of Article 22 of the Constitution because the claimant’s assertion that he was not responsible for the reasons for his absence lasting longer than a year was not considered among the decisive factors for the definition of actual presence. In Decision No. Up-200/04, dated 22 June 2006 (Official Gazette of the Republic of Slovenia, No. 76/06), the Constitutional Court found a violation of Article 22 of the Constitution, because the Administrative Court took the position that the fact that the complainant was not able to return to the Republic of Slovenia due to war circumstances and to the expiry of her passport was not essential, but only the fact that the complainant interrupted her actual presence in the Republic of Slovenia and is still living abroad should be considered. In Decision No. Up-211/04, dated 2 March 2006 (Official Gazette of Republic of Slovenia, No. 28/06, and OdlUS XV, 40), which concerned an application for a permanent residence permit which the complainant filed on the basis of the ARSCOSS, the Constitutional Court rejected the position of the courts that the fact the complainant was unable to return to the Republic of Slovenia due to the war was not relevant for the decision whether the complainant fulfilled the condition of actual presence in Slovenia. The position of the Constitutional Court was that the assertions of the complainant concerning the impossibility of returning due to war circumstances or due to a refusal at the border could constitute such circumstances that could justify the complainant’s absence for a longer period of time due to circumstances beyond his control, and that these circumstances have to be regarded as decisive for the definition of actual presence in the Republic of Slovenia. Certainly, in the proceedings decided on the basis of the ARSCOSS also after this amendment of the Act, it will continue to remain a duty of the administrative authorities to determine with certainty in each case, in accordance with the principle of legality and the principle of substantive truth, whether these statutory conditions are met; therefore, a person who asserts these rights will also have to demonstrate, in accordance with the rules of administrative procedure, that the facts to be considered existed for the whole period relevant for the decision in the case.

#### B – IV

36. In order to reach a decision on whether such unconstitutional consequences could occur due to the suspension of the implementation or the rejection of the ARSCOSS-B in a referendum, as required by the first paragraph of Article 21 of the RPIA, it is necessary to identify the constitutional values at issue and decide which of them should be given priority. The right to a referendum, which is protected as a human

right under Article 90 of the Constitution, read in conjunction with Article 44 of the Constitution, may be opposed by several constitutional values. These are the ones the legislature defined by the concept of “unconstitutional consequences” in the first paragraph of Article 21 of the RPIA. Whether the right to a referendum should yield to these constitutional values depends on which of these values are at issue and what weight they carry.

37. Until the legislature remedies the unconstitutional gap in the law that the Constitutional Court found in Decision No. U-I-246/02, the statutory regulation concerning the legal status of the citizens of other republics of former Yugoslavia who were erased from the register of permanent residents remains inconsistent with the second paragraph of Article 14, Article 34, and Article 2 of the Constitution (see paragraph 27 of this decision). In addition, the failure to comply with the decision of the Constitutional Court itself entails a new violation of the Constitution, namely Article 2 and the second paragraph of Article 3 thereof. The weight of all these violations is all the more important, as seven years have passed since the second decision (No. U-I-246/02) of the Constitutional Court and as they may lead to violations of rights, including human rights and fundamental freedoms.<sup>25</sup> The Constitutional Court has in the interim reiterated in its subsequent decisions that any prolongation of the unconstitutional situation already entails unconstitutional consequences in terms of the first paragraph of Article 21 of the RPIA (particularly emphasized in Decision No. U-II-3/04), which means that the review which was requested of the Constitutional Court this time had actually already been carried out. With the further passage of time, considering that the legislature has not responded for an additional six years despite the clear warnings of the Constitutional Court, this unconstitutional situation has only deepened. It has become intolerable.
38. In the weighing of constitutional values, it should also be considered whether the legislature, by adopting an act remedying an unconstitutionality, also regulates other issues that bear no direct relation to the elimination of the unconstitutionality as such. The proposed Article 1.a of the ARSCOSS regulates the issuance of permanent

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25 When deciding in constitutional complaint proceedings, the Constitutional Court usually established a violation of the right to the equal protection of rights (Article 22 of the Constitution), which in judicial proceedings is a specific expression of the general principle of equality determined in the second paragraph of Article 14 of the Constitution. For example, in Decision No. Up-20/97 it found that the complainant was in an unequal position compared to those aliens who were not citizens of other former Yugoslav republics but who had permanent residence in the Republic of Slovenia at the time the AA entered into force, which constituted a violation of the rights determined by Article 22 of the Constitution with regard to one's residence. In Decision No. Up-336/98 it found a violation of the complainant's right to equality before the law determined by the second paragraph of Article 14 of the Constitution, which is expressed as a violation of Article 22 of the Constitution in proceedings for deciding on the rights, obligations, and legal benefits of individuals, with regard to their residence, because the condition of residence in the Republic of Slovenia, as one of the conditions for entitlement to a social security income supplement, was interpreted in accordance with Article 81 of the AA, an interpretation that the Constitutional Court found to be inconsistent with the Constitution already in Decision No. U-I-284/94.

residence permits to the children of the erased citizens of other republics of former Yugoslavia, namely those who were born in the Republic of Slovenia after 25 June 1991. The Act also newly regulates the issuance of special decisions to the citizens of the Republic of Slovenia who, at the time of the attainment of the independence of the Republic of Slovenia, had the citizenship of other republics of former Yugoslavia and permanent residence registered in the Republic of Slovenia, but this residence ceased to be valid once the provisions of the AA became applicable to them; later, they were, however, granted citizenship of the Republic of Slovenia without having first obtained a permanent residence permit (the proposed Article 1.b). The Act also equalises the position of the persons who were issued decisions on the retroactive recognition of permanent residence on the basis of Point 8 of Decision No. U-I-246/02 with that of the persons who were issued such decisions in 2009 (the proposed Article 1.c). The decisions issued in 2004 namely merely established permanent residence retroactively, with effect from the erasure from the register of permanent residents onwards. The ARSCOSS-B equalises these decisions with those from 2009 in which a permanent residence permit as well as the registration of permanent residence status were recognised retroactively. Other issues also covered by the ARSCOSS-B include the deadline by which an alien who is issued a permanent residence permit and who at the time of the issuance of this permit does not actually reside in the Republic of Slovenia due to a justified absence, will be required to move back to the Republic of Slovenia and resume their actual presence in the Republic of Slovenia (the proposed Article 1.d); the additional reasons for denying the issuance of a permanent residence permit to an alien (the proposed amendments to Article 3); the deadline for filing an application for a permanent residence permit (the transitional provisions); and a different definition of the competent authorities. The proposed Article 1 of the Act also provides for the issuance of a permanent residence permit (effective only from the issuance onwards) to a specific group of people, namely to those citizens of other republics of former Yugoslavia who have continuously resided in the Republic of Slovenia since 25 June 1991 although they were not registered as permanent residents and therefore could not have been erased from the register of permanent residents.

39. The regulation of these issues has no direct bearing on remedying the established unconstitutionality and to that extent, the Act regulates more than what is required by the decisions of the Constitutional Court. However, by including these solutions in the ARSCOSS-B, the National Assembly may not be accused that it has regulated issues that are not directly related to the established unconstitutionality. It may also not be accused that it has done so with the purpose of preventing these issues from becoming subject to a referendum, which would entail an abuse of its legislative function. In remedying unconstitutionality, the National Assembly is entitled to address the issues which relate to the same subject-matter and are inextricably related to the remedying of unconstitutionality, particularly, as in this case, to the prevention of new unconstitutionality. The Constitutional Court considers the regulation of the legal status of the children of those citizens of other republics of

former Yugoslavia who have been erased from the register of permanent residents in the same manner as the legal status prescribed for their parents to be necessary from the point of view of the Constitution, as their positions are directly related. The retroactive recognition of permanent residence should also apply to the Slovene citizens who were not granted a permanent residence permit before being granted citizenship; otherwise, the individuals erased from the register of permanent residents who were granted citizenship of the Republic of Slovenia would be in a worse position than those who have already been granted permanent residence permits and have received supplementary decisions on the retroactive recognition of permanent residence pursuant to Point 8 of Decision No. U-I-246/02. Although these two groups were not covered by the decision of the Constitutional Court, such an approach of the National Assembly undoubtedly prevented the emergence of new unconstitutionality, as an omission of such legislative measures would entail an unconstitutional gap in the law which would result in an unconstitutional distinction between individuals who are in essentially the same position. These unconstitutionality could not be remedied in any other manner consistent with the Constitution. It should, however, be noted that the need to regulate these issues to a large extent arose later, with the passage of time, which can be attributed to the Government (as the authority constitutionally authorised to propose laws) as well as to the National Assembly, as they have delayed the remedying of the established unconstitutionality for almost seven years. Regarding the other issues, the Constitutional Court considers them to be of minor importance or regards them as subsidiary issues: some of them to be merely procedural in nature (deadlines, transitional provisions), others, in terms of substance, only “concomitants” of the key substantive issues (such as the grounds for denying a permanent residence permit), while the purpose of the third group of subsidiary issues is solely to provide a comprehensive resolution of the problem of the legal status of the citizens of other republics of former Yugoslavia who actually reside in the Republic of Slovenia (the second group of beneficiaries pursuant to the proposed Article 1 of the ARSCOSS<sup>26</sup>).

40. In light of these considerations, it is evident that by adopting the ARSCOSS-B, the legislature responded in a manner consistent with the Constitution to the unconstitutional position found by the Constitutional Court in Decision No. U-I-246/02. The provisions of the ARSCOSS-B are clear and precise and establish a basis on which it will be possible to definitively regulate the legal status of those citizens of other republics of former Yugoslavia who have been erased from the register of permanent residents, if and insofar as their status remains unregulated to this day. While remedying the unconstitutionality, however, the Act does not regulate issues that have no direct bearing on remedying this situation, or it regulates only certain less important issues, “concomitants” of the key substantive issues.

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26 This refers to the citizens of other republics of former Yugoslavia who resided in the Republic of Slovenia on 25 June 1991 and were actually present there from that day onwards, as determined already by ARSCOSS in 1999.

41. The proposers of the request to call a referendum have made several complaints with respect to the ARSCOSS-B. The pertinent complaints are those which might carry some constitutional weight. In addition to the complaints about the ambiguity and vagueness of the Act and those that claim that the Act regulates more than required in order to remedy the unconstitutionality, which have proved to be unfounded, the proposers of the referendum also complain that the National Assembly violated the legislative procedure, as the ARSCOSS-B was allegedly unjustifiably adopted in a shortened procedure, and additionally the National Assembly has misleadingly stated in the preamble to the draft Act that the Act would have no financial implications for the state budget. Pursuant to the third paragraph of Article 21 of the CCA, the Constitutional Court is also competent to rule on the constitutionality and legality of the procedures under which legislation has been adopted. However, the Constitutional Court has reiterated on many occasions that in reviewing the procedure under which a law has been adopted, it is competent to rule only on the constitutionality of the procedure, that is to say, on violations of the rules laid down in the Constitution (see, for example, Decision no. U-I-215/96, dated 25 November 1999, Official Gazette RS, No. 101/99, and OdlUS VIII, 265, Decision No. U-I-104/01, dated 14 June 2001, Official Gazette RS, No. 52/01, and OdlUS X, 123, and Order No. U-I-192/03, dated 13 May 2004). A violation of the RPNA does not by itself entail that an act is inconsistent with the Constitution; to that end, it must be demonstrated that there has been a violation of the provisions of the Constitution, which the proposers of the referendum do not allege.
42. The proposers of the referendum also complain that the ARSCOSS-B does not regulate the compensation for damages which will allegedly be claimed by the citizens of other republics of former Yugoslavia on the basis of this Act. In their opinion, the compensation for damages should be regulated so as to limit the amount or to determine them as a fixed amount, since there is also a limit to the compensation awarded to the victims of the Second World War and the postwar revolutionary violence, to those who suffered in the concentration camps during the Second World War, and to the relatives of the persons who died in the War for Slovenia.
43. By adopting the ARSCOSS-B, which recognised actual residence status retroactively, the legislature introduced moral satisfaction as a particular form of redress for the violations of human rights caused by erasure from the register of permanent residents. The legislature thereby also accomplished the duty determined in the fourth paragraph of Article 15 of the Constitution. If damage was caused to individuals due to their erasure from the register of permanent residents because they were deprived of rights that were conditional on permanent residence in Slovenia, the question of possible state liability could arise on the basis of Article 26 of the Constitution, which provides for the constitutional protection of claims for compensation against the state and its bodies. The complaint of the proposers of the referendum that this issue should be regulated precisely by the ARSCOSS-B and that the Act is inconsistent with the Constitution as it does not include such regulation, is unfounded. The regulation of the liability for damages would entail regulating an issue which is not directly and inextricably related to the elimination of unconstitutionality established in Decision No. U-I-246/02. However,

er, the issuance of decisions pursuant to the ARSCOSS and the ARSCOSS-B does not by itself constitute a new liability of the state nor does it entail new legal bases for claims for compensation, so as to imply a direct relation between the issue of assessing the new compensation claims against the state and the content of the ARSCOSS-B. While the special regulation of state liability is always possible and admissible, the fact that the compensation is not subject to ARSCOSS-B cannot by itself carry any particular weight in determining whether the Constitutional Court should find an occurrence of unconstitutional consequences in terms of the first paragraph of Article 21 of RPIA. The Constitutional Court, without considering the question of whether the failure to adopt the necessary legislative regulation, as established by a decision of the Constitutional Court, might entail unlawful conduct in terms of Article 26 of the Constitution,<sup>27</sup> or the question of whether, in the event this unlawful conduct is substantiated, other elements of state liability would be established, observes that the legislature can at any time regulate these questions separately. Already in Decision No. U-II-1/04, dated 26 February 2004, the Constitutional Court took the view that a complete exclusion of the right to claim damages for the unlawful conduct of the state (provided the constitutional and statutory conditions for such a claim are met) is contrary to Article 26 of the Constitution.<sup>28</sup> However, this situation also concerns a human right which can be limited pursuant to the third paragraph of Article 15 of the Constitution,<sup>29</sup> of course under the conditions of the so-called strict test of proportionality.

44. The claim of the proposers of the referendum that on the basis of decisions issued pursuant to the ARSCOSS and the ARSCOSS-B, new claims can be made in respect of various rights is also not true, except insofar as the decisions can be used in future proceedings as evidence of compliance with the condition of permanent residence in the Republic of Slovenia. The Constitutional Court emphasizes that the retroactive recognition of permanent residence within the meaning of Decision No. U-I-246/02 does not create new rights for these individuals and does not retroactively create new legal relationships, as that is of course not possible. In addition, the issuance of decisions “retroactively” on the basis of the ARSCOSS-B does not by itself interfere with earlier

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27 The Supreme Court, for example, already ruled on the issue of legislative unlawfulness in Judgment No. II Ips 800/2006, dated 24 June 2009, in which it stated that the legislature's liability for damages can be justified only by the most serious violations of the constitutional provisions and fundamental standards of civilization. It did not state among these violations that the Constitutional Court abrogated as unconstitutional the third paragraph of Article 40 of the CRSA to the extent that it referred, *inter alia*, to the grounds of danger to the public order.

28 This constitutional provision guarantees everyone the right to compensation for damage caused through unlawful acts in connection with the performance of any function or other activity by a person or body performing such function or activity under state authority, local community authority, or as a bearer of public authority.

29 The Constitution allows for the exclusion (or suspension) of individual human rights only in the event of a war or state of emergency, and only temporarily (Article 16 of the Constitution), while absolutely prohibiting such for certain rights. In the third paragraph of Article 15 the Constitution does not mention the suspension (or exclusion) of human rights. Therefore, they cannot be suspended by a law but only limited.

decisions of the competent authorities in respect of individual rights related to permanent residence. Such decisions became final if the individuals concerned did not challenge them, and can no longer be interfered with on the basis of the ARSCOSS-B. There were legal remedies (including the constitutional complaint) available in order to challenge the administrative decisions, and, as evidenced by the decisions of the Constitutional Court referred to in paragraph 22 of this decision, the individuals who used these remedies have succeeded in securing their rights and legal interests.

45. Certain allegations that the proposers made in response to the request of the National Assembly indicate that they do not really want a referendum which would decide whether the adopted Act eliminates the established unconstitutionality in a manner consistent with the Constitution. The proposers argue that there never was any unconstitutionality. To a large extent, however, they refer to some unnamed legal experts and through these experts express the view that the citizens of other republics of former Yugoslavia had “an indisputable obligation to apply for Slovene citizenship or the status of an alien with permanent residence”. Referring to these unnamed experts, they also wonder whether “the so-called erased” are not themselves to blame for the situation “due to their own failure to comply with the law in force or to use the legal remedies available to them”. They further contend that the “the competent national authorities [...] found it perfectly legal that those who have not applied to regularise their citizenship or alien status do not wish to live in the Republic of Slovenia or are not present here at all”. The proposers of the referendum openly attack and reject Constitutional Court Decision No. U-I-246/02. They believe that the Act should provide for a “mandatory review” of the decisions issued on the basis of Point 8 of the operative provisions of the constitutional decision. Again with reference to the unnamed legal experts, they express the view that a decision of the Constitutional Court “cannot entail a basis for the issuance of individual administrative decisions” and that therefore the decisions issued on the basis of Point 8 of the operative provisions of this decision are “legally questionable”, although the Constitutional Court already expressly stated in its Order No. U-II-3/03 that the national authorities were to follow the part of the decision which, pursuant to the second paragraph of Article 40 of the CCA, regulates the manner of implementation [of the decision], until the legislature adopts a different regulation. Namely, in a state governed by the rule of law the decisions of the Constitutional Court, which, pursuant to the third paragraph of Article 1 of the CCA, are binding, must be complied with regardless of whether legal experts express doubts about them. The national authorities and therefore also the administrative authorities are bound by a decision of the Constitutional Court and cannot be absolved of this duty to comply by any concerns of the experts, even if these are justified. In order to comply with the decision of the Constitutional Court, the referendum may not, in terms of substance, entail to any degree a decision on whether certain issues should be regulated in a manner consistent with the Constitution. Such a legislative referendum would constitute a referendum on a decision and the authority of the Constitutional Court (therefore on whether there is any unconstitutionality and whether it should be eliminated at all); as such, it would be inadmissible (see Constitutional Court Order No. U-II-3/03).

## B – V

46. On the basis of weighing the constitutional values at issue and taking into account the relevant circumstances, including the fact that (1) the regulation proposed by the National Assembly remedies the unconstitutionality found by the Constitutional Court Decision no. U-I-246/02, (2) by adopting the ARSCOSS-B, the National Assembly only provided for the remedy of unconstitutionality and the regulation of some urgent and related issues, (3) the ARSCOSS-B cannot be accused of unconstitutionality as alleged by the proposers of the referendum; (4) the National Assembly could not remedy the fundamental unconstitutionality in any other manner, and that even if the ARSCOSS-B were to be rejected at a referendum; (5) more than seven years have passed since the adoption of the Constitutional Court Decision no. U-I-246/02; the Constitutional Court held, for the reasons set out in the reasoning part of the Decision, that other constitutional values must prevail. The implementation of the ARSCOSS-B and the issuance of acts on its basis will remedy all the established unconstitutionality which have arisen as a result of the erasure of persons from the register of permanent residents; their human rights and fundamental freedoms will also be protected in a manner consistent with the Constitution, as the legislature has thereby fulfilled all obligations arising from the decisions of the Constitutional Court. In this case, it is therefore necessary to give priority to the rule of law (Article 2 of the Constitution), the right to equality before the law (the second paragraph of Article 14 of the Constitution), the right to personal dignity and safety (Article 34 of the Constitution), the right to obtain redress for the violations of human rights (the fourth paragraph of Article 15 of the Constitution) as well as the authority of the Constitutional Court (Article 2 and the second paragraph of Article 3 of the Constitution) over the right to decision-making at a referendum. The continuation of the unconstitutional situation as a result of the rejection of the ARSCOSS-B at a referendum would be intolerable from the point of view of the Constitution. Therefore, the Constitutional Court upheld the applicant's position that unconstitutional consequences would occur due to the rejection of the ARSCOSS-B at a referendum.

## C

47. The Constitutional Court reached this decision on the basis of Article 21 of the RPIA and the third indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of: Jože Tratnik, President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. The decision was reached by seven votes against two. Judges Deisinger and Mozetič voted against and submitted dissenting opinions. Judges Pogačar, Sovdat, and Zobec submitted concurring opinions.

*Jože Tratnik*  
*President*

1. I voted against the Decision because I am of the opinion that the basic precondition requiring the prohibition of the referendum was not fulfilled, namely the occurrence of unconstitutional consequences that would result from the rejection of the Act Amending and Supplementing the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (ARSCOSS-B).
2. The provision of Article 21 of the Referendum and Public Initiative Act (RPIA) is formulated on ill-considered premises, namely it is based on the assumption that the Act would be rejected in the referendum, while the unconstitutional consequences are defined only as a possibility. It is absurd to consider that a referendum may be prohibited even if the Act would definitely be approved in the referendum. If the referendum is prohibited, this indisputably results in a violation of the human rights of the potential participants in the referendum and, on the other hand, in the establishment of potential unconstitutional consequences of the referendum. For this reason, the other side of the provision of Article 21 of the RPIA should be interpreted as the reliable establishment of the occurrence of unconstitutional consequences due to the rejection of the Act. A virtual or vague possibility of the occurrence of such consequences would distort the meaning of the above-mentioned legal regulation. There is another particularity in Article 21 of the RPIA, namely the prohibition of the referendum follows already if unconstitutional consequences would occur as a result of the postponement of the enforcement of the Act. The Constitutional Court thus must find that unconstitutional consequences would occur already immediately after the Act has been adopted but not yet entered into force, because it is illogical that they would occur only after the Act has been rejected in the referendum.
3. When adopting a decision in compliance with Article 21 of the RPIA, the Constitutional Court is put in a special position, namely it must establish whether unconstitutional consequences exist or would arise, i.e. it must establish the existing or future state of the facts. Therefore, in the case at issue it had to find whether the Act had been adopted based on the previous decisions of the Constitutional Court so as to remedy unconstitutionality, or whether it would be possible to remedy the unconstitutional consequences despite the failure to implement the Act. A decision of the Constitutional Court finding an unconstitutionality and a request by it to remedy this by an act are not sufficient. The Constitutional Court must verify whether the actual situation has changed upon a call for a referendum and/or whether it is possible to remedy the unconstitutional consequences in some other way, as it is obliged to do so in compliance with Article 21 of the RPIA.
4. I shall focus only on the issue of the occurrence of unconstitutional consequences, given the fact that this formal condition must be fulfilled or else the methods of the Constitutional Court's review of the request of the National Assembly to prohibit the referendum cannot be considered at all.
5. Notwithstanding the previous decisions of the Constitutional Court [on this issue], this case, No. U-II-1/10, involves an assessment of the current situation, which differs

from the situation at the time those decisions were issued. The assessment pursuant to Article 21 of the RPIA can only be based on the assumption that the rejection of the Act in the referendum would render it absolutely impossible to resolve the status of the erased persons by means of retroactive recognition of permanent residence.

6. Without the amended Act (ARSCOSS-B) and according to the data of Ministry of the Interior, dated 17 May 2010 (reply to indent 8 on page 4), 6,387 supplementary decisions were issued in compliance with Point 8 of the operative provisions of Constitutional Court Decision No. U-I-246/02, retroactively recognising the right to permanent residence status in the Republic of Slovenia as of the day of erasure from the register. The supplementary decisions were issued to 3,585 persons who acquired citizenship of the Republic of Slovenia and to others who did not acquire citizenship. In Paragraph 45 of its Decision No. U-II-1/10, the Constitutional Court expressly emphasised that the retroactive recognition of residence had not been unlawful. In the event the Act were to be rejected in the referendum, there would be no reason for not approving [an application for permanent residence] in the same way for other applicants too. The likelihood of unconstitutional consequences therefore cannot be attributed to the potential rejection of the Act.
7. Moreover, Paragraph 27 of the Decision stipulates that the amended Act also regulates the status of the children of the erased persons, which had not been considered problematic in previous decisions of the Constitutional Court. Even without the amended Act, these children can acquire permanent residence if they are of full age, whereas in the case of minors, their parents as their legal representatives or their guardians can arrange such on their behalf.
8. I agree that the legislature is bound by the decisions of the Constitutional Court and, in this respect, the adoption of the ARSCOSS complies with this basic premise. Nevertheless, when deciding pursuant to Article 21 of the RPIA, the Constitutional Court cannot ignore the assessment regarding the occurrence of unconstitutional consequences. Point 8 of the operative provisions of Constitutional Court Decision No. U-I-246/02 is substantively the same as the essential substance of the ARSCOSS-B and in an appropriate manner enables recognition of permanent residence status as of the day of removal from the register. Even if there was a referendum that approved or rejected the Act, the authority of the Constitutional Court would not be undermined as its decision would substitute for the Act if the latter was rejected.

*Dr Mitja Deisinger*

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**DISSENTING OPINION OF JUDGE MAG. MIROSLAV MOZETIČ,  
JOINED BY JUDGE DR MITJA DEISINGER**

**I**

1. I voted against the Decision on the prohibition of the referendum on the Act Amending the Act on the Regulation of the Status of Citizens of Other Successor

States to the Former SFRY in the Republic of Slovenia (ARSCOSS-B) since due to its rejection unconstitutional consequences would occur. These unconstitutional consequences are related to the continuation of the unconstitutionality established by Constitutional Court Decision No. U-I-246/02, dated 3 April 2003, and particularly to the fact that the mentioned Decision of the Constitutional Court has not yet been implemented. The proposed Act, which was adopted by the National Assembly, is intended to eliminate these unconstitutionality. The reasons for the “prohibition” of the referendum have not convinced me and I believe that the potential rejection of the Act in the referendum would not result in such severe unconstitutional consequences that, considering the affected constitutional rights, it would be permissible to interfere with the constitutional right to decision-making in a referendum.

2. In order to dispel any doubts, I fully support the position of the Constitutional Court, consistently repeated in a series of decisions, that its decisions are binding and that (if an act is found unconstitutional) the National Assembly must comply with the decisions and implement them and that any non-compliance with the decisions of the Constitutional Court entails a serious violation of the Constitution. I also agree with the position that neither the National Assembly nor the voters in a referendum may directly decide on whether or not to comply with a decision of the Constitutional Court,<sup>1</sup> even though this happens frequently, most often indirectly, when the National Assembly does not adopt an appropriate act or, even though it adopts such act, it fails to regulate the issue concerned in accordance with the decision of the Constitutional Court or regulates it in such a way that it is not in compliance with the Constitution. A similar thing would happen if the voters did not approve in a referendum an act eliminating an unconstitutionality established by a decision of the Constitutional Court. Nevertheless, I believe that such a violation of the Constitution (non-compliance with a decision of the Constitutional Court) in itself cannot be the only reason for prohibiting a referendum. I do not agree with the position that the fact that a decision of the Constitutional Court has not been implemented is in itself an unconstitutional consequence. This is a dangerous position which can result in a situation in which we would have to prohibit every referendum which the National Assembly believed could cause unconstitutional consequences or that unconstitutional consequences could continue to exist in the sense of Article 21 of the RPIA (even without particular reasoning). Such an unconstitutional situation can be sanctioned by the Constitutional Court within the framework of its competences by imposing stricter sanctions (declaratory, abrogating decision) and particularly by defining the manner of the execution [of its decisions] which can even be used to determine that a temporary regulation to fill a gap or replace an abrogated legal provision.
3. In my opinion, it is not even very important in the case at issue whether the right to vote in a referendum is a human right or a general constitutional right. In my personal opinion, it above all entails the exercise of power (competence) arising from

1 Nevertheless, there is a certain amount of pathetic exaggeration in the position that permitting the referendum could “jeopardise the very existence of the Constitutional Court”.

the second paragraph of Article 3 of the Constitution. A referendum is one of the forms of direct decision-making by citizens (voters) on issues regulated by law (the first paragraph of Article 90).<sup>2</sup> Nevertheless, certain conditions have to be fulfilled in order to enable the exercise of such competence or the implementation of this general constitutional or human right.<sup>3</sup> This can be decided by the National Assembly or required by the National Council, by a certain number of deputies of the National Assembly, or by a certain number of citizens. This competence or right cannot be affected merely by the issue of who initiated the process of deciding in a referendum. In any case, it is the “representatives” of the citizens (voters) and we can say that (maybe somewhat pathetically) this procedure is always triggered by the citizens, directly or indirectly, who would like to decide on a specific act. In the event of this procedure, voting on an act in a referendum is the last step in the process of adopting an act.<sup>4</sup> Therefore, the fact that voting in a referendum is only possible upon request does not make this any less a constitutional (human) right. It cannot be otherwise, because of the nature of this decision, since it is not a right to be exercised periodically. It is only exercised upon request. The determination of eligible proposers prevents this right from being exercised in an ill-considered manner.<sup>5</sup>

4. What could be the reason, in my opinion, for prohibiting the referendum? If I base my deliberation on Constitutional Court Decision No. U-I-47/94, dated 19 January 1995 (Official Gazette of the RS, No. 13/95, and OdlUS IV, 4), an interference with the right to decide in a referendum, which is a human right, is only possible if it is required for the protection of human rights or allowed by the Constitution itself. The Constitution foresees no particular limitations of this right. An interference with the right to decide in a referendum is thus only allowed if required for the protection of the human rights of others. The RPIA grants the competence for such a review to the Constitutional Court (the first paragraph of Article 21), which decides the issue upon the request of the National Assembly.
5. When the National Assembly receives a request to call a referendum, it is obliged to do so unless it believes that a [referendum] decision to enforce or reject an act could result in unconstitutional consequences (the first paragraph of Article 21 of the RPIA). In such a case, it must request within the specified deadline that the Constitutional Court decide on the issue. The Constitutional Court thus reviews if the opinion of the National Assembly that there could be unconstitutional consequences is justified or not and then assesses on the basis of Decision No. U-I-47/94 if the re-

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2 Considering this position and concurring that it is not a human right, the question arises if an act can, at all, interfere with the constitutional right of the voters to decide on all issues regulated by an act in a referendum. The Constitution gives no such authority to the legislature, nor does it contain any limiting provisions. From this point of view, Article 21 of the RPIA is also problematic.

3 This is a human right according to Constitutional Court Decision No. U-I-47/94.

4 The RPIA regulates the subsequent legislative referendum approving an act.

5 Abuses are, of course, possible. There are many different ways to influence and in a way manipulate citizens voting in a referendum. Nevertheless, this can also be done with voters in elections (as these are the same people), and the members of a legislature are far from immune to different attempts at influencing their decisions.

jection of the act in a referendum would indeed affect such significant constitutional rights that, considering the affected constitutional rights, it would be permissible to interfere with the constitutional right to decide in a referendum (i.e. to prohibit the referendum). I disagree with the position that the National Assembly need not justify its claim that the rejection of the act could result in unconstitutional consequences and that the mere claim and reference to a decision of the Constitutional Court is sufficient. I believe that such a position is not based on the first paragraph of Article 21 of the RPIA.

6. This is a case of weighing between constitutional rights. On the one hand there are the constitutional rights that are being violated (which has in this specific case been established by the Constitutional Court) and on the other hand there is the constitutional right to a referendum. In this specific case, the weighing must also take into account if the established unconstitutionality would still actually exist, even if the act had not been passed, which answers the key question of whether the rejection of the act at the referendum would indeed result in the occurrence (or continuation) of unconstitutional consequences, reflected in the violation of the rights of affected individuals. It is thus necessary to establish not only if the legislature at the legislative level (abstractly) complies with the Decision of the Constitutional Court but also, and particularly, if the actual state or circumstances that represented (or still represent) the violation of human rights on which the Decision of the Constitutional Court was based still exist. This finding is important when weighing which rights should be given priority. It is clearly evident from the first paragraph of Article 21 of the RPIA that it is the National Assembly which has to reason the existence or occurrence of such unconstitutional consequences, i.e. to reason its opinion that unconstitutional consequences would occur. In my opinion, it is not enough that it merely claims that the proposed act implemented the Decision of the Constitutional Court.

## II

7. There is no dispute that the position of the citizens of other republics of former Yugoslavia who had permanent residence in Slovenia as of 26 February 1992 but failed to apply for Slovene citizenship or had their application rejected, has not been regulated in a legal manner. The Constitutional Court encountered this issue several times in the procedures for reviewing regulations and the procedures involving a constitutional appeal and assessed such situation as unconstitutional.
8. Thus, the unconstitutionality of a legal regulation relating to the legal position of the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents in Slovenia was established for the first time in Decision No. U-I-284/94, dated 4 February 1999 (Official Gazette of the RS, No. 14/99 of 12 March 1999). It was established that the AA was in conflict with the Constitution since it did not stipulate the conditions for obtaining a permanent residence permit by the citizens of other republics of former Yugoslavia who decided not to apply for citizenship of the Republic of Slovenia or who have had their application for citizenship rejected. The position of the Constitutional Court was that the general regulation of permits

for temporary and permanent residence was not suitable for the position in which the citizens of other republics of former Yugoslavia found themselves, since it failed to take into account that these persons had valid permanent residence status and actually resided in the territory of Slovenia. It pointed out that it was the permanent residence status and actually residing in the territory of Slovenia that put these persons in a position that required special regulation. It is also prohibited the imposition of the measure of forcible removal from the Republic of Slovenia on such persons.

9. The National Assembly responded to Decision No. U-I-284/94 by passing the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (Official Gazette of the RS, No. 61/99, ARSCOSS). This Act allowed the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents to obtain a permanent residence permit. Furthermore, Article 19 of the Act Amending the Citizenship of the Republic of Slovenia Act (Official Gazette of the RS, No. 96/02) implemented the possibility that a person with permanent residence on 23 December 1992 who actually lived in the Republic of Slovenia as of that day may obtain citizenship of the Republic of Slovenia under more favourable conditions.
10. According to the data of the Ministry of the Interior which the Constitutional Court received in relation to case No. U-I-246/02, 18,305 citizens of other republics of former Yugoslavia who were registered on 26 February 1992 as permanent residents in the Republic of Slovenia were transferred from the register of permanent residents to the records kept on aliens. Based on the explanations of the Ministry of the Interior, dated 17 May 2010 (in case No. U-II-1/10), it is evident that the stated numbers of those “erased or transferred” were obtained by comparing the computer records and the physical records. According to the computer records, 29,064 persons were “erased”. After comparing the two records it was established that 10,759 persons deregistered their permanent residence and emigrated. Of the remaining 18,305 persons, 12,937 filed an application according to the ARSCOSS and 1,033 according to the Aliens Act, i.e. a total of 13,080 persons. The mentioned persons who filed an application in accordance with the Aliens Act obtained a permanent residence permit under the ARSCOSS, since this was more favourable for them. Of the total of 12,047 applications, 10,713 were granted, 288 rejected, and 97 dismissed and 949 procedures were stayed because of the withdrawal of the application or because the alien became a citizen of the Republic of Slovenia in the interim. It can be established that practically all persons who lodged an application managed to obtain a permanent residence permit or citizenship. It can also be established that approximately 5,225 persons failed to lodge an application by the specified deadline, i.e. 28 December 1999 (three months after the entry into force of the Act, which took place on the sixtieth day after the publication of the Act, i.e. 30 July 1999).
11. In view of the stated data, I therefore agree with the finding of the majority, namely that the citizens of other republics of former Yugoslavia removed from the register of permanent residents who actually resided in Slovenia, were able to regulate their legal status on the basis of the ARSCOSS or the CRSA-Č, and I add, of course, if they

wanted to. Nevertheless, I am not convinced of the accuracy of the finding that those who were “forcibly removed” or left Slovenia for other erasure-related reasons and who did not actually reside in Slovenia upon the entry into force of the ARSCOSS were not allowed to exercise these rights. We do not even know if they were indeed deported, since the Ministry of the Interior maintained no records of this. In Decision No. U-I-246/02 the Constitutional Court found that few persons were deported since the measure was rarely imposed because the unregulated residence status of the citizens of other republics was generally tolerated (Paragraph 27 of the reasoning). In addition, the Constitutional Court prohibited the imposition of the measure of forcible removal by Decision No. U-I-284/94 (published in the Official Gazette, dated 12 March 1999). Albeit, I agree that such cases cannot be completely excluded.

12. By Decision No. U-I-246/02, dated 3 April 2003 (Official Gazette of the RS, No. 36/03, dated 16 April 2003), the Constitutional Court established the unconstitutionality of the ARSCOSS (after the enforcement of the ARSCOSS-A) since it did not determine retroactive recognition of permanent residence status, i.e. for the entire period since the erasure, for the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992. With the mentioned Decision the Constitutional Court established the unconstitutionality of the ARSCOSS also because it failed to regulate the acquisition of a permanent residence permit for those individuals who were forcibly removed from the country as aliens and since it did not define the notion of actual presence in the Republic of Slovenia that needed to be proved by the citizens of other republics of former Yugoslavia in order to obtain a permanent residence permit under the provision of retroactive recognition of permanent residence status; in particular, the Act should determine the period of absence after which the condition of actual residence is no longer fulfilled. The Constitutional Court also abrogated the provision that determined the deadline for submitting the application.
13. The mentioned Decision had not been (legally) implemented until the adoption of the proposed Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (the ARSCOSS-B) for which a request was filed that it should be approved by the voters in a referendum and which is now the subject of review before the Constitutional Court (in this Decision, No. U-II-1/10). This does not mean that the applications that were filed have not been resolved and because of the abrogation of the deadline for submission, new applications could have been filed.
14. According to the data of the Ministry of the Interior, 724 persons obtained permanent residence permits and 2,070 obtained citizenship in the period from the adoption of Constitutional Court Decision No. U-I-246/02 (published on 16 April 2003) until 11 May 2010. In the same period, 162 applications were allegedly rejected, 128 dismissed and in 469 cases the procedure was stayed. In total, 3,553 persons filed applications. According to the data, 5,225 persons did not submit an application until 19 February 2003 and if we subtract the 3,553 persons we can establish that 1,672 persons did not submit an application. Considering the fact that many of these persons

might have died by now, the number becomes even smaller. The Ministry of the Interior provides a different number of unresolved cases, but they based their calculations on the number of 25,671 erased persons. It is not too convincing in explaining where this figure originates from. The most probable cause resulting from the report of the Ministry of the Interior is that records have not been kept up-to-date since 2003 and that there were obviously still discrepancies between computer and physical records. The fact is, namely, that the data on submitted applications and resolved applications (one way or another) are approximately the same in both reports of the Ministry of the Interior and that the only difference is in the data on the “erased”.

15. These data point to the fact that surprisingly few persons applied for regulation of their status after the publication of Constitutional Court Decision No. U-I-246/02. The reason for this is unknown. Nevertheless, we can claim with a reasonable level of probability that after the publication of Constitutional Court Decision No. U-I-246/02 all the erased persons had the possibility to file an application to regulate their status even if they left Slovenia because of their erasure or even if they were forcibly removed. In my opinion, the fact that the Constitutional Court established certain unconstitutionality cannot be cause enough for them not taking action [regarding the situation]. As indicated, those who missed the deadline had another opportunity to file an application due to the fact that this provision was abrogated. Even though the Constitutional Court found that the legal term “actual continuous residence” is undetermined to the point that it represents a violation of Article 23 of the Constitution and ordered that it be specified in more detail, the reasoning of the Decision indicates how the term should be interpreted, in particular, the issue of when the interruption of continuous residence occurred. In this framework it was also possible to resolve the cases in which the measure of the forcible removal of an alien was pronounced (which was only possible until 12 March 1999). As frequently highlighted by the Constitutional Court, the interpretation of undefined legal notions lies within the competence of the regular courts. The decisions of the Constitutional Court in procedures involving a constitutional complaint (see point 34 of the reasoning of the mentioned Decision) also contributed to the interpretation of this term. It is interesting that some of the stated decisions were issued prior to the publication of Decision No. U-I-246/02. Furthermore, the Decision states that the existence of permanent residence status must be determined for the entire time after erasure. In addition to finding that very few applications were filed after the publication of the Decision of the Constitutional Court (compared with the most recent data of the Ministry of the Interior on the number of erased persons with unresolved status), the fact that relatively few court proceedings were initiated is also somewhat surprising. We could observe that this indicated the lack of action (lack of interest) on the part of those affected rather than the unwillingness of the Republic of Slovenia to resolve these issues after the adoption of both decisions of the Constitutional Court.
16. In view of the above, it could be concluded that all those interested have had the opportunity to file an application to resolve their status and that the others probably have no intention of doing so. Nevertheless, if there are still individuals who wish

to file an application, they can do so on the basis of the applicable Act. Despite that, I cannot agree with the position that the Act must be amended in order to be able to resolve the applications of the “erased persons” who have not yet regulated their status because they filed no application.<sup>6</sup> Nonetheless, this is negated by the fact that practically all applications filed after the publication of Constitutional Court Decision No. U-I-246/02 have been granted.

17. I therefore conclude that the National Assembly failed to adequately reason its opinion that the potential rejection of the Act would result in such severe unconstitutional consequences that this would justify an interference with voters’ constitutional right to decide on the Act in a referendum.
18. Of course, this does not mean that if the Act were rejected at the referendum, the National Assembly would be freed from the obligation to try again to regulate these issues in other ways, where possible. And it would most certainly not excuse the administrative bodies from deciding on all the applications, taking into account all the positions of the Constitutional Court, and this would apply even more strictly to the courts which would interpret the undetermined legal term “actual uninterrupted residence” when deciding on judicial protection. In my opinion, it is clearly evident from the Decision of the Constitutional Court that when resolving the applications of all those who meet the prescribed conditions it must be established that they were entitled to permanent residence for the entire period after erasure. This does not mean that I am claiming that all the “erased persons” have already regulated their status; I only say that the National Assembly failed to justify the existence of such an unconstitutional state that would justify the prohibition of referendum. Moreover, it cannot be said that by stating the figures I only tried to illustrate that the number of unresolved issues was small and that therefore the claimed unconstitutional consequences were not severe enough. The purpose of stating the figures was sufficiently clarified in the previous paragraphs. I dare anticipate that the number of unresolved issues stated by the Ministry of the Interior in the most recent communication will not change much or at all until the expiry of the deadline for submitting applications determined anew by the present Act. The issue of the “erased persons”, at least in terms of permanent residence status, will thus be resolved upon the expiry of the legal deadline for submitting applications; until that time, it is possible to manipulate the “large” numbers presented by the Ministry of the Interior.

*Mag. Miroslav Mozetič*

*Dr Mitja Deisinger*

<sup>6</sup> The Act further regulates some issues that arose with the passage of time which can be resolved on the basis of adequate interpretation.

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## CONCURRING OPINION OF JUDGE MAG. JADRANKA SOVDAT

1. I voted for the Decision since I agree with the reasons substantiating the review of the Constitutional Court in this matter. After the Constitutional Court established several times, in its previous decisions related to the issue of erasure from the register of permanent residents, that there were unconstitutional consequences and that the legislature should respond as soon as possible to the unconstitutionality established in Decision No. U-I-246/02 dated 3 April 2003 (Official Gazette of the RS, No. 36/03, and OdlUS XII, 24), there really should be especially well-founded constitutional reasons based on which the unconstitutionality could continue. More on this will be presented below. I would first like to present the constitutional considerations I have with regard to the statutory regulation of the legislative referendum and related competence of the Constitutional Court stipulated in the first paragraph of Article 21 of the Referendum and Public Initiative Act (Official Gazette RS, No. 26/07 – official consolidated text – hereinafter: the RPIA). However, I am aware that the basis of my concerns and the first paragraph of Article 21 of the RPIA are so directly interconnected that a completely different statutory regulation would be required. Therefore, these questions can only be posed in relation to the future but they cannot change the “game” in the middle of which we have found ourselves. It started with the request of the proposers of the referendum and continued with the request of the National Assembly of the Republic of Slovenia for the evaluation of unconstitutional consequences, and according to the applicable law it needs to actually end with the decision of the Constitutional Court adopted on the basis of the first paragraph of Article 21 of the RPIA. However, there are two reasons for writing this opinion. The first relates to my concerns regarding the regulation of the constitutional review of the admissibility of legislative referenda, whereas the second relates to the issues that were the focus of this case.

### I

2. At the time of the entry into force of the RPIA (Official Gazette RS, No. 15/94) Article 10 stipulated that a legislative referendum cannot be called if it concerns acts passed by the shortened procedure, when such is required by an emergency, the defence of the state, or natural disasters, acts adopted on direct execution of the state budget,<sup>1</sup> or acts adopted to implement ratified treaties. In addition, the first paragraph of Article 16 determined the jurisdiction of the Constitutional Court to review, upon the request of the National Assembly, whether the content of a call for a referendum is contrary to the Constitution. By Decision No. U-I-47/94, dated 19 January 1995 (Official Gazette RS, No. 13/95, and OdlUS IV, 4), the Constitutional Court abrogated Article 10 and established the unconstitutionality of Article 15 since it did not provide any jurisdictional protection against a decision of the National Assembly to not call a referendum. In the reasoning of the Decision the Constitutional Court stated:

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1 It is interesting that the pension and health care “funds” were not taken into consideration by the legislature.

“In view of the fact that Article 90 entails the constitutional implementation of the constitutional right to direct decision-making of citizens determined by Article 44 of the Constitution, and also because the right of 40,000 voters to require a referendum, which is encompassed in Article 90, it can be considered a “human right” under the legal regime referred to in Article 15 of the Constitution, the provisions of the second and third paragraphs of Article 15 of the Constitution also apply for potential statutory interferences with the provisions of Article 90 (insofar as they refer to this constitutional right).” On these grounds it decided that the statutory exclusion of certain legislative referenda is a measure that is not necessary since a less restrictive measure could be used in order to grant protection to an objective allowed by the Constitution – i.e. either the right of others or the public interest.<sup>2</sup> A less restrictive measure was seen in the fact that the Constitutional Court could in each individual case review “whether the suspension of the implementation of this law due to a referendum or its non-implementation would truly affect such an important constitutional right that, due to this – upon weighing the affected constitutional values – it would be permissible to interfere with the constitutional right to decision-making in a referendum”. The big question is whether today with all the experience gained through the review of the admissibility of previous as well as subsequent legislative referenda, the same decision would be made concerning the legislature being denied the possibility to evaluate in advance the inadmissibility of certain legislative referenda (the abrogated Article 10) as well as whether the right to referendum decision-making – therefore, the right to vote in a referendum required by eligible legislative referendum proposers determined in the second paragraph of Article 90 of the Constitution – is actually a human right, as the Constitutional Court has repeated and continues to repeat in numerous decisions.

3. First it needs to be established that in Decision No. U-I-47/94 not even the Constitutional Court itself declared the right to referendum decision-making a human right. It linked this right to Article 44 of the Constitution and characterised it as a human right considering that a call for a legislative referendum can be required by 40,000 voters and even in this decision the words human right are in inverted commas. In a way, it assigned 40,000 voters, as one of the eligible legislative referendum proposers, the role of exercising a human right.<sup>3</sup> Therefore, we are dealing with two aspects of this human right – the right to require a referendum and the right to vote in a referendum as an expression of direct participation in the management of public affairs. It should be noted, however, that the right to vote in a referendum is actually the primary right. Only if this right exists as a human right can the first right mentioned also be recognized as being of the same nature. Since in that Decision the Constitu-

2 Already in decisions reached prior to this decision, as well as in some subsequent decisions, the Constitutional Court stated that the public interest is a constitutionally admissible aim, on the basis of which a human right can be restricted in accordance with the third paragraph of Article 15 of the Constitution (see F. Testen 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, p. 200).

3 This position is difficult to attribute to other eligible proposers.

tional Court linked Article 90 of the Constitution to the right determined by Article 44 of the Constitution, the question arises what the content of this right actually is.<sup>4</sup> Even if there was no such provision in the Constitution, a legislative referendum would entail an implementation of the constitutional right to direct decision-making power of the citizens arising from the second paragraph of Article 3 of the Constitution [“In Slovenia power is vested in the people. Citizens exercise this power directly and through elections”]. In the Commentary on the Constitution, Prof. Čebulj states that the right determined by Article 44 of the Constitution entails “a general constitutional right [that] has no separate statutory regulation, but is exercised within the legislation concerning local self-government, the referendum and public initiative, and elections.”<sup>5</sup> The same definition is provided by Prof. Grad,<sup>6</sup> who states that it is a “general constitutional right exercised through other constitutional rights that in a more concrete manner regulate the participation of citizens in the management of public affairs, in particular, for example, local self-government, the referendum and public initiative, and elections.”<sup>7</sup> Local self-government is a constitutional right that the Constitution explicitly grants in Article 9 (among the general provisions) and regulates in Chapter V in more detail. It is therefore a constitutional right but not a human right. Similarly as with self-government, the Constitution also regulates a referendum or direct implementation (in this case legislative) of the power referred to in the second paragraph of Article 3 (thus among the general provisions) and in Article 90 (in Chapter IV a), where it regulates the National Assembly). Therefore, in terms of systemic-technical considerations, this is the same regulation. Yet, for referendum decision-making the Constitutional Court established the criteria of review arising from the second and the third paragraphs of Article 15 of the Constitution i.e. such review that only applies to human rights but not to other constitutional rights lacking this legal nature, while in the case of local self-government this was not the case. As we have seen, both local self-government and the referendum are related in the same way to Article 44 of the Constitution.

4. Was the reason for the application of the criteria that apply to the manner of exercising or restricting human rights the similarity between the right to vote and the right to decision-making in a referendum? The right to vote is undoubtedly a human right. The Constitution regulates it as such in Article 43, although its relevant elements – in this discussion the principle of periodicity is of particular importance for its exercise – are also regulated in other provisions of the Constitution (the first paragraph of Article 81, the second paragraph of Article 98, and the

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4 The Constitutional Court states that Article 90 is “a derivation of the constitutional right to the direct decision-making power of the citizens determined by Article 44 of the Constitution.”

5 J. Čebulj in: L. Šturm (ed.), *ibid.*, p. 490.

6 F. Grad, Dissenting Opinion in Decision No. Up-3486/07, Up-3503/07, Up-3768/07, dated 17 January 2008 (Official Gazette RS, No. 19/08, and OdlUS XVII, 23), Paragraph 6.

7 Grad criticises the review of the Constitutional Court according to which the right to vote in elections to the National Council is reviewed under Article 44 of the Constitution instead of Article 43, which would be more appropriate in his opinion. It increasingly seems to me he is right.

third paragraph of Article 103). And it is the principle of periodicity and thus the periodic exercise of the right to vote that in my opinion makes the right to vote significantly different from the right to vote in a referendum. This principle attributes the right to vote its universal character, for at the end of certain a period (i.e. a term of office) its exercise does not depend on whether a definite number of citizens or politicians will want it to be exercised since the periodicity regarding its exercise is ordered; however, an early election can trigger the exercise of this right outside of the intervals planned, but surely and always upon the expiry of the term of office. This content of the voting right as a human right is without a doubt explicitly stated in Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter: ECHR).<sup>8</sup> As regards the right to vote in a referendum, the situation is essentially different. In addition to the fact that, on the basis of the second paragraph of Article 90 of the Constitution, every citizen (being a voter) has the right to require, together with 39,999 other citizens (being voters), that a referendum be called (and in Decision no. U-I-47/94 the Constitutional Court in particular exposed this aspect, but as I have already pointed out, this right is, in my opinion, secondary), it is characteristic of the right to vote in a legislative referendum that as citizens (being also voters) we can only exercise it when the politicians we have elected (i.e. the National Assembly, one third of the deputies of the National Assembly, or the National Council) so decide. And this can be several times a year, every ten years, or *ad absurdum* never. Unusual for a human right. Although as regards the manner of its exercise, the right to vote in a referendum is exercised similarly as the right to vote, namely it also reflects the declaration of the will of a citizen entailing decision-making, this is nevertheless not a decision on who to vest with the legislative power, but rather a decision on the content of the matter to be approved (or not) in a referendum,<sup>9</sup> and based on this the right to vote in a referendum differs significantly from the right to vote. Thus the question arises whether the decision of the Constitutional Court on the basis of which the right to vote in a referendum is considered a human right (since then the two words have been written without inverted commas) was the right one. It is true that the development of human rights can lead to an individual right being proclaimed a human right earlier in certain countries, and due to its proclamation as such there is no need to wait for its general recognition in the international community. Still, the question arises whether, in accordance with the nature of human rights, the same really applies to the right to vote in a referendum.

8 Article 3 of the Protocol No. 1 to the ECHR stipulates: "The High Contracting Parties undertake to hold free elections at reasonable intervals (stressed by J.S), by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." There is probably no need to draw attention to the fifth paragraph of Article 15 of the Constitution, since the interpretation of other provisions of the Constitution leads us to the same conclusion.

9 More in F. Grad, *Volitve in volilni sistem* [Elections and the Electoral System], Inštitut za javno upravo pri Pravni fakulteti, Ljubljana 1996, pp. 26-29.

5. In modern countries, the direct exercise of authority has mainly been replaced by so-called representative democracy. This superseded “self-governance”,<sup>10</sup> historically already established in the ancient Greek Athenian democratic state.<sup>11</sup> All citizens over 18 years of age could vote in the People’s Assembly, which met four times a month in order to decide on the most important domestic and foreign issues.<sup>12</sup> The policy was proposed by a council consisting of 500 citizens, who were chosen by lot for a period of two years.<sup>13</sup> However, this kind of direct democracy was only possible in a small state where the number of free citizens with full rights (and male, of course) that could take part in the exercise of authority was very low. Then centuries passed before the idea of the sovereignty of the people started to appear, the idea that authority belongs to the people.<sup>14</sup> And that people can exercise it either by directly performing all or some of the offices or by electing representatives through which to exercise authority indirectly.<sup>15</sup> It became increasingly obvious that the direct exercise of authority or “self-governance” was only preserved to a minor degree and thus from the time that a middle class arose, “political (elected) representation as the basis of the democratic political form of government” was accepted.<sup>16</sup> It has also been established in the modern state, where there are simply more tasks of governance than can be performed by the people themselves.<sup>17</sup> If this is the case, does this not concern more the question of who is called to exercise authority than the exercise of a human right? Does this not concern the constitutional-political decision to establish when a legislative decision is to be taken by voters directly and when it is to be made by those entrusted by the voters to make these decisions during their term of office? And as we are already discussing the comparison with the right to vote, is it not more of, for example, an electoral system in its narrow meaning (its choice is subject to a political decision) than the periodic exercise of a right that results in entrusting power to govern to representatives of the people so elected? And if so, the question whether in terms of decision-making in a referendum we would like to resemble Switzerland (a country of numerous referenda) or France (where referenda are rare) is probably a matter of a constitutional-political decision determined by the Constitution or an

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10 “A free person is, within the constraints of their capacities – physical, mental, social, and economic – a self-governing person.”, B. Watt, *UK Election Law: A Critical Examination*, Cavendish Pub. Ltd., Oregon 1996, p. 10.

11 On the origin of elections in Athens, see T. Karakamiševa, *Elections and Electoral Systems*, Kultura, Skopje 2004, pp. 31–34.

12 J. Harvey and L. Bather, *The British Constitution*, Third Edition, Macmillan – St. Martin’s Press, London 1972, p. 546.

13 *Ibid.*

14 For more on this subject, see I. Kaučič in: F. Grad and others, *Državna ureditev Slovenije* [The Organisation of the State of Slovenia], First edition, ČZ Uradni list Republike Slovenije, Ljubljana 1996, pp. 21–23.

15 *Ibid.*, p. 24. Cf. Gicquel on direct democracy (gouvernement du peuple par lui-même) and representative democracy (le gouvernement du peuple par ses élus ou ses représentants), J. Gicquel, *Droit constitutionnel et institutions politiques*, 14<sup>ème</sup> édition, Montchrestien, Paris 1991, p. 116.

16 I. Kaučič, *ibid.*, p. 27.

17 This is what Watt says: “In a large modern state there is simply too much governing to be done to leave it in the hands of the people; they must choose representatives to do the work for them.”, Watt, *ibid.*, p. 11.

act and not a matter of a human right and its (in)admissible restriction. In individual cases it is more of a political decision on whether the elected representatives of the people, by having been elected, already have the power to make decisions on a certain important issue or if they again require legitimising their decision-making.<sup>18</sup>

6. If it is a matter of a constitutional-political decision on whether we want to be a country of referenda or not and not a matter of the restriction of a human right, then the question of the need for competence determined by the first paragraph of Article 21 of the RPIA must be raised, although it was practically “ordered” by the Constitutional Court in Decision No. U-I-47/94; it definitely “ordered” it since the basis used was the criteria applying to a human right, which in accordance with the fourth paragraph of Article 15 of the Constitution *inter alia* needs to be ensured legal protection (this is the reason for the logical establishment of unconstitutionality under Article 15 of the RPIA). This question is posed *a fortiori* since the Constitutional Court later explicitly noted that it has the same competence to review the constitutionality of acts passed by the legislature as well as acts adopted (i.e. approved) by voters in a referendum.<sup>19</sup> If that is the case, then the first and the latter can give rise to the same unconstitutional consequences and the same applies to the omission of their adoption. In the event of an omission of the required statutory regulation, therefore either when no act has been adopted (after years have passed, as in this specific case) by the National Assembly, or in the event the act is rejected in a referendum. What is then actually the role of the Constitutional Court when it needs to review the [possible] occurrence of unconstitutional consequences which make the right to vote on a specific issue in a referendum yield to other constitutional values?
7. Due to the facts already mentioned in the introduction, namely that in the middle of a “game” the rules cannot be modified, and due to the necessary connection between the starting-point, which I have serious reservations about, and the jurisdiction determined in the first paragraph of Article 21 of the RPIA, I am aware that the questions that I have and which I have emphasised can be taken into account *de lege ferenda* and therefore cannot influence the decision in this case. Probably this is something requiring serious reconsideration by the legislature. For this reason I have written them down. My final position on these issues is not urgently required since it cannot influence the decision-making with regard to this case, although what direction I favour can be deciphered. In the decision-making in this matter the Constitutional

18 Prof. Jambrek states: “The powers and tasks of regulatory bodies have to be given legitimacy since they stem from the people and in an identifiable manner they are the expression of the people’s will. Therefore, there should be a continuous chain of democratic legitimacy running from the people to the regulatory body and from the latter back to its source.” P. Jambrek in: L. Šturm (ed.), *ibid.*, p. 48. Cf. F. Grad, *ibid.*, pp. 23–24, and B. Watt, *ibid.*, p. 11.

19 This is explicitly stated in Decision No. U-II-3/03, dated 22 December 2003 (OdlUS XII, 101). The conseil constitutionnel, in Decision No. 92-313 DC, dated 23 September 1992, stated differently that it was not competent (since this competence is not explicitly determined in either the Constitution or the organic act on the Constitutional Court) to rule on the constitutionality of an act adopted by the French people in a referendum; it referred to (the second review of) the act approving the ratification of the European Union Treaty.

Court remains a “prisoner” of the first paragraph of Article 21 of the RPIA, which by determining the jurisdiction of the Constitutional Court also determines its tasks. In its decision-making, the Constitutional Court is bound by this provision with its constitutional basis in the eleventh indent of the first paragraph of Article 160 of the Constitution. Therefore, I was of the opinion that the decision-making in this matter should consider this provision and follow the explanation provided by the Constitutional Court in its previous decisions. On the basis of the second paragraph of Article 14 of the Constitution, also the Constitutional Court is bound to ensure equality before (the Constitution and) the law. By the first paragraph of Article 21 of the RPIA, the legislature ordered the Constitutional Court to establish, upon request, whether “unconstitutional consequences could occur due to the suspension of the implementation of the law or due to a law not being adopted”.

8. In the past four years<sup>20</sup> the Constitutional Court has been tasked with deciding on the constitutional admissibility of a legislative referendum four times. At the request of the National Assembly it established, based on what was then the first paragraph of Article 16 of the RPIA (the text of which was not very different from the first paragraph of Article 21 of the RPIA), in Decision No. U-II-1/06 (in the case of a preliminary referendum) that the suspension of the adoption and implementation of the amendment to the Health Care and Health Insurance Act could result in unconstitutional consequences, and in the reasoning (Paragraph 17) it expressly stated that the Constitutional Court was only required to establish whether the alleged unconstitutional consequences could arise. The latter were determined by the Constitutional Court to lie in the fact that, short of a law regulating property relationships between the Vzajemna insurance company and the HIIS (the Health Insurance Institute of Slovenia) in relation to the former’s transformation into a public limited company, an interference with the property and financial standing of the HIIS might occur contrary to Article 50 of the Constitution, and consequently, this would entail an interference with the position of the insured persons paying compulsory health insurance. The reasoning of Decision No. U-II-1/06 does not indicate that the Constitutional Court weighed different constitutional values. It is obvious that it considered the mentioned reason to be sufficient to establish the occurrence of unconstitutional consequences. In Decision No. U-II-1/09, dated 5 May 2009 (Official Gazette RS, No. 35/09) it established that unconstitutional consequences would have arisen if the amendment to the Attorneys Act had been suspended or rejected based on the finding of the unconstitutionality of the applicable Attorneys Act and the Attorney Fee Tariff Act, whose unconstitutionality was, in the opinion of the Constitutional Court, remedied by the amendment. The reasoning of this Decision also does not indicate that the Constitutional Court weighed [between different constitutional values], but it shows which were the constitutional values (the right to judicial protection, the right to defence in criminal proceedings, and the right of the Bar Association of Slo-

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20 An overview of some decisions over a longer period is also provided in the dissenting opinion of Judge Prof. Ribičič in Decision No. U-II-1/06, dated 27 February 2006 (Official Gazette RS, No. 28/06, and OdlUS XV, 17).

venia to take part in the adoption of lawyers' fees, based on which the Constitutional Court established that unconstitutional consequences would occur. In Decision No. U-II-2/09, dated 9 November 2009 (Official Gazette RS, No. 91/09), it established that if the amended regulations on judges' salaries had been rejected at the referendum, unconstitutional consequences would have occurred. The last Decision differs from the previous ones mainly in the fact that its reasoning shows that the Constitutional Court returned to the original reasons given in Decision No. U-I-47/94, which indicate that the Constitutional Court must weigh the right to a referendum against the constitutional values that would be affected if the act was rejected at the referendum. In Decision No. U-II-2/09, the constitutional values whose protection would be ensured by the implementation of the act, including the right to judicial protection, the independence of the judiciary, and compliance with the Constitutional Court's decision, prevailed over the right to a referendum.

9. The first paragraph of Article 21 of the RPIA has been designed so that it contains an inherent assumption based on which the Constitutional Court must assume that the act would be rejected at the referendum (if the first part of the provision referring to the suspension of the implementation is ignored), even though it is completely clear that the opposite could be the case. The deprivation of the right to vote in the referendum may therefore lead to the finding that unconstitutional consequences have occurred which would not have occurred if the citizens had voted for the act in the referendum. However, it is not up to the Constitutional Court to guess what would happen at the referendum (it is perfectly clear that it cannot do so), but it must evaluate the possibility of unconstitutional consequences occurring based on the mentioned assumption – i.e. that the act would be rejected at the referendum. Therefore, the possibility that the act might even be approved in the referendum in a specific case cannot influence the review in any way.
10. The interpretation of the first paragraph of Article 21 of the RPIA also has to take into consideration the purpose of this provision. This purpose is indicated specifically in Constitutional Court Decision No. U-I-47/94. The Constitutional Court should assess if the right to a referendum is opposed by the constitutional values that have to be given priority over the right to vote in a referendum. The latter right cannot automatically be assigned greater weight merely because it is (can be) exercised by all persons eligible to vote (and is therefore enjoyed by more eligible persons), even if it is opposed by constitutional values, including human rights, which are, given the circumstances of a specific case, provided to only a limited number of eligible persons. If this factor (the number of eligible persons) were the criterion of review, the Constitutional Court would no longer be needed to make decisions, as the number of eligible persons on the opposing side is seldom equal. Furthermore, it is necessary to take into account that the decision of the Constitutional Court on the [potential] occurrence of unconstitutional consequences does entail a limitation of the right to a referendum, but in itself does not entail that the reasons (i.e. the constitutional values) causing this limitation should be reviewed as restrictedly as possible. If on the other side of the scales there are also human rights and also other constitutional

values, including such as are actually the mechanism of the state of law, ensuring the protection of human rights and fundamental freedoms (e.g. the authority of the judiciary or the authority of the Constitutional Court<sup>21</sup>), then these values cannot be from the very start assigned a lesser weight than the right to a referendum. For this reason and pursuant to the second paragraph of Article 14 of the Constitution, I believe that as long as we have the authority referred to in the first paragraph of Article 21 of the RPIA, the approach to assessing the constitutionality of the consequences that can be expected if the act is rejected at the referendum should remain based on the position which the Constitutional Court explicitly emphasised already in Decision No. U-II-2/09. In order to abandon this position there would have to be, in my opinion, serious and well-founded reasons, which I do not see at this moment, because the interpretation of the legal text is restricted by the respective possible linguistic interpretation.<sup>22</sup>

11. The RPIA requires that we determine whether the rejection of an act in a referendum would result in unconstitutional consequences. The text of the first paragraph of Article 21 of the RPIA was interpreted in the latest decision as if it contained an inherent weighing of the right to a referendum against other constitutional values in view of the purpose of this statutory provision. Thus far I perceive no argument allowing anything more than that without crossing the boundary of linguistic interpretation and ascribing it contents it cannot have. Of course, this position leads to questions that are essential: 1) which constitutional values are identified that stand against the right to vote in a referendum, 2) what weight are they attributed, and 3) what are the reasons that some are attributed greater weight than others? In this respect, my review differs from that of some of my colleagues, and this in itself is the area that relates to the circumstances of this specific case, namely the decision on whether the rejection of the ARSCOSS-B at the referendum would give rise to unconstitutional consequences within the meaning of the first paragraph of Article 21 of the RPIA.

## II

12. When assessing the circumstances of this case, several important questions arose. The final outcome of the review greatly depends on the answers to these questions. This is undoubtedly a case when the legislature has not responded to the decision of the Constitutional Court for several years, in spite of the fact that since the expiry of the response deadline established in Decision No. U-I-246/02, the Constitutional Court has a number of times reiterated its warning regarding the response in its subsequent decisions and rulings on issues directly related to this matter, as well as

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21 These values, if measured in terms of the number of eligible persons, even exceed the number of persons eligible to vote, as they pertain to all persons in the state as well as foreigners within the state.

22 As the academic Prof. Pavčnik states, linguistic interpretation is "also the level setting the outer boundary that the interpreter cannot cross." M. Pavčnik, *Teorija prava, Prispevek k razumevanju prava* [Theory of Law, A Contribution to Understanding Law], Cankarjeva založba, Ljubljana 1997, p. 356.

in the annual reports on the past year's work.<sup>23</sup> Ever since the 2003 Annual Report, the Constitutional Court has continued to repeat in these reports that the deadline for the legislature's response had expired, while the unconstitutionality had not yet been remedied, and pointed out a grave violation of Article 2 and the second sentence of the second paragraph of Article 3 of the Constitution. Therefore, we have before us a case entailing an already established unconstitutionality, as indicated in the decision of the Constitutional Court. But this finding in itself is not sufficient for assessing the [potential] occurrence of unconstitutional consequences. It had to be determined whether the act with which the legislature responded remedied the unconstitutionality in a manner consistent with the Constitution. That does not mean that the Constitutional Court reviewed whether the ARSCOSS-B is consistent with Decision No. U-I-246/02, as an act can only be reviewed based on the Constitution and not a decision of the Constitutional Court; it does mean, however, that precisely because of compliance with the principle of equality, the adopted statutory regulation was reviewed in the light of those constitutional provisions on the basis of which the Constitutional Court had already reviewed the constitutionality of the statutory regulation in force. That is, from the aspect of Article 2 and the second paragraph of Article 14 of the Constitution. Moreover, in Paragraphs 21 and 24 it added additional reasons in the light of Article 34 as well as Articles 22 and 25 and the first paragraph of Article 23 of the Constitution, which could have been noted by the Constitutional Court already during the previous review, since these constitutional reasons were there to be invoked. I fully agree with this approach.

13. I also agree that the Constitutional Court had to first clarify the meaning of its two main decisions whereby it decided on the constitutionality of statutory regulation regarding the erasure from the register of permanent residents. First, Decision No. U-I-284/94, dated 4 February 1999 (Official Gazette RS, No. 14/99, and OdlUS VIII, 22), to which the legislature very quickly responded, which has perhaps not been stressed clearly enough by the domestic and international publics, and which for the most part finally regulated the status of these persons. This was extremely important, because on this basis the violations of human rights ceased for the most part, with the right referred to in Article 34 of the Constitution having the central role, in my opinion. Then it had to clarify the meaning of Decision No. U-I-246/02, whereby the Constitutional Court established an unconstitutionality, as the legislature failed to regulate the status of these persons retroactively. At first glance it is not clear what exactly the Constitutional Court had in mind, even though in its subsequent decisions it often reiterated that the legislature may remedy the unconstitutionality only in one manner consistent with the Constitution. The legal status by its very nature cannot be regulated retroactively. And even though the legislature, in regulating this issue, practically literally followed the two decisions of the Constitutional Court issued in the constitutional complaint cases, the question arose what that actually

23 Annual reports are published on the website of the Constitutional Court <http://www.us-rs.si/o-sodiscu/let-na-porocila/>.

means and what is actually meant by the ARSCOSS-B stating that “it is deemed that a person has a permanent residence permit and registered permanent residence at the address at which permanent residence was registered at the time of the erasure from the register of permanent residents”. I agree with the answer given in this respect by the Constitutional Court in its decision. This does not in fact involve the regulation of legal status retrospectively, but the determination of the status that has existed throughout (if a person indeed resided in Slovenia throughout this time), and in the case of persons who were forcibly removed from the country as aliens or who left the country for reasons directly related to the erasure, it involves the creation of a legal fiction with a very specific legal purpose and meaning, and therefore in itself cannot give rise to any other legal consequences, which is explained in detail in the Decision. Of greatest importance, in my view, is the definition of either the declaration of the actual status or the legal fiction, which the Constitutional Court explicitly pointed out in Paragraph 43 of the reasoning – the definition of immaterial satisfaction in the sense of the elimination of the consequences of human rights violations, as prescribed by the fourth paragraph of Article 15 of the Constitution, which in individual cases apparently occurred.

14. I am convinced that the competent authorities deciding in individual procedures in accordance with the ARSCOSS-B, which upon entry into force will supplement the provisions of the ARSCOSS, will carry out the tasks stipulated by this Act in accordance with the Constitution and these legal provisions. While doing so, they will be able to rely on the explanation of the mentioned act which the Constitutional Court had to provide in order to review the constitutionality of its provisions. I am also certain that they will not accept the speculations that the proposers of the call for a referendum fear and state as the reasons against the adoption of this act. In a state governed by the rule of law, the competent authorities have all the authority to prevent the abuse of law and the rights stipulated therein.
15. It was not possible to weigh which constitutional values should be given priority in this case until the Constitutional Court found that the legislature responded to its decision by an act that cannot be said to be unconstitutional and it cannot be claimed that by this act the legislature regulated issues that are not directly related to the subject matter of regulation (meaning that abuse could be at play); on the contrary, omitting the regulation of some issues might even give rise to new unconstitutionality.
16. I agree with the reasons given with reference to this in Parts B – IV and B – V of the reasoning of the Decision. What reaffirms my opinion that in this case other constitutional values should be given priority over the right to vote in the referendum is in a way related to my starting point in this opinion, even though I expressly stated that the issues I highlighted should in fact be considered for the future and not for this case. The decision whether to allow a referendum or not – which could be the simple interpretation of the provision of the first paragraph of Article 21 of the RPIA – is in fact a decision about whether this act should be adopted by the National Assembly (namely the representatives of the people in whom the citizens of this country vested the legislative power) or whether the legislative function should in this case be per-

formed by the people themselves (after it has been performed by their representatives, as we are referring to a subsequent legislative referendum). If the decisions of the Constitutional Court clearly state that the Constitution is binding on both the National Assembly and the people when it makes direct decisions, the decisions of the Constitutional Court are binding also on the voters in the referendum, in which case there occurs an equal unconstitutionality if either of them fails to perform the task stipulated by the Constitution. Just as we can claim that the National Assembly grossly violated Article 2 and the second sentence of the second paragraph of Article 3 of the Constitution by failing to comply with the decision of the Constitutional Court, the same could be claimed of the voters who would (“take back” the legislative function and) in the referendum reject the act which constitutionally puts an end to this violation of the Constitution. Let me again point out the standpoint of the Constitutional Court, i.e. that it may repeal as unconstitutional also an act approved by the people in a referendum. Therefore, the purpose of the first paragraph of Article 21 of the RPIA is to prevent further unconstitutionality after the National Assembly has once and for all (after many years in this case) finally remedied this violation of the Constitution. That is why it is also important in this case that the unconstitutionality has lasted for (too) many years and that regarding it the Constitutional Court (more often than with regard to any of its decisions, especially subsequent decisions on the same matter) clearly stated that unconstitutional consequences occurred (which it even classified in the meaning of the first paragraph of Article 21 of the RPIA), owing to the legislature’s failure to respond and the consequential non-compliance with the Decision of the Constitutional Court, and that by the adoption of this act the legislature remedies this unconstitutionality. The Constitutional Court clearly stated that statutory regulation was necessary to remedy the unconstitutionality and expressly highlighted this finding in its Decision. These are additional reasons why I voted for the Decision.

*Mag. Jadranka Sovdat*

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#### **CONCURRING OPINION OF JUDGE JASNA POGAČAR**

1. The reasoning [in Decision No. U-II-1/10] states that the Constitutional Court already in Decision No. U-I-47/94, dated 19 January 1995, proclaimed the right to decide in a referendum a human right. However, my view of the positions presented in the mentioned Decision is somewhat different.
2. In the matter at issue in Decision No. U-I-47/94, the Constitutional Court reviewed the admissibility of a legal regulation which at the abstract level excluded a referendum on specific types of acts (adopted by the shortened legislative procedure or referring to the implementation of ratified international agreements or the direct implementation of the budget). The decision is based on the finding that the Constitution does not explicitly impose restrictions on the issues that may be decided in

a legislative referendum. The Constitutional Court explained that Article 90 of the Constitution allows the exercise of the substantive provision of Article 44 of the Constitution on citizens' right to participate in the management of public affairs. In view of the fact that Article 90 of the Constitution represents the implementation of the right determined in Article 44 of the Constitution and because the right of 40,000 voters to require a legislative referendum which it encompasses may be considered a human right under the legal regime referred to in Article 15 of the Constitution, it decided that the second and the third paragraphs of Article 15 of the Constitution also apply to potential legal interferences with its provisions (if referring to this constitutional right). The adopted positions are therefore intended for reviewing the admissibility of restricting the rights referred to in Article 90 of the Constitution, for which the Constitutional Court has established a legal protection regime equivalent to the one that applies for relative human rights and freedoms.

3. What is relevant for decision-making in accordance with the first paragraph of Article 21 of the RPIA is the position according to which the National Assembly may require the Constitutional Court to determine whether the content of a call for a legislative referendum is not in conformity with the Constitution. In each specific case the Constitutional Court will have to review whether a decision made in a referendum to suspend the enforcement of an act or to reject it would affect such important constitutional rights that it would be admissible – weighing the constitutional values at issue – to interfere with the constitutional right of decision-making in a referendum.
4. The Constitutional Court characterized the right to decision-making in a referendum as the right referred to in Articles 44 and 90 of the Constitution, but it did not proclaim it a human right with universal import. It also did not explain its content, nevertheless it may be deduced from Article 90 of the Constitution that it entails rights enabling the implementation of a legislative referendum. Namely, it entails the right to request that a legislative referendum be called and the right to vote in a legislative referendum. The right arising from Article 44 of the Constitution is a general political right, which cannot be directly exercised, so the Constitution regulates its realisation in several places. A legislative referendum is a form of direct participation in the management of public affairs, expressly regulated by Article 90 of the Constitution, which also specifies the entitlements that ensure the implementation of a legislative referendum.
5. Even though in my opinion the Constitutional Court in Decision No. U-II-1/10 proclaimed the right to request a call for a legislative referendum and the right to vote in a legislative referendum to be human rights, this did not influence my decision, as I agree with the review and the result of the weighing of the constitutional values at issue.

*Jasna Pogačar*

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**CONCURRING OPINION OF JUDGE JAN ZOBEC,  
JOINED BY JUDGE DR ERNEST PETRIČ**

**I**

1. I will begin my considerations on the request for the prohibition of the referendum at the point where they should in fact end, namely by balancing the right to a referendum with the consequences that would result from the rejection of the Act in the referendum. Namely, a decision permitting or refusing a referendum depends on the answer to the following question: which of the conflicting constitutional values should be given priority. The first step in the search for the answer to this question is the definition of the “weight” of the competing values.<sup>1</sup>
2. First of all, I would like to discuss the right to a referendum, which has been defined by the Constitutional Court as a “human right”. It defined this right for the first time in Decision No. U-I-47/94, dated 19 January 1995, as follows: “In view of the fact that Article 90 represents a constitutional derivation of the constitutional right to the direct decision-making power of the citizens determined by Article 44 of the Constitution and also because the right of 40,000 voters to require that a referendum be called, which is encompassed in the article, can be considered a ‘human right’ under the legal regime referred to in Article 15 of the Constitution, the provisions of the second and third paragraphs of Article 15 of the Constitution shall also apply to potential legal interferences with these provisions (when referring to this constitutional right).” In my opinion, a referendum is not so much a human right as it is an important tool in the system of checks and balances with different roles and effects – depending on who the proposer of the referendum is. When a referendum is required by voters it has a different role than the one called by the National Assembly on its own initiative. The role of a referendum called by the National Assembly is different from the role of a referendum required by at least thirty elected deputies. In view of the various proposers, it is difficult to equate the different types of referendum and say that the weight of the underlying right to a referendum is always ‘the same’, irrespective of who initiates the referendum. There is undoubtedly a difference that must be considered between a referendum required by at least 40,000 voters directly exercising their right to a referendum and to direct participation in the management

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1 The weighing (and balancing) of the competing values is a difficult and dangerous task (it can easily overstep intuition and become arbitrary). It is impossible to compare colours and smells, length and weight; likewise, individual constitutional goods are beyond metrical comparison. Balancing (in law, this concept should be understood only metaphorically – *cf.* Tsakyrakis, Proportionality: An Assault on Human Rights?, *International Journal of Constitutional Law*, Vol. 7, Issue 3 (2009), p. 473) does not mean quantifying but establishing relations between the competing values and requires argumentative skills. What weighs heavily and prevails in the end, what is decisive, is the argument, the rational justification of the decision underpinned by the law of balancing, according to which the permitted degree of non-fulfilment of one value depends on the importance of the recognition of the competing value (*cf.* R. Alexy, *A Theory of Constitutional Rights* – trans. J. Rivers, Oxford University Press, Oxford, 2002, p. 101 *et seq.* In an individual case it is not the value with greater weight that prevails but the value which is supported by stronger arguments in the concrete circumstances.

of public affairs, and a referendum required by a parliamentary minority. A petition filed by at least thirty elected deputies entails 'only' an indirect type of participation in the management of public affairs. Namely, this constitutes a request which is generated within a representative democracy to correct, supervise, or check the speed of such democracy and which remedies its flaws and deviations by returning to its source – the people. The people (using the referendum as a tool) participate in the creation of a referendum [required by thirty deputies] to a similar extent as they participate in any voting in the National Assembly – only indirectly, through their elected representatives.

3. Therefore, the request for a referendum submitted by thirty elected deputies cannot be regarded in any other way. Whether such a request which gives rise to the exercise of the human right to a referendum, occurs or not depends entirely on two coincidences which cannot be directly influenced by the voters – the first coincidence is the situation when at least thirty elected deputies are in a minority position when an act is being adopted, and the second coincidence is the autonomous decision of these deputies to place the decision on an act on which they have been outvoted in the process of adoption, in the hands of the people in a referendum. As a human right which is not at all placed in the hands of the people (such as the right to periodical elections to the National Assembly), such a referendum, while it is still in the request phase, is in my opinion relatively distant from the people (precisely as distant as every decision made by the representatives of the people in the legislature) and is therefore less important than a referendum which is required by at least 40,000 voters – and can therefore be subject to more restrictions.
4. On the other hand, a referendum is an extremely powerful tool for protecting the weaker participants in the political process (and their voters) against an undemocratic parliamentary majority which disregards parliamentary dialogue and political discourse. By protecting the minority from the 'tyranny' of the majority (this term refers to those situations when the argument of power is used instead of the power of argument, situations beyond constitutional tolerance when the parliamentary majority only pursues its own interests), by promoting tolerant and democratic dialogue and a search for joint solutions, and by facilitating the development of constitutional pluralism "in which the constitutional players limit each other to adopting the fewest possible unilateral decisions and focus on decisions which benefit as many people as possible and pursue the supreme value of human dignity",<sup>2</sup> [a referendum required by 30 deputies] gains importance. Even though the referendum is intended for the people, in order to protect their rights and interests, even though it is a 'veto point of the weaker in the political process'<sup>3</sup> and even though it forces those who, supported by the majority of the votes in the parliament, pursue only their own coa-

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2 See M. Avbelj, *Ustavni monizem in krčenje referendumskega odločanja – kritična analiza doktrine zlorabe referenduma* [The Constitutional Monism and the Reduction of Referendum Decision-Making: A Critical Review of the Abuse of Referenda Doctrine], *Revus*, Issue 4 (2005), p. 87.

3 *Ibid.*

lition interests, to seek compromises,<sup>4</sup> it has its limitations. When there is no room for compromise (already) in the parliament, there is no referendum either. When and where this limit is, is a matter of balancing in every single case, namely the Constitutional Court (in the legal discourse and based on argumentation) must balance the 'veto point of the weaker' with the price to be paid for this (the possibility that due to the referendum unconstitutional consequences may occur).

5. And what is on the other side of the scales? Is there perhaps something that can completely annihilate the right to a referendum or even make it non-existent in a specific (in this case, even essential) area?

## II

6. Historical experience teaches us that democracy contains within itself the germs of self-destruction. To survive (to protect it from itself) it is necessary that democracy features an immune subsystem, namely one whose tool is the referendum request of a parliamentary minority "by which constitutional pluralism and constructive political-interest discourse is guaranteed",<sup>5</sup> and one which prevents (even within constitutional pluralism or particularly for this reason) (constitutional) democracy from being abolished in the name of democracy.<sup>6</sup> An important part of this subsystem is a release valve consisting of the constitutional prohibition on a referendum – and even more so when a referendum petition aims at disregarding a decision of the Constitutional Court. Therefore the idea that the people, functioning as the last instance, should decide on the 'validity' of a decision of the Constitutional Court is fundamentally constitutionally wrong.<sup>7</sup> Even more so if it is accompanied by the overt intention of the proposers of the referendum to manipulate the legislature's obligation arising from a decision of the Constitutional Court. Namely, it is not their intention to submit the ARSCOSS-B for legitimate consideration and supervision by the people in a referendum, but to achieve that this act is rejected by the will

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4 *Ibid.*, p. 86.

5 *Ibid.*, p. 93.

6 This threat is well illustrated by an interesting and topical consideration of B. M. Zupančič, namely that "[t]oday [...] under the influence of manipulative media, it is particularly easy to mislead a democratic majority into electing an undemocratic tyrant", followed by "[s]topping a widely supported Milošević or for this part even a Haider, Kučma, Hitler, Mussolini, etc. [...] is only possible on the basis of the constitution, which functions as an agreement subjecting the carriers of executive power to a Constitutional Court review" (European Convention on the Protection of Human Rights and Fundamental Freedoms; on its 50<sup>th</sup> anniversary, Information and Documentation Centre of the Council of Europe at NUK, Ljubljana 2000, p. 1).

7 North American constitutional history features a well known case concerning the Constitution of the State of Colorado, which in 1912 (supported by the zealous endeavours of T. Roosevelt) introduced through constitutional amendments the institute of the recall of judicial decisions, according to which the people had the right to recall in a referendum a decision of the Supreme Court of the State of Colorado which had declared a law or a city statute unconstitutional, and thus the unconstitutional legal act remained valid. Later the Supreme Court [of the United States] declared this constitutional amendment to be contrary to the Constitution of the United States. For more see S. Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, *American Journal of Legal History*, Vol. 24, Issue 3 (1980), pp. 257–272.

of the people and that, consequently, the unconstitutional situation established by Decision No. U-I-246/02, which has lasted for over seven years, continues.<sup>8</sup> The referendum proposers' premise that compliance with the decisions of the Constitutional Court is a matter of majority decision-making is constitutionally inadmissible. In Decision No. U-I-111/04, dated 8 July 2004, the Constitutional Court stated that "The Constitution [...] is also binding on citizens when they exercise power directly (the second paragraph of Article 3) by deciding on a certain law in a referendum" and that "[in] the Republic of Slovenia [...] a so-called constitutional democracy was established, the essence of which is that the values protected by the Constitution, including in particular human rights and freedoms (Preamble to the Constitution), can prevail over the democratically adopted decisions of the majority." When the Constitutional Court has already pronounced itself on these values and imposed on the legislature the obligation to remedy the unconstitutionality established, namely a referendum on a law which implements a decision of the Constitutional Court in a manner consistent with the Constitution and limits itself to remediation of the established unconstitutionality which can be remedied in only one manner (and additionally regulates only incidental and technical issues, those issues which are considered 'accessory' and those which are vital for the absolute protection of human rights and which can be rectified in only one way), the institute of the Constitutional Court prohibiting a referendum carries particular weight and importance. In my opinion, this weight is such that in this part (the part where the Act entails only the fulfilment of a clear-cut obligation imposed by the Constitutional Court Decision) it not only prevails over the 'human right' to a referendum but completely annihilates it – the right to a referendum simply does not extend that far. Therefore, in this part, no collision of constitutionally protected values is possible.<sup>9</sup> There is only one constitutional value, or stated more correctly, order: the legislature's obligation to implement the decisions of the Constitutional Court.

7. It is irrelevant whether I concur with Decision No. U-I-246/02 or not and whether I have or would have serious second thoughts about it – now, when it is only a matter of its implementation all these second thoughts, doubts, or even opposition are completely irrelevant if only for the fact that this is a decision of the highest body of

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8 It is evident at first sight that the referendum would be burdened by a democratic deficit – and that instead of having a legitimising, legislative, and supervisory character, it would have a political one (*cf.* A. Teršek, *Z referendumom nad demokratičnost in legitimnost*, *Pravna praksa*, Issue 7 (2004), p. 37). This intention of the referendum proposers (which somewhat reduces the 'weight' of the right in the case at issue) is evident from their reproaches against Constitutional Court Decision No. U-I-246/02, on which the ARSCOSS-B is based; the above-mentioned reproaches are stated in point 43 of the reasoning of the Decision.

9 And therefore the test of proportionality should not be used, whereby the court ponders what price must be paid for interfering with a right and which, in the allegory of J. Rivers, means that a nutcracker should be used to crack nuts and not a mallet – the latter only in the case the nutcracker is ineffective. In this case the use of a mallet and a nutcracker is of no relevance – it is the responsibility of the court to preserve the nut intact (*cf.* S. Tsakyrakis, cited work, pp. 492–493).

judicial power for the protection of human rights and that its decisions are binding.<sup>10</sup> This Decision is absolutely and unconditionally binding – on the National Assembly, on its deputies, on the people (the electorate), and on constitutional judges when deciding on permitting the referendum. As there exists the constitutional obligation of the legislature to remedy any unconstitutionality established in a decision of the Constitutional Court (Article 2 and the second paragraph of Article 3 of the Constitution; compare with Decision No. U-I-114/95, dated 7 December 1995, Official Gazette of the RS, No. 8/96, and OdlUS IV, 120), any obstacles used by the legislature (even if in its original role of the people) to hinder or prevent the achievement of this constitutional goal are considered unconstitutional, even though they might be highly 'democratic'.

8. In such circumstances a decision of the Constitutional Court has different force, effects, and obligations than when it plays 'only' the role of precedent and involves only a (relative) reference to the standards, doctrines, and viewpoints which the Court has developed in its jurisprudence (throughout the development of the Constitutional Court review, these are subject to constant verification, upgrading, supplementing, and also disintegration). I ask myself what permission to hold a referendum would mean from this point of view. I believe it would not only undermine the existence of the above-mentioned Decision but eventually, through continuous prolongation and generalisation, it would threaten the very existence of the Constitutional Court. What would be left of this institution if its decisions could simply be disregarded – if nothing else works, then also by means of the mechanisms of democratic decision-making, in order to achieve this goal. And what would remain of the Constitutional Court today if it permitted this to happen by granting permission for the referendum – would this not *in futuro* entail the gradual (self-)abolishment of the highest defender of human rights.

### III

9. If I put the right to a referendum on one side of the scales, considering that voters can only decide on some unessential, incidental, and more or less technical issues, all of which brings the specific weight of this right closer to 'voidness' (at the referendum, the voters could not vote on whether permits for permanent residence should be issued to the children of the citizens of other republics of former Yugoslavia who were born in the Republic of Slovenia after 25 June 1991, because these children would be in a worse position than their parents, because this issue involves the human rights of children; likewise, they could not vote on issues concerning those Slovene citizens who had been removed from the register of permanent residents and had acquired citizenship without having first acquired a permit for permanent residence), and all the rest on the other side of the scales – that is, not only human rights, the observance and protection of which are provided for in the ARSCOSS-B (dignity, equality

<sup>10</sup> It is true that 'only' a law can stipulate that the decisions of the Constitutional Court are binding. But this would also apply if the law did not stipulate that – such an effect follows already from the constitutional status and the jurisdiction of the Constitutional Court (Articles 160 and 161 of the Constitution).

before the law, safety)<sup>11</sup> with which the National Assembly attempted to remedy the unconstitutionality established in points 1, 2, and 3 of the reasoning of Decision No. U-I-246/02, but also the fact that the failure to abide by a decision of the Constitutional Court constitutes a violation of Article 2 and the second paragraph of Article 3 of the Constitution and that more than seven years have elapsed since Decision No. U-I-246/02 was issued, I am convinced that the constitutional values guaranteed by the ARSCOSS-B should be given priority – irrespective of the fact that it is not known how many persons cannot regulate their legal status without the ARSCOSS-B (these are individuals who were not actually present in the Republic of Slovenia at the time the ARSCOSS was enforced – either due to the measure of the forcible removal of an alien from the country or because they had left the Republic of Slovenia for reasons directly related to their removal from the register of permanent residents). The prohibition of a referendum can indeed be based only on actual, concrete, and proven (not only theoretical, but also tangible) unconstitutional consequences which would occur due to the rejection of an act in a referendum, which means that the National Assembly in requesting this prohibition must by means of definitions factually and concretely state (and prove) that the rejection of the act at the referendum would give rise to such consequences. However, the case at issue is special in this regard. I believe that the burden of the claim and the burden of proof are shifted here. Shifted because the meaning and the purpose of the ARSCOSS-B are completely clear and undisputable: to remedy the unconstitutionality established in Constitutional Court Decision No. U-I-246/02. In such cases the National Assembly need not separately allege and prove that the postponement of the enforcement of an act or the rejection of an act in the referendum would give rise to unconstitutional consequences. One unconstitutional consequence is already the very fact that the Decision of the Constitutional Court has still not been implemented. The Decision of the Constitutional Court by which the Constitutional Court established an unconstitutionality (the Constitutional Court would not have established that if it had not been convinced of the existence of unconstitutionality)<sup>12</sup> and the finding

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11 One question is whether those persons who had been removed from the register of permanent residents can perhaps become a group pushed to the margins of society due to strong social stigmatisation and therefore have to be considered a specific (definable) social minority. In such case of a direct conflict (between the social majority and minority) this should give sufficient reason to narrow the scope of the right to direct participation in the management of public affairs and the right to decide at a referendum, particularly because restrictive interference with the rights of one group of people cannot be justified by the protection of the rights of another group (cf. A. Teršek, *Ustavnopravne meje referendumске демокracije – ob odločbi US RS št. U-I-111/04-21 in “Primer džamija”*, Revus, Issue 5 (2005), p. 85). This circumstance could thus represent additional ‘weight’ in favour of the prohibition of the referendum (the protection of a civilised individual against the violence of others has always been the function of everything legal – see B. M. Zupančič, *ibid.*) – but not when such a group enjoys very strong support from the majority exerting influence in terms of politics and the media.

12 Last but not least, it follows from point 27 of the reasoning of Decision No. U-I-246/02 that the number of persons to which it refers is not high. Namely, the Constitutional Court stated that “it does not exclude the possibility that some citizens of other republics left the Republic of Slovenia also for fear of the pronounce-

that by this regulation the National Assembly eliminates the unconstitutionality established in the Decision are already enough. If the referendum proposers are of the opinion that the rejection of the Act at the referendum would not give rise to unconstitutional consequences or that these would be so negligible or of such little importance that the right to referendum decision-making should be given priority (or as I see it, that it is still possible to talk about the existence of the human right to a referendum), then the burden of proof is on them. The lack of reliable data on how many people who had been removed from the register of permanent residents could be considered entitled persons pursuant to the ARSCOSS-B because without this Act they cannot regulate their status (in other words, the number of people who, for reasons directly associated with the removal from the register, were not actually present in the Republic of Slovenia upon the enforcement of the ARSCOSS and thus could not regulate their legal status) cannot serve as an excuse for the failure to abide by the decision of the Constitutional Court.

10. To conclude: the encroachment on the right to a referendum is in this case shallow, superficial, and therefore negligible (this right only exists for the purpose of regulating some incidental, more or less technical issues which due to their organic relation to the subject matter of the retroactive recognition of permanent residence could not be, in the nature of things, regulated separately by some other act; as regards the essential issue, namely the question of whether the unconstitutionality established in points 1, 2, and 3 of the operative provisions of Decision No. U-I-246/02 should be remedied, there is no right to a referendum). On the other hand, the rejection of the Act at the referendum would deeply interfere with a constitutional value, i.e. compliance with the decisions of the Constitutional Court, and with the very essence of the rights which are (for now only on paper) protected by the Decision of the Constitutional Court.

*Jan Zobec*

*Dr Ernest Petrič*

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ment of the measure of the forcible removal of an alien pursuant to Article 28 of the AA, even if such measures had rarely been pronounced and the unregulated residence status of the citizens of other republics had generally been tolerated.”

Decision No. **U-II-1/12, U-II-2/12**, dated 17 December 2012

### DECISION

At a session held on 17 December 2012 in proceedings in accordance with the first paragraph of Article 21 of the Referendum and Popular Initiative Act (Official Gazette RS, No. 26/07 – official consolidated text), initiated upon the requests of the National Assembly, the Constitutional Court

*decided as follows:*

1. Unconstitutional consequences would occur due to the suspension of the implementation or rejection of the Slovene National Holding Company Act (EPA 516-VI) in a referendum.
2. Unconstitutional consequences would occur due to the suspension of the implementation or rejection of the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (EPA 637-VI) in a referendum.

*Reasoning*

#### A

1. On the basis of the first and second paragraphs of Article 21 of the Referendum and Popular Initiative Act (hereinafter referred to as the RPIA), on 6 November 2012 and 23 November 2012 the National Assembly adopted two orders requesting the Constitutional Court to assess whether unconstitutional consequences could occur due to the suspension of the implementation or rejection of the Slovene National Holding Company Act (hereinafter referred to as the SNHCA) and of the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (hereinafter referred to as the MSSBA) in a referendum.
2. In the request regarding the SNHCA, the National Assembly alleges that unconstitutional consequences could occur due to the suspension or rejection of the SNHCA in a referendum, as well as a situation that would be inconsistent with Articles 1, 2, 3, 8, 34, 50, 51, 86, 87, 89, 90, 91, and 153 of the Constitution. The implementation of entire chapters of the Constitution that regulate the organisation of the state, human rights, and fundamental freedoms would allegedly be seriously jeopardised. It

alleges that the SNHCA should be implemented within the shortest possible period of time; any later implementation would allegedly to a high degree nullify its provisions. Even the approval of this Act in a referendum would allegedly not be able to eliminate unconstitutional consequences, as in the period until the referendum is to be carried out it would not be possible to take urgently necessary measures to maximise the value of state property and to stabilise public finances, which would thus render impossible the financing of state tasks determined by the Constitution. In the assessment of the National Assembly, such a situation represents an evident unconstitutionality, the elimination of which is allegedly necessary for the protection of such constitutionally important values as ensuring a social state and human dignity.

3. The National Assembly alleges that if the Republic of Slovenia does not adopt the reform measures in time it will be obliged to apply for international financial assistance. It is of the opinion that the commitments contained in the agreement regulating the granting of such assistance would entail an interference with the constitutional principle of supremacy. The so-called *troika* that would be making the decision, i.e. the representatives of the European Union, a representative of the International Monetary Fund (hereinafter referred to as the IMF), and the parliaments of other Member States of the European Union, would “dictate” assistance measures that would be inconsistent with Article 3a of the Constitution. Furthermore, by the end of 2013 Slovenia should adopt regulations for the implementation of Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ L 306, 23 November 2011, page 41 – hereinafter referred to as Directive 2011/85/EU), while it is also bound by the intergovernmental treaty on the fiscal agreement that was ratified by the National Assembly by the Act Ratifying the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, and the Kingdom of Sweden (Official Gazette RS, No. 35/12, MP, No. 4/12 – hereinafter referred to as the TSCG).
4. Delayed adoption of measures regarding the management of state property would allegedly also jeopardise the fulfilment of international commitments of the Republic of Slovenia regarding the public deficit. The National Assembly warns that on the basis of Articles 3a and 8 of the Constitution, Slovenia must respect the commitments that it made to its European partners in the euro area. Disrespecting such commitments under European Union law would not only entail a violation of such law, but also an unconstitutional situation in the framework of Slovenia’s constitutional regulation. Without the adoption of the immediate necessary measures it would not be possible to eliminate the excessive public deficit of the state and thus provide for the fulfilment of the obligations determined by Articles 119 and 126 of the Treaty

on the Functioning of the European Union (consolidated version, OJ C 83, 30 March 2010 – hereinafter referred to as the TFEU) in order to reduce the public deficit by 3% of the gross domestic product (hereinafter referred to as GDP) by the end of 2013.

5. The National Assembly substantiates the unconstitutionality of the present regulation by alleging that anomalies and complexities occurred in the implementation of the Management of Assets Owned by the Republic of Slovenia Act (Official Gazette RS, Nos. 38/10, 18/11, 77/11, and 22/12 – hereinafter referred to as the MAORSA), allegedly resulting in the Republic of Slovenia losing credibility abroad. The SNHCA, as part of the reforms, would allegedly contribute to the improvement of the economic environment and to the stabilisation of the public finances. As Slovenia has announced such reforms, the implementation of the SNHCA would allegedly be a necessary step towards improving the credit rating of the state. The National Assembly alleges that the present regulation in the MAORSA and its implementation in practice allow for abuses, which devalues state property. The Capital Assets Management Agency of the Republic of Slovenia (hereinafter referred to as the CAMARS) allegedly overexploited its independent position and acted, contrary to the guidelines adopted by the Government, to the detriment of state property and therefore of the taxpayers. It allegedly follows therefrom that due to the worse economic situation in the state, the exercise of the constitutional right to security of employment and the right to social security (Articles 66 and 50 of the Constitution) is not ensured. As the CAMARS allegedly does not achieve optimal profitability from the management of state property, which allegedly affects the economic situation, the welfare of the state, and employment possibilities, the National Assembly alleges that the MAORSA interferes with Article 34 of the Constitution, which guarantees the right to personal dignity and safety to everyone.
6. The National Assembly also alleges that the present regulation under the MAORSA is inconsistent with the principle of the separation of powers (the second paragraph of Article 3 of the Constitution). The SNHCA allegedly determines additional competences of the National Assembly that allegedly to a greater extent implement the principle of the separation of powers.
7. The current regulation is allegedly inconsistent with the principle of the conformity of legal acts determined by Article 153 of the Constitution as it allegedly fails to implement to a sufficient degree the Guidelines of the Organisation for Economic Cooperation and Development (hereinafter referred to as the OECD) for the corporate management of companies in state ownership.
8. In the opinion of the National Assembly, the hindered borrowing of the state on the international financial markets and consequent jeopardised financing from public funds allegedly entail a violation of the Constitution, as such a situation already interferes with the constitutional guarantees regarding social security and human dignity. A situation in which financing from public funds that are allegedly jeopardised to such a degree that the state is allegedly no longer able to finance its obligations that are guaranteed to citizens and other entitled persons by Articles 50 and 51 of the Constitution allegedly violates the principle of a social state determined by Article

2 of the Constitution and interferes with the position of Slovenia as a democratic republic (Article 1 of the Constitution) based on human dignity. In such a position, the current regulation in the MAORSA, which does not allow for effective and clear management of state property, is allegedly inconsistent with the constitutional right to social security, including the right to a pension, as the Republic of Slovenia is allegedly not able to guarantee a living minimum income to a particular part of the population, and even less the social minimum income, which is higher.

9. The National Assembly also alleges that the request of a group of deputies that a referendum on the SNHCA be called does not fulfil the constitutionally determined conditions for the calling of a referendum, as it allegedly does not contain 30 handwritten signatures of deputies. Therefore, the calling of such referendum would in itself cause unconstitutional consequences. By Order No. U-II-1/12, dated 15 November 2012, the Constitutional Court requested that the National Assembly state whether there exists a request for the calling of a subsequent legislative referendum regarding the SNHCA, with the handwritten signatures of at least 30 deputies enclosed, in conformity with the first paragraph of Article 15 of the RPIA and the second paragraph of Article 113 of the Rules of Procedure of the National Assembly (Official Gazette RS, No. 92/07 – official consolidated text – hereinafter referred to as RPNA-1). On 22 November 2012, the President of the National Assembly announced that a request calling for a referendum on the SNHCA with 30 signatures of deputies enclosed exists.
10. In its request regarding the MSSBA, the National Assembly alleges that the suspension of the implementation or the rejection of this Act in a referendum could lead to a situation that would be inconsistent with Articles 1, 2, 3, 8, 50, 51, and 153 of the Constitution, and also the implementation of entire chapters of the Constitution that determine the organisation of the Republic of Slovenia, human rights, and fundamental freedoms would be seriously jeopardised. The National Assembly alleges that the prompt adoption of reform measures, including the reorganisation of the banking sector, is crucial due to the deterioration of the credit rating of Slovenia, as Slovenia would otherwise have to apply for international financial assistance from the European fund in order to ensure financial stability. By applying for international financial assistance in which also the IMF is included, a constitutionally inadmissible interference with the supremacy of the state that is outside the scope determined by Article of 3a of the Constitution would occur.
11. The National Assembly substantiates the unconstitutionality of the existing statutory regulation with the allegation that the regulation currently in force fails to regulate the possibility to resolve the situation that has arisen in the Slovene banking system and caused a deterioration of the credit ratings of the Republic of Slovenia. As a consequence, borrowing possibilities are allegedly limited and thus financing from public funds is jeopardised. It claims that the existing instability of public finances is so severe that the Republic of Slovenia is no longer able to finance the obligations that are guaranteed to its citizens and other entitled persons by Articles 50 and 51 of the Constitution, which entails, as a consequence, also a violation of the principle of a social state determined by Article 2 of the Constitution. In the opinion of the

National Assembly, such a situation also entails an interference with the position of the Republic of Slovenia as a democratic state (Article 1 of the Constitution) and an interference with the human dignity of its citizens. Due to the hindered borrowing, which is a consequence of the continual deterioration of its credit ratings, the reason for which lies precisely in the condition of the banking system, the state is allegedly no longer able to ensure the social minimum income to current and future generations, and for a certain part of the population the provision of even a living minimum income is allegedly jeopardised. In addition to the rights that the Constitution specifically determines as human rights, also other rights whereby the Constitution binds the state to act in a defined active way (e.g. Articles 49, 52, and 66 of the Constitution) are allegedly jeopardised. Due to the hindered borrowing or imminent incapacity to borrow, the state is allegedly unable to fulfil its obligations even by increasing the public deficit, which currently is already excessive. Due to its incapacity to borrow, the state is allegedly unable to provide for social and other rights, thus also causing a violation of the second paragraph of Article 148 of the Constitution.

12. The National Assembly also alleges that without the adoption of the immediate urgent measures contained in the MSSBA subsequent deterioration of the credit ratings of the state and of the banks would occur, possibly rendering the recapitalisation of banks through the European Central Bank (hereinafter referred to as the ECB) impossible, thus causing a liquidity crisis in the banks, as the ECB resources are allegedly the sole remaining source of liquidity for the banks. The problem of repaying the credits that the Republic of Slovenia has received from the European Investment Bank (hereinafter referred to as the EIB) would allegedly result, and also the credibility of guarantees by the state would allegedly decrease.
13. The National Assembly alleges that the negative trend regarding the deterioration of credit ratings, which has arisen precisely because of the problems in the Slovene banking system, can only be halted by the implementing measures contained in the MSSBA. The adoption of the MSSBA would allegedly once again enable state borrowing, which is urgently necessary in order to provide for social security. It thereby specifically underlines the importance of prompt implementation of the reform measures, as the MSSBA would allegedly efficiently eliminate unconstitutional consequences and prevent the emergence of new, even worse, unconstitutional consequences only if it is implemented in the shortest time possible. Even if the Act were to be implemented after a decision thereon in a referendum, which allegedly would happen only in the first quarter of 2013, this would compromise its effects to a great degree.
14. Allegedly, delayed implementation of the MSSBA would, due to the higher price of delayed realisation of such measures, also jeopardise the fulfilment of the international commitments of Slovenia regarding the public deficit. Without the adoption of immediate necessary measures it would allegedly be impossible to eliminate the excessive public deficit of the state and thereby provide for the fulfilment of the obligations determined by Article 3a of the Constitution and Article 126 of the TFEU, and, by the end of 2013, to reduce the public deficit by 3% of GDP. For the same

reason, it would allegedly be impossible to fulfil the obligations under Article 8 of the Constitution. The legislature has namely already ratified the TSCG, on the basis of which respect for the fiscal rule regarding a balanced budget must be ensured. The National Assembly also warns that the Republic of Slovenia has to adopt regulations ensuring transposition of Directive 2011/85/EU by the end of 2013.

15. The request of the National Assembly regarding the SNHCA was transmitted by the Constitutional Court, for reply, to the group of deputies who filed the request calling for a referendum regarding the SNHCA (hereinafter referred to as the applicant of the request for the calling of a referendum on the SNHCA), which replied to it. It claims that the substantive prerequisites for prohibiting the referendum are not met, as the National Assembly allegedly had not demonstrated the unconstitutionality of the regulation currently in force, which it should have demonstrated with reference to the established case law. It thereby refers to Decisions of the Constitutional Court No. U-II-1/11, dated 10 March 2011 (Official Gazette RS, No. 20/11), and No. U-II-3/11, dated 8 December 2011 (Official Gazette RS, No. 109/11). The claims of the National Assembly allegedly refer only to the inefficiency of the regulation currently in force, which the SNHCA allegedly eliminates and ensures a higher level of accord with the OECD guidelines. The applicant of the request for the calling of a referendum on the SNHCA does not concur with the position of the National Assembly that during the legislative proceedings the insufficiencies of the SNHCA to which the OECD called attention were eliminated by amendments. Moreover, it claims that the regulation under the SNHCA is inconsistent with the first paragraph of Article 146 and with Article 148 of the Constitution. It explains its viewpoint on the reasons for the adoption of the Act at issue and its own proposal regarding the statutory regulation of the management of state property, which as such was also submitted in the legislative procedure and which was intended to ensure, through a special state management company, effective and clear management of state property, but which was rejected by the ruling coalition. It specifically warns that also the capital investments of the state in the banks that would allegedly in the near future face reorganisation requiring an increase in their capital will be transferred to a holding company. As the resources for an increase in the banks' capital are allegedly not envisaged in the budget for 2013 and 2014, these resources will allegedly have to be provided by the holding company. The applicant of the request for the calling of a referendum on the SNHCA claims that the SNHCA does not belong in the framework of measures that are linked to the financial stabilisation of the state. Also the real properties of the state would allegedly be transferred to the holding company, whereby it would not be suitable for some of them to be managed by the holding company. The applicant is of the opinion that all the formal prerequisites for the calling of a referendum are met. The proceedings by which the Constitutional Court decides whether due to the calling of a legislative referendum unconstitutional consequences could occur are allegedly not intended to assess whether the procedural prerequisites for the calling of such are met, as this is, according to the regulation of the National Assembly in its Rules of Procedure, decided on by

the President of the National Assembly, which reflects his autonomy when dealing with such issues. The applicant proposes that the Constitutional Court decide that unconstitutional consequences would not occur due to the suspension of the implementation or the rejection of the SNHCA at a referendum.

16. The request of the National Assembly regarding the MSSBA was transmitted by the Constitutional Court for reply to the Trade Union of Chemical, Non-Metal, and Rubber Industries of Slovenia (hereinafter referred to as the petitioner for a referendum on the MSSBA), which replied to it. It is of the opinion that the request of the National Assembly is deficient as it states neither that the MSSBA represents the direct implementation of a particular human right, nor that this Act remedies the unconstitutionality of an act that has been so determined by a decision of the Constitutional Court, in light of the fact that in its hitherto constitutional assessments the Constitutional Court has allegedly only interfered with the right to a referendum in these two instances. In this regard, the National Assembly allegedly only unclearly claimed the existence of the unconstitutionality of the provisions of the valid legislation in the field of the financial system. The National Assembly allegedly did not even allege the unconstitutionality of particular statutory provisions, thus the Constitutional Court would have to, as is required when it assesses a request regarding the unconstitutionality of an act, refuse to decide on the merits of the request. The reasons by which the National Assembly substantiates the request allegedly show at the utmost that the implementation of the legislation is inappropriate, and not that it is constitutionally deficient. Also the assessment of the National Assembly that the current regulation is poor and that the MSSBA improves it allegedly cannot substantiate the claims regarding the unconstitutionality of the statutory regulation. The claims of the National Assembly regarding the jeopardised sovereignty of the Republic of Slovenia are allegedly “misplaced” and allegedly concern some uncertain and distant possibility, which is not demonstrated. The reference to human dignity allegedly cannot be regarded as a relevant constitutional argument, as the decision-making of the Constitutional Court would thus pass from a legal assessment to an assessment of economic grounds and of the benefits resulting from challenging the acts. The urgency of the implementation of the MSSBA allegedly also cannot be a reason for the interference with the right to a referendum, as this Act could have been implemented sooner. Furthermore, the right to a referendum allegedly cannot be nullified due to some supposed time constraint.
17. The Constitutional Court sent the reply of the applicant of the request for the calling of a referendum on the SNHCA and the reply of the petitioner for a referendum on the MSSBA to the National Assembly, which replied to them. The National Assembly concurs with the attached opinions of the Government regarding the allegations of the applicant of the request for the calling of a referendum on the SNHCA and regarding the allegations of the petitioner for a referendum on the MSSBA. Regarding the SNHCA, the Government is of the opinion that the issue of proving the inexistence of the basic prerequisites for prohibiting the referendum in the case

at issue by referring to another case (Decision No. U-II-1/11) with a significantly different factual and substantive situation is inappropriate and that each individual case should be decided on separately. It states that in the case at issue regarding the SNHCA, this Act is part of an integrated package of measures and that it is precisely the bad management of companies with capital investment from the state that is one of the key reasons for the poor condition of the public finances. The fact that the method of management of state property is of key importance to the condition of the public finances is allegedly admitted by the applicant of the request for the calling of a referendum on the SNHCA itself, in that it claimed that “the management influences not only the state as the owner but also the economic and social condition of the state.” The government is of the opinion that the existence of unconstitutionality is sufficiently and relevantly demonstrated by the substantiation of the unconstitutionality of the existing statutory regulation from the viewpoint of the right to social security and a pension, of a democratic and social state, of the right to security of employment, of the principle of the separation of powers, and of the principle ensuring the conformity of legal acts. It explains in detail why the SNHCA is more appropriate than the MAORSA, and reiterates the claims of the National Assembly from the request. Regarding the MSSBA, the Government claims that the request of the National Assembly is substantiated in detail and grounded, and that it clearly stems therefrom which constitutional rights are violated in the current situation, as there exists no legal basis for appropriate treatment of weakened finances in the banking sector. Therefore, it would be impossible to prove the unconstitutionality of the existing legislation, as it does not contain tools for transferring and resolving the banks’ bad debts. In the opinion of the Government, the economic sovereignty of the state is a sufficiently high criterion that can be considered by the Constitutional Court when weighing the right to a referendum and the limitation of such right. It states reasons why it is allegedly precisely the MSSBA that is of crucial importance for improving the situation in the banking sector. It stresses the need for prompt implementation of the MSSBA, as its delayed implementation (if a referendum is held, only in the first quarter of 2013) would lead to the inability to realise measures urgently necessary for the reorganisation of the Slovene banking system whereby the financing of the obligations of the state determined in the Constitution would be rendered impossible.

18. From the Ministry of Finance the Constitutional Court received the documents regarding the proceedings conducted against the Republic of Slovenia on the basis of Article 126 of the TFEU due to its excessive public deficit, data regarding the main guidelines for economic policy and public finance policy for 2013 and 2014, data regarding expected borrowings of the Republic of Slovenia for 2013, data regarding the expected total amount of payments for obligations arising from credits and guarantees to the detriment of the state for 2013, the last three credit ratings of the Republic of Slovenia issued by the credit rating agencies Standard & Poor’s, Moody’s Corporation, and the Fitch Group, as well as some other data regarding the situation of public finances in the Republic of Slovenia.

19. The explanations of the Ministry of Finance were sent to the applicant of the request for the calling of a referendum on the SNHCA and to the petitioner for a referendum on the MSSBA. The petitioner for a referendum on the MSSBA took a position thereon, whereby it continued to fully support the positions in its reply to the request of the National Assembly. It is of the opinion that the documentation of the Ministry of Finance confirms its position that there are no substantiated constitutional reasons for the prohibition of a referendum on the MSSBA. Allegedly, from the data of the Ministry of Finance it namely proceeds that “the budget is not at all illiquid, and there are no prospects (demonstrated or substantiated in the request of the National Assembly) for something similar in the future; the borrowings of the state are obviously flowing quite smoothly, even ‘successfully’, regarding the MF documentation. These data allegedly only show a certain oscillation of interest rates or conditions for borrowing. Referring to the assessment criteria determined by Decision U-II-1/11, it claims that it is not possible to substantiate the prohibition of a referendum by the supposed unconstitutionality in the future and by economic reasons that are not measurable.

#### B – I

20. In conformity with the first sentence of the second paragraph of Article 3 of the Constitution, in Slovenia power is vested in the people. In conformity with the second sentence of the second paragraph of this Article, they exercise this power directly and through elections, consistent with the principle of the separation of powers. In such manner, the Constitution establishes already at the level of basic constitutional principles two ways whereby the power, which in any case belongs to the people, is exercised.<sup>1</sup> Elections are that democratic and generally established constitutional institute on the basis of which the people – the voters – confer this power on the members of the representative body for the period of a predefined term of office. It is through elections that the legitimacy that the elected members of the representative body exercise this power in the name of the citizens is established.<sup>2</sup> For the exercise of this power they are politically accountable to the people, and such accountability is re-established over and over again through periodic and free democratic elections. Therefore, in such sense this is termed the people’s indirect exercise of power, i.e. representative democracy.<sup>3</sup> The people’s direct exercise of power includes the known forms of direct democracy,<sup>4</sup> which also include the referendum.
21. In Article 90, the Constitution determines the legislative referendum as the basic form of direct democracy, whereby it determines in the first paragraph of this Article that in a referendum questions that are regulated by law can be decided on. In

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1 Cf. F. Grad in: L. Šturm (Editor), *Komentar Ustave Republike Slovenije, dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia: Supplement to the Commentary – A], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2011, p. 1099.

2 Cf. F. Grad, *Parlament in vlada* [Parliament and Government], Uradni list RS, Ljubljana 2000, p. 29.

3 Cf. F. Grad in: L. Šturm (Editor), *op. cit.*, pp. 1099–1100.

4 Cf. I. Kaučič in: L. Šturm (Editor), *op. cit.*, p. 1165.

the fifth paragraph of Article 90, the Constitution leaves the determination of the regulation of the manner of conducting legislative referenda to a law. Legislative referenda are called by the National Assembly, and the National Assembly is bound by the result of such referendum (the first paragraph of Article 90 of the Constitution). The second paragraph of Article 90 of the Constitution on one hand confers on the National Assembly the competence to decide on its own and of its own initiative whether to call a legislative referendum, and on the other hand gives certain subjects the right to call for a referendum: the National Assembly must call a legislative referendum if so is required by at least one third of the deputies, by the National Council, or by forty thousand voters. It clearly proceeds from this provision of the Constitution that voters directly exercise power at a legislative referendum either when a decision thereon is adopted by the National Assembly or when constitutionally authorised applicants request a legislative referendum. The manner how the right to request a call for a referendum is exercised is also determined by law, in conformity with the fifth paragraph of Article 90 of the Constitution. The legislature implemented its constitutional mandate determined by the fifth paragraph of Article 90 of the Constitution by means of the RPIA, by which the subsequent legislative referendum was established. The right to request a referendum is an important constitutional right which in an established constitutional democracy enables individual issues subject to statutory regulation to not be definitively decided on by an elected representative body, but that an act which such body has already adopted is, in accordance with the valid regulation under the RPIA, referred to the voters in order to be confirmed. If such right is successfully exercised, the voters decide on the implementation of such act in a referendum, whereby in this case they exercise the legislative power directly by exercising the right to decide in a referendum, the exercise of which is also regulated by the RPIA.<sup>5</sup>

22. In the first paragraph of Article 90, the Constitution allows for the calling of a legislative referendum on all issues that are the subject of regulation by law. From this provision stems the fact that the Constitution favours a wide possibility of conducting legislative referenda. However, this does not mean that the right to request a legislative referendum is absolute in the sense that the referendum should be admissible whenever the conditions for the calling of such under the second paragraph of Article 90 are fulfilled. The Constitutional Court adopted such a position already by Decision No. U-I-47/94, dated 19 January 1995 (Official Gazette RS, No. 13/95, and OdlUS IV, 4), where it proceeded from the fact that parallel to the right ensured by the second paragraph of Article 90 of the Constitution there can also exist other, equally constitutionally protected rights whose constitutional protection needs to be ensured. The weight of such other constitutional rights can in certain cases be so important that the right to request a legislative referendum must give way to them. It is also on this that the first paragraph of Article 21 of the RPIA is based, in accord-

5 Cf. S. Nerad in: I. Kaučič (Editor), *Zakonodajni referendum* [Legislative Referendum], Inštitut za primerjalno pravo, GV Založba, Ljubljana 2010, p. 125.

ance with which, even though the conditions determined by the second paragraph of Article 90 are fulfilled, a referendum cannot be held if it is possible to assess that unconstitutional consequences would occur due to the suspension of the implementation of the act at issue or its rejection in a referendum.

23. The Constitutional Court has hitherto numerous times underlined that the notion of an unconstitutional consequence is a non-defined legal term whose content is interpreted by the Constitutional Court through positions adopted in proceedings for the review of the constitutional admissibility of a legislative referendum.<sup>6</sup> As a particular case might deal with a collision of constitutional values, wherein on one hand there is a constitutionally ensured right to request a legislative referendum, and on the other there are other constitutionally protected values, it has to be determined in each individual case what these constitutionally protected values are that can oppose the right determined by the second paragraph of Article 90 of the Constitution. In the hitherto decisions adopted in the exercise of its competence determined by Article 21 of the RPIA, the Constitutional Court proceeded from the criteria of its assessment that were, after being first formulated in Decisions No. U-II-1/06, dated 27 February 2006 (Official Gazette RS, No. 28/06, and OdlUS XV, 17) and No. U-II-1/09, dated 5 May 2009 (Official Gazette RS, No. 35/09, and OdlUS XVIII, 20), further elaborated and as such their grounds were contained in Decision No. U-II-2/09, dated 9 November 2009 (Official Gazette RS, No. 91/09, and OdlUS XVIII, 50). In the latter case, the Constitutional Court had to deal with a request for the calling of a referendum on an act by which the legislature had remedied an unconstitutional situation which had arisen because it had failed to respond to Decision of the Constitutional Court No. U-I-159/08, dated 11 December 2008 (Official Gazette RS, No. 120/08, and OdlUS XVII, 71) within the time limit imposed by the Constitutional Court.<sup>7</sup> By this Decision, the unconstitutionality of an act in force was determined. The Constitutional Court deemed the position and the authority of the judiciary, as ensured by the second paragraph of Article 3 and Article 125 of the Constitution, the right to judicial protection (the first paragraph of Article 23 of the Constitution), and the importance of respect for the Constitutional Court decisions for the enforcement of the principles of the rule of law (Article 2 of the Constitution) and of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution) to be constitutionally protected values that had to be given priority over the right to request a referendum.<sup>8</sup> In the mentioned case, these values were the starting

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6 Cf. Decision No. U-II-1/11, Paragraph 14.

7 In this Decision the Constitutional Court assessed the constitutionality of the regulation of judicial salaries in the Public Sector Salary System Act (Official Gazette RS, No. 95/07 – official consolidated text, 17/08, 58/08, and 80/08 – PSSSA) and in the Judicial Service Act (Official Gazette RS, No. 94/07 – official consolidated text – JSA).

8 The Constitutional Court assessed that such values must be given priority over the right to a referendum and that unconstitutional consequences would occur by the rejection of the Acts in a referendum. It namely established that even after two Constitutional Court decisions by which disrespect for one of the fundamental principles of the Constitution was established, i.e. the principle of the separation of powers, the legislature

point of the assessment. Therefore, the criteria of the assessment proceeded from the fact that there existed an unconstitutionality with regard to the valid statutory regulation that previously had been finally determined by a Constitutional Court decision, and from the assessment of whether the act which was to be the subject of deciding in a referendum remedied such unconstitutionality. On the basis of these findings, the Constitutional Court assessed whether it would be admissible for the previous unconstitutional situation to continue, were the act to be rejected in the referendum. Decision No. U-II-1/10, dated 10 June 2010 (Official Gazette RS, No. 50/10), also concerned a case with the same basis. In that case an unconstitutionality had been determined by Decision No. U-I-246/02, dated 3 April 2003 (Official Gazette RS, No. 36/03, and OdlUS XII, 24)<sup>9</sup> due to an inconsistency with the principles of legal certainty (Article 2 of the Constitution) and equality (the second paragraph of Article 14 of the Constitution), while by Decision No. U-II-1/10 the Constitutional Court specifically underlined also the right to personal dignity (Article 34 of the Constitution). For a long period of time the legislature failed to respond to Decision No. U-I-246/02, whereby the Constitutional Court in quite a number of subsequent decisions kept warning of the unconstitutionality of such situation.<sup>10</sup> Therefore, the assessment of the admissibility of the referendum in that case was performed on the basis of the same starting points as in Decision No. U-II-2/09.

24. The criteria of assessment by which the Constitutional Court in the mentioned cases assessed whether unconstitutional consequences could occur due to the rejection of the act in a referendum were adapted to the constitutional values which the Constitutional Court established carry significant weight in relation to the right to request a referendum.<sup>11</sup> The fact that the unconstitutionality had already been determined by a decision of the Constitutional Court placed two questions at the centre of the assessment criteria: 1) whether the valid act is unconstitutional, and 2) whether the act which was to be decided on in a referendum eliminates such unconstitutionality in a constitutionally consistent way. These were the basic questions that had to be answered in order for the Constitutional Court to then weigh, in such a situation involving a collision of constitutional values, whether priority should be given to the right to request

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had still not eliminated the unconstitutionality. It assessed that further continuation of the unconstitutional situation that a rejection of the Acts in a referendum would cause was constitutionally unacceptable, especially from the viewpoint of the role that the judicial authority has in a state governed by the rule of law and particularly regarding the protection of human rights and fundamental freedoms.

- 9 By this Decision, the Constitutional Court assessed the constitutionality of the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia (Official Gazette RS, No. 61/99 and 64/01 – ARLSCFY).
- 10 For instance, in Decision No. U-II-3/04, dated 20 April 2004 (Official Gazette RS, No. 44/04, and OdlUS XIII, 29).
- 11 In Decision No. U-II-2/09, the Constitutional Court stated: “The purpose that the legislature followed while adopting the first paragraph of Article 21 of the RPIA was obviously to prevent, by a Decision of the Constitutional Court, that in a referendum voters could adopt a decision which would render impossible a constitutionally consistent elimination of an unconstitutional legislative regulation.”

a referendum or to other constitutional values. The Constitutional Court followed such approach in its subsequent decisions by which it exercised its competence determined by the first paragraph of Article 21 of the RPIA, regardless of the fact that in some of them (see, in particular, Decision No. U-II-1/11) it was faced with situations that in their essence were significantly different than the situations in the mentioned decisions. Furthermore, as two cases concerned extensive acts that regulated entire legal fields (i.e. pension insurance and family relations), the Constitutional Court, due to the mentioned starting points, requested that the National Assembly demonstrate that there existed an evident unconstitutionality in the valid legislation that the Act which was to be subject to approval in a referendum allegedly remedied. Therefore, it requested that the National Assembly clearly demonstrate the existing unconstitutionality of the valid statutory regulation whose elimination was necessary in order to protect important constitutional consequences that had to be given priority over the right to request a legislative referendum, by which the voters were to decide on the adopted act.<sup>12</sup> If the National Assembly failed to demonstrate the unconstitutionality of the valid act, the Constitutional Court halted its assessment already at the first level of the determination of the existence of unconstitutional consequences, i.e. on the level of assessing whether the valid regulation was unconstitutional, without substantively assessing whether the case at issue referred, in addition to the right to request a legislative referendum, also to other values whose exercise and protection the newly adopted act pursues and which also must enjoy constitutional protection. In this manner, by Decision No. U-II-1/11 the Constitutional Court rejected the request at issue of the National Assembly, as the latter failed to demonstrate that the unconstitutionality of the act regulating pension and disability insurance already existed. It dismissed as irrelevant the allegations of the National Assembly that the state would have to increase borrowings even more in the future due to increased expenditures for the co-financing of the pension system as they could not substantiate the unconstitutionality of the valid statutory regulation.

25. In cases which are different in terms of content from the instances in Decisions Nos. U-II-2/09 and U-II-1/10, the hitherto established way of assessing the possibility of the occurrence of unconstitutional consequences can cause the constitutional arguments of the National Assembly directed towards the determination of unconstitutional consequences and the constitutional arguments of the applicants of the request for the calling of a referendum to not be given sufficient weight. When the situations which the Constitutional Court deals with are not such as those contained in Decisions Nos. U-II-2/09 and U-II-1/10, it can occur that the question of whether in addition to the right to request a legislative referendum also other constitutional rights are at issue is no longer the starting point of the assessment, as the assessment of the Constitutional Court can halt already at the first stage, as the criteria of assessment are entirely adapted to the situation stated in the mentioned Decisions. The criteria on the basis of which the Constitutional Court assessed the admissibility of the refer-

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12 The Constitutional Court already drew attention to the time limit for a constitutional review of the admissibility of a referendum in Decision No. U-II-1/11 and equally in Decision No. U-II-3/11.

endum in the stated cases were adapted to the constitutional values that by these two Decisions were weighed against the right to request the calling of a legislative referendum. What they had in common was especially that there already existed two Decisions of the Constitutional Court regarding the unconstitutionality of an act that in a state governed by the rule of law, in which the principle of the separation of powers is established, required that the legislature respond by adopting an appropriate statutory regulation that remedies such unconstitutionality. In different cases, such a starting point can lead to the overlooking of other constitutional values that may have an important, even decisive, weight when weighing the constitutional right determined by the second paragraph of Article 90 of the Constitution and other constitutionally protected values. Such can occur especially when what is at issue is a statutory regulation that predominantly or entirely regulates anew particular social questions. An act can namely regulate the exercise of constitutionally guaranteed rights and protect constitutional values that by their nature have an important constitutional weight in comparison to the right to request the calling of a constitutional referendum.

26. The stated facts require the Constitutional Court to modify to a certain extent its position regarding the starting point of the assessment and elaborate its understanding of the notion of unconstitutional consequences in the sense of the first paragraph of Article 21 of the RPIA. The fundamental value-based starting point for the competence of the Constitutional Court under the first paragraph of Article 21 of the RPIA is namely that that it is the Constitutional Court as the guardian of the Constitution whose duty it is to adjudge truly whether by the suspension of the implementation of an act or by its rejection in a referendum “so important constitutional rights would be affected that for this reason it would be admissible – by weighing the affected constitutional values – to interfere with the constitutional right”<sup>13</sup> to request a referendum, which is provided for by the second paragraph of Article 90 of the Constitution. The starting point of the assessment of the Constitutional Court is the constitutionally protected rights or other constitutionally protected values, while the assessment of the Constitutional Court regarding which of them has to be given priority in each individual case must be adapted to their nature and the relationship between them.
27. The criteria of the assessment that the Constitutional Court introduced by Decisions Nos. U-II-2/09 and U-II-1/10 are thus appropriate and sufficient when the Constitutional Court deals with a request to respect the principles of a state governed by the rule of law (Article 2 of the Constitution) and of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution), the basis of which can be found in the already extant decisions of the Constitutional Court. Then, by the adopted act the legislature eliminates the established unconstitutionality. These criteria are also appropriate when what is at issue is in one part a fully defined statutory regulation for which, already in the legislature’s assessment, it is evident that it is unconstitutional, regarding which the legislature itself would assess that such an unconstitutionality must be remedied. It is then possible to request and expect that the

13 As the Constitutional Court stated already in Decision No. U-I-47/94.

legislature fulfil the burden of allegation and the burden of proof in order to convince the Constitutional Court of the unconstitutionality of the valid act that the newly adopted statutory regulation remedies in a constitutionally consistent way, and that due to the need to ensure the protection of the stated constitutionally protected values these values must be given priority over the right to request a legislative referendum.

28. However, the constitutional assessment of the admissibility of a referendum is not limited only to instances when what is at issue is a determined unconstitutionality of a statutory regulation that needs to be eliminated. When what is at issue is the question of whether due to the rejection of an act in a referendum other constitutional values would inadmissibly be affected that do not of themselves refer to the elimination of the existing unconstitutionality of the statutory regulation, nor does the newly adopted act primarily pursue such a goal, in the starting point of the assessment of the admissibility of a referendum such constitutional rights must be taken into consideration and, regarding their importance and nature, the criteria for the assessment of the possibility of the occurrence of unconstitutional consequences must be established. Due to the holding of the referendum and the [possible] rejection of the act in a referendum, these constitutional values must not remain unprotected to such an extent that such would cause their substantial limitation or even emptying, which would destroy the balance of the constitutionally protected values.
29. With regard to all of the above, in the assessment of the existence of the possibility that unconstitutional consequences might occur, it is not possible to proceed from the established criteria for the assessment that presuppose an assessment of the constitutionality of the valid statutory regulation and of the newly adopted statutory regulation that is to be the subject of deciding in a referendum, but what has to be determined is which constitutionally protected values may be an obstacle to the realisation of the legislative referendum. Important constitutionally protected values are placed in opposition to the right determined by the second paragraph of Article 90 of the Constitution and these establish the starting point of the constitutional assessment and determine the criteria of its assessment in individual cases. In this manner, the Constitutional Court has the possibility to perform its role as the guardian of constitutional values and to assess, by means of weighing – in conformity with the general principle of proportionality (Article 2 of the Constitution) – which values, among all the values that otherwise enjoy constitutional protection, must be given priority in order to maintain the balance between the constitutional values and to protect those that due to the rejection of the act at issue could be jeopardised.
30. The legislature must respond, with the adoption of appropriate statutory regulation, to needs in all fields of social life, which is even more true if such needs concern the foundations of the functioning of the state or its ability to efficiently ensure human rights and fundamental freedoms.<sup>14</sup> The representative authority was given the com-

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14 Already in Decision No. U-I-69/03, dated 20 October 2005 (Official Gazette RS, No. 100/05, and OdlUS XIV, 75), the Constitutional Court stated: "The principle of adapting the law to social relations is one of the principles of a state governed by the rule of law (Article 2 of the Constitution)."

petence to exercise legislative authority in free democratic elections that demand responsible exercise of such power. The Government, as the constitutionally determined proposer of laws (Article 88 of the Constitution), also carries equal responsibility. The legislature has wide discretion regarding the regulation of individual social questions. The way it regulates them is a matter of the appropriateness of the statutory regulation, the adoption of which it is competent for and for which it carries all political responsibility. In this sense, the statutory regulation can also be, in conformity with the first paragraph of Article 90 of the Constitution, the subject of political decision-making in a referendum. However, the legislature is the first subject that, in accordance with the statutory regulation, is bound by the Constitution (the first paragraph of Article 153 of the Constitution), which it has to respect. Therefore, in instances when the legislature's intention is to protect important constitutional guarantees by exercising the legislative power and when by the adopted act it also has, in its opinion, already protected them, these values are placed against the right to request a legislative referendum. The legislature then no longer operates only in the framework of the appropriateness of the statutory regulation that is entirely within its discretion. When the protection of constitutional values is at issue, the statutory regulation gains a constitutional dimension. The latter is the basis for weighing the values and for assessing which of them should be given priority in order to ensure balanced (proportional) respect for all protected interests. Thereby the legislature has to assess whether the implementation of the newly adopted act is necessary in order to ensure the protection of the constitutional values that are placed against the right to request a referendum.

31. The right to request a legislative referendum is an important constitutional right explicitly determined by the second paragraph of Article 90 of the Constitution. As such, the Constitutional Court has to ensure its constitutional protection. Therefore, in the case of a collision between various constitutional values, the Constitutional Court must assess, when exercising the competence determined by the first paragraph of Article 21 of the RPIA, which of the constitutionally protected values must be given priority. Thereby, it first has to assess the importance of the constitutionally protected values that the National Assembly claims are placed against the right to request a referendum and whether their protection requires that statutory measures must be urgently adopted. Due to the holding of a referendum or rejection of the act in a referendum, the non-implementation of the newly adopted statutory regulation would inadmissibly limit or possibly even empty such values. Such would entail a serious obstacle to the exercise of the right to request a legislative referendum on acts that are intended to at least substantially mitigate, if not prevent, the limitation or even emptying of constitutional values. Due to their constitutional weight, they can outweigh the right under the second paragraph of Article 90 of the Constitution. On this basis, it first has to be determined what constitutional values are relevant in a specific case. Then, in accordance with their constitutional weight, it has to be assessed whether the right to request the calling of a legislative referendum has to have priority or whether such has to give way, as due to the protection of other con-

stitutional values newly adopted statutory measures must urgently be implemented in order to prevent unconstitutional consequences from occurring due to the suspension of the implementation of the act or its rejection in the referendum. Thereby, the Constitutional Court has to consider that due to Article 25 of the RPIA (which prohibits the National Assembly, for one year after the promulgation of referendum decision, from adopting an act that would be substantively inconsistent with the decision of the voters), the rejection of an act in a referendum can cause unconstitutional consequences to remain for at least one year.

## **B – II**

32. The petitioner for a referendum on the MSSBA alleges that there is a substantial deficiency in the request of the National Assembly in that it allegedly does not claim which statutory regulation is allegedly unconstitutional. Therefore, these allegations [of the petitioner] have to be replied to even before beginning a substantive assessment. Neither the RPIA nor the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) precisely determine the content of a request of the National Assembly by which it initiates the proceedings determined by the first paragraph of Article 21 of the RPIA. By the nature of the matter, its content can only be directly linked to the subject of the decision-making of the Constitutional Court, while this depends precisely on the content of the notion of unconstitutional consequence. In fact, the CCA namely does explicitly determine in the first paragraph of Article 24b what a request for a review of constitutionality must contain, but this and other provisions of Chapter IV of this Act, in conformity with the first paragraph of Article 49 of the CCA in other matters in the jurisdiction of the Constitutional Court, only apply *mutatis mutandis* and insofar as not otherwise provided by this Act. Under the second paragraph of Article 49, the CCA explicitly determines that the Rules of Procedure of the Constitutional Court determine which information must be contained in applications in other matters within the jurisdiction of the Constitutional Court if such is not already determined by law. As the RPIA, which establishes this special competence of the Constitutional Court, does not contain any provisions regarding this matter, the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, 54/10, and 56/11 – hereinafter referred to as the Rules) determine that the request of the National Assembly must contain a statement of the consequences which allegedly could occur due to the suspension of the implementation of the law or due to the law at issue not being adopted, and a statement of reasons due to which the consequences are allegedly unconstitutional (the second and third indents of Section XI.1. of the Annex with reference to the second paragraph of Article 34 of the Rules). The request of the National Assembly that refers to the referendum on the MSSBA contains such statement. Therefore, it is not possible to concur with the allegations of the petitioner for a referendum on the MSSBA regarding the existence of a substantial deficiency in the request that as a consequence allegedly does not allow for its substantive review.

33. However, it is necessary to agree with the position of the applicant of the request for the calling of a referendum on the SNHCA that the decision regarding the existence of the request for the calling of a legislative referendum constitutes an integral part of the National Assembly's autonomy. Therefore, the Constitutional Court did not take a position on the allegations of the National Assembly that refer to whether the National Assembly correctly determined that there existed a request by at least one third of the deputies regarding the calling of a referendum on the SNHCA.
34. Regarding the facts stated in paragraphs 28 to 30 of the reasoning of this Decision, what first has to be determined is which constitutional values are those which the National Assembly claims would be inadmissibly limited or jeopardised due to the suspension of the implementation of the SNHCA or the MSSBA or due to their rejection in a referendum. Thereby, the National Assembly specifically warns that inadmissible unconstitutional consequences would already occur due to the suspension of the implementation of the Acts, which was the reason why, regarding the MSSBA, it had filed its request even before the collection of voters' signatures for the filing of a request for the calling of a legislative referendum finished.
35. In both requests, the National Assembly underlines specific constitutionally protected values that in its opinion are already limited to such a degree that an unconstitutional situation already exists. It is precisely the implementation of the SNHCA and the MSSBA that allegedly would prevent the deterioration of the otherwise already existent unconstitutional situation and thus also the emergence of more severe unconstitutional consequences than already exist. Therefore, the implementation of these two Acts as two measures, among others, for the stabilisation of public finances intended to ensure the reorganisation of the banking sector and to ensure efficient and clear management of state property, is allegedly necessary.
36. The National Assembly alleges that the existing instability of public finances is already such that the Republic of Slovenia is no longer able to finance the state's obligations arising from the constitutionally guaranteed rights to social security and health insurance. Due to the hindered borrowing, which is a consequence of the continued deterioration of the relevant credit ratings, the reason for which lies precisely in the condition of the banking system and in the inefficient and opaque management of state property, the state is allegedly no longer able to ensure a social minimum income to current and future generations, and for a certain part of the population, even a living minimum income is allegedly jeopardised. Thereby, human dignity is allegedly already inadmissibly affected. In such an unstable condition of public finances, the fulfilment of the state's obligation to ensure the exercise of individual rights by paying out financial resources is allegedly made impossible, even though the state is bound to such action on the basis of Article 2 and the second paragraph of Article 148 of the Constitution. Thereby, beside the rights that are explicitly provided for by the Constitution as human rights, there are allegedly many other rights at issue regarding which the state is bound by the Constitution to act in a certain active way so that individual rights, such as those regarding employment and work (Article 66 of the Constitution) would also in fact be ensured. If the necessary measures are

not adopted, the state would allegedly no longer be able to fulfil its obligations due to the hindered borrowing or imminent inability to borrow. The National Assembly therefore alleges substantial limitations regarding providing for the efficient functioning of the state and providing for an efficient system of social security and health care, which under the second paragraph of Article 50 of the Constitution the state must provide for in order for the human rights determined by the first paragraph of Article 50, the first and second paragraph of Article 51, and Article 52 of the Constitution to be ensured, as well as the rights which the state must create the conditions for the implementation thereof (such as Article 66 of the Constitution).

37. The National Assembly affirmed that without the adoption of immediate urgent measures it would not be possible to eliminate the excessive public deficit of the state and thus to ensure the fulfilment of the obligations that Slovenia must respect on the basis of Article 3a of the Constitution and Article 126 of the TFEU, so that by the end of 2013 it would reduce the public deficit by 3% of GDP. Equally, for such reason it would allegedly be impossible to ensure the fulfilment of the obligations determined by Article 8 of the Constitution. The legislature had namely already ratified the TSCG, on the basis of which respect for the fiscal rule regarding a balanced budget should be ensured. Furthermore, Directive 2011/85/EU should be implemented by the end of 2013. The National Assembly therefore claims that without the adoption of specific measures, which the MSSBA and the SNHCA also constitute an integral part of, the state cannot ensure the fulfilment of its obligations that stem from binding instruments of international law (Article 8 of the Constitution) and obligations that stem from its membership in the European Union (Article 3a of the Constitution).
38. Without the adoption of immediate urgent measures, the subsequent deterioration of the credit ratings of the state as well as of the banks would allegedly occur, which could render impossible also the recapitalisation of the banks by the ECB and thus cause Slovene banks to have a liquidity crisis, as ECB funds are currently allegedly their only remaining source of liquidity. The problem of repaying the loans that the Republic of Slovenia obtained from the EIB would allegedly occur and subsequently the credibility of the guarantees of the state would deteriorate. Subsequent deterioration of credit ratings would allegedly in this and in the next year lead to an increase in the public deficit, and also problems with the liquidity of the banks and the state would allegedly occur, which would lead to a situation in which Slovenia would be obliged to apply for financial assistance from the European fund for providing the financial stability. By requesting international financial assistance, in which also the IMF is involved, a constitutionally inadmissible interference with the sovereignty of the state outside the scope determined by Article 3a of the Constitution would occur. The National Assembly therefore claims that by the adoption of immediate, urgent measures an inadmissible interference with the sovereignty of the state (the first paragraph of Article 3 of the Constitution) would be prevented.
39. The National Assembly therefore places against the constitutional right to request a decision on an act in a referendum determined by the second paragraph of Article 90 of the Constitution the duty to ensure the efficient functioning of the state by

the performance of its important functions and ensuring the rights to social security, health care, and also the other human rights regarding which the Constitution imposes obligations on the state, which is underlined already among the general provisions of the Constitution (the first paragraph of Article 5). In the field of establishing an appropriate economic basis for ensuring efficient free economic initiative (the first paragraph of Article 74 of the Constitution) as well as in the field of the creation of opportunities for employment and work (Article 66 of the Constitution), as well as in other fields, the efficient functioning of the state is in public interest. The efficiency of the state in all of the above fields should enable the establishment of conditions for work and for ensuring social protection and thus for ensuring the conditions which should provide for a life worthy of a human being (Article 34 of the Constitution), which actually forms the basis of human dignity (Article 1 of the Constitution). In addition, the National Assembly also underlined the duty of the state to respect adopted international obligations (Article 8 of the Constitution) and obligations arising from the European legal order (the third paragraph of Article 3a of the Constitution), and ensuring the sovereignty of the state (the first paragraph of Article 3 of the Constitution), which forms a constitutionally determined basis for the existence of the state insofar as the exercise of a part of its sovereign rights were not transferred to the European Union. What are at issue are important constitutional values which call, if they are substantially limited, for a responsible response from the Government as well as from the legislature.

40. Therefore, while assessing whether unconstitutional consequences would occur due to the suspension of the implementation of the SNHCA and the MSSBA or due to their rejection in a referendum, the Constitutional Court must proceed from the question whether the possibility of a significant limitation of important constitutional values has been demonstrated, as is alleged by the National Assembly. After it determines that the National Assembly has demonstrated such limitation, it has to assess which constitutional values should be given priority in the stated circumstances: the right to request a legislative referendum or the immediate implementation of the Acts which the National Assembly assessed are urgently necessary for the protection of important constitutional values.

### B – III

41. As the National Assembly first of all underlines that the sovereignty of the state, which is certainly one of the central constitutionally protected values (the Preamble to the Constitution and the first paragraph of Article 3 of the Constitution), is in jeopardy, it first has to be assessed whether this value is in fact jeopardised in the stated circumstances. As the Constitutional Court already stated in Opinion No. Rm-1/02, dated 19 November 2003 (Official Gazette RS, No. 118/03, and OdlUS XII, 89), with reference to legal theory, state sovereignty is a characteristic of state power as the highest authority in the state (the so-called supreme state power), which is externally independent from any other authority; what is at issue are thus its external sovereignty, which represents the independence of the state power or the state with

respect to other subjects of the same kind, and its internal sovereignty, which reflects the fact that in its territory the state is the supreme, independent, and original power, which has legally subordinated everything located in its territory. It expressly underlined that neither the first nor the second aspect of state sovereignty is absolute; the external sovereignty precisely due to the existence of public international law.<sup>15</sup> If the state were to need international monetary assistance and if to acquire such assistance it were necessary to conclude an agreement on its allocation with the IMF, which in the opinion of the National Assembly would exceed the transfer of sovereignty under Article 3a of the Constitution to the European Union, such in itself would not entail an inadmissible threat to state sovereignty. The Republic of Slovenia as a state is an international subject and as such can sovereignly conclude international treaties that have, in conformity with Article 8 of the Constitution, a status higher than laws within the hierarchy of legal acts that exist in the state. However, treaties are only assigned such power after being ratified by the National Assembly, meaning that the final decision regarding the conclusion of such international agreement is left to the legislature. When what is at issue is a transfer of the exercise of a part of the sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the state governed by the rule of law, such international agreement must be ratified by the National Assembly by a qualified majority of deputies (the first paragraph of Article 3a of the Constitution). Sovereignty could be jeopardised by the content of such international agreement and only then the question of its constitutional relevance might arise. The circumstances of the case at issue are not such, therefore in the framework of this assessment it is not demonstrated that this good, which otherwise is constitutionally very important, would already be directly affected or inadmissibly limited.

42. However, also other values underlined by the National Assembly which are likewise constitutionally protected need to be taken into consideration. Other important constitutional values include the effective functioning of a state governed by the rule of law and the effective functioning of a social state, and in such framework, also fostering the exercise of human rights and fundamental freedoms, which include the right to free economic initiative (the first paragraph of Article 74 of the Constitution), the duty of the state to create opportunities for employment and work (Article 66 of the Constitution), and the rights from the field of social security. Under the first paragraph of Article 74, the Constitution ensures free economic initiative. Such requires that the state create conditions for its free exercise and this also has to be taken into consideration by the legislature when adopting statutory regulations. The latter thereby has to consider that the second sentence of the second paragraph of Article 74 of the Constitution does not allow only for the possibility of statutory regulation, but also requires the legislature, by prohibiting the performance of economic activity contrary to the public benefit, to form economic policy, and gives it the authority to adopt measures by which it will be able to ensure the realisation of the goals of such

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15 See Paragraph 22 of Opinion No. Rm-1/02.

policy (The Constitutional Court took such a standpoint already in Decision No. U-I-145/95, dated 9 November 1995, Official Gazette RS, No. 68/95, and OdlUS IV, 113). The Constitution thereby allows the legislature wide discretion regarding the choice of economic policy measures which it deems necessary, whereby the legislature itself is bound by the constitutional prohibition that it must not allow the performance of economic activity contrary to the public benefit. What is at the heart of the economic policy by which the conditions for exercising free economic initiative are created is undoubtedly ensuring the effective functioning of the banking sector. Precisely from this view, it is understandable that the National Assembly stresses the urgent need to eliminate the so-called credit crunch,<sup>16</sup> where what is at issue is a situation in which the banks fail to perform one of their basic roles in the economic system.

43. Without creating the conditions for the effective realisation of free economic initiative, it is not possible to expect stable and efficient development of the economic system that would provide sufficient financial resources for the effective functioning of the state regarding the exercise of its functions, i.e. from the functions of the state power to ensuring constitutionally protected values, including the accessibility of education (Articles 57 and 58 of the Constitution), the existence and development of cultural, scientific, and artistic life (Article 59 of the Constitution), and the establishment of stable systems in the field of social security (the second paragraph of Article 50 of the Constitution), which have to ensure the right to social security (the first paragraph of Article 50 of the Constitution), the right to health care (the first and second paragraphs of Article 51 of the Constitution), and the rights of persons with disabilities (Article 52 of the Constitution).
44. From the data that were submitted by the Ministry of Finance, it is evident that the level of available budgetary financial resources substantially diminished in 2012. In September 2012, it allegedly reached the lowest level in the past five years (215 million euro). A liquidity deficit is also predicted for the first months of 2013, due to which the state budget should borrow funds already in the first quarter of next year. In its *Economic Issues 2012*, also the Institute for Macroeconomic Analysis and Development draws attention to this fact.<sup>17</sup> At the same time, the Budgetary Memorandum 2013-2014 (EPA 692-VI, 693-VI) proceeds from the fact that, even if all the expected structural and other planned urgent measures are taken, in 2013 GDP will still decrease by 1.4%. At the same time, in its Autumn Forecast for the Period 2012-2014<sup>18</sup> the European Commission predicts a 1.6% decrease in GDP for the same year, which can, as proceeds from the credit assessments that the Ministry of Finance submitted, have an influence on its further decrease in the future. Since a simultaneous increase

16 Also the OECD in its Economic forecast for Slovenia draws attention to the need to restore the credit activity of banks. See Economic outlook, analysis and forecasts, Slovenia - Economic forecast summary (November 2012), available at: <http://www.oecd.org/eco/economicoutlookanalysisandforecasts/sloveniaeconomicforecast-summary.htm> (13 December 2012).

17 Available at: [http://www.umar.gov.si/fileadmin/user\\_upload/publikacije/izzivi/2012/EI-2012.pdf](http://www.umar.gov.si/fileadmin/user_upload/publikacije/izzivi/2012/EI-2012.pdf) (13 December 2012).

18 Available at: [http://ec.europa.eu/economy\\_finance/eu/forecasts/2012\\_autumn/si\\_en.pdf](http://ec.europa.eu/economy_finance/eu/forecasts/2012_autumn/si_en.pdf) (13 December 2012).

in the public deficit is predicted, it is not possible to doubt the allegations of the National Assembly that in 2013, as proceeds from the data submitted by the Ministry of Finance, further borrowing of at least 1.4 billion euro will be necessary to ensure the smooth functioning of the state in all the stated fields. The Constitutional Court thus has no reason to doubt the credibility of the submitted data, especially since also the estimations and data of other appropriate domestic and international institutions confirm them. The fact that in such a situation certain urgent measures need to be adopted that concern the reorganisation of the banking system, the management of state property, further fiscal consolidation, and also certain structural reforms, proceeds not only from a few successive credit ratings issued by various credit rating agencies, but also from the concluding statement of the IMF mission<sup>19</sup> and from the economic prognosis of the OECD for Slovenia.<sup>20</sup> The urgency of the adoption of certain measures therefore has a role in ensuring the efficient functioning of the state, which also includes ensuring the human rights and fundamental freedoms to which the National Assembly draws attention.

45. The National Assembly has already adopted certain statutory measures, some of which are also already the subject of constitutional assessment by the Constitutional Court (such as the Fiscal Balance Act, Official Gazette RS, No. 40/12 – FBA). The basis of the purpose of such is the same as is the purpose of the statutory measures that would be subject to deciding in a referendum. This purpose is to ensure the efficient functioning of the state in the current circumstances of a severe economic crisis, when the state already has an excessive public deficit that it has to reduce in order to ensure the performance of its functions and, at the same time, to ensure the respect of certain – even more important in the economic crisis – human rights, to which the National Assembly explicitly draws attention. Regarding the existing economic and especially financial circumstances, it is thus not possible to deny the urgency of the measures that the state has to adopt, among them especially measures regarding the reorganisation of the banking system and ensuring efficient and transparent management of state property. The SNHCA and the MSSBA entail such measures. The fact that the stated Acts introduce measures that are to a certain extent interconnected is claimed not only by the National Assembly but also by the applicant of the

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19 See Slovenia 2012 Article IV Consultation – Concluding Statement of the Mission, available at: <http://www.imf.org/external/np/ms/2012/100212.htm> (13 December 2012).

20 See Economic outlook, analysis and forecasts, Slovenia - Economic forecast summary (November 2012), available at: <http://www.oecd.org/eco/economicoutlookanalysisandforecasts/sloveniaeconomicforecastsummary.htm> (13 December 2012).

Also the Secretary General of the OECD, Angel Gurría, among other things, stated at the Bled Strategic Economic Forum (2012) that: “Slovenia must ensure that the framework for the governance of state-owned enterprises, which is currently being discussed, is robust enough to deal with the range of structural challenges facing the state owned sector, including competitiveness, deleveraging, and privatisation. The overall objective must be to ensure consistency, predictability, and transparency in the governance of state-owned enterprises. This will in turn help improve market and consumer confidence.” Available at: <http://www.oecd.org/fr/slovenie/newchallengesnewchampions.htm> (13 December 2012).

request for the calling of a referendum on the SNHCA by drawing attention to the fact that the capital investments of the Republic of Slovenia in the banks in need of reorganisation will also be transferred to the above-mentioned holding company.

46. Ensuring respect for the adopted international obligations and the obligations of the Republic of Slovenia which, as a Member State of the European Union, stem from full membership in this international organisation also has to be taken into consideration as constitutionally important. The TSCG is an international treaty that is formally separated from the treaties of the European Union.<sup>21</sup> It is to take effect on 1 January 2013, under the condition that by then the instrument of its ratification will have been deposited by twelve states party to the treaty whose currency is the euro; if such does not occur by that date, implementation occurs on the first day of the month after the instrument of ratification is deposited by the twelfth state party to the treaty whose currency is the euro (the second paragraph of Article 14 of the TSCG). At this time, the instruments of ratification of eight states party to the treaty whose currency is the euro have been submitted.<sup>22</sup> However, the instrument of ratification of the Republic of Slovenia is one of these. By the implementation of the act on ratification, the treaty is transposed into the internal legal order. It therefore binds the state authorities, even though such international obligation arises only by the entry into force of the treaty. By ratifying the treaty, the state assumes obligations under the treaty that are to be interpreted in accordance with international law (The Vienna Convention on the Law of Treaties, Official Gazette SFRY No. 30/72 – hereinafter referred to as the VCLT, and rules of customary international law that are not codified therein). When a treaty becomes internationally binding, there also arises an international obligation of the state to fulfil it. Under the provision of Article 26 of the VCLT, every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*). Under Article 27 of this Convention, a particular party may, as a general rule, not invoke the provisions of its internal law as justification for its failure to perform a treaty. If the fulfilment of an international obligation from a treaty requires the adoption or amendment of the appropriate normative regulation, the state is bound by international law also to fulfil the obligation at issue in such manner. The failure to fulfil the obligation entails a violation of the treaty – it entails that the state commits an international offence resulting in a responsibility under international law (compare with Decision

21 Some thoughts concerning the Draft Treaty on a Reinforced Economic Union – Editorial Comment, in: Common Market Law Review, Vol. 49, No. 1 (2012), p. 5; C. Calliess and C. Schoenfleisch, *Auf dem Weg in die europäische „Fiskalunion“? – Europa- und verfassungsrechtliche Fragen einer Reform der Wirtschafts- und Währungsunion im Kontext des Fiskalvertrages*, in: JuristenZeitung, Vol. 67, No. 10 (2012), p. 481.

22 For two states signatories who are members of the euro area, information is already published that as far as the national legal order is concerned, the ratification is complete, but the documents have not yet been submitted. See: Table on the Ratification Process of the Amendment of Art. 136 TFEU, ESM Treaty and Fiscal Compact, Brussels, 7 December 2012, available at: <http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/fboschi/public/art.%20136%20ESM%20fiscal%20compact%20ratprocess.pdf> (13 December 2012).

No. U-I-376/02, dated 24 March 2005, Official Gazette RS, No. 46/05, and OdlUS XIV, 17). After at least another four states party to the treaty who are members of the euro area submit the instruments of ratification when the TSCG becomes internationally binding, Slovenia will be obliged to ensure that the budgetary position of the general government of the state is balanced or in surplus (indent (a) of the first paragraph of Article 3 of the TSCG).<sup>23</sup> At the latest, within one year after this treaty enters into force, the state must ensure that this rule is binding and permanent, if possible a constitutional rule, or it has to ensure its full respect and fulfilment in national budgetary procedures by some other means. In conformity with the principle of acting in good faith (*bona fide*), a state which has ratified an international treaty must immediately act in such a manner that it will be able to fulfil its obligations arising therefrom when such treaty enters into force internationally.

47. Likewise, in conformity with Article 3a of the Constitution, the state must fulfil its obligations that arise from the legal order of the European Union. Thereby, it has to be taken into consideration that economic policy, even though it does not lie in the exclusive competence of the European Union, as does, for example, monetary policy, has become a matter of common interest and is conducted in the framework of wider guidelines which are adopted by the Council (Article 120 of the TFEU), and that the Government and National Assembly must adopt economic decisions in such a manner so as to contribute to the goals which the European Union strives to achieve.<sup>24</sup> Regarding the obligations under the law of the European Union, the National Assembly specifically underlines the recommendations of the Council adopted on the basis of the seventh paragraph of Article 126 of the TFEU precisely due to the proceedings against the Republic of Slovenia regarding the excessive public deficit. It thereby draws attention to the fact that in 2010 and 2011 Slovenia did not reduce this deficit, wherefore in this and the next year it has to be reduced by 3% of GDP. Council Decision of 19 January 2010 on the existence of an excessive deficit in Slovenia (2010/289/EU)<sup>25</sup> determined that there existed an excessive deficit in Slovenia which was not only a consequence of the reference values regarding its admissibility being temporary exceeded. The determination of the fact that there exists an excessive deficit causes the initiation of proceedings regarding the excessive deficit. The purpose of such proceedings regarding the excessive deficit is to encourage and, if necessary, compel the Member State to reduce the determined deficit.<sup>26</sup> The proceedings regarding the excessive deficit are multi-level proceedings which can lead to the

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23 The rule from indent a) is deemed to be respected if the annual structural balance of the sector of the state attains the medium-term objective for a particular state, determined in the amended Stability and Growth Pact by the bottom level of the structural deficit at the level of 0.5% of GDP under market prices.

24 As in Decision of the Constitutional Court No. U-I-178/10, dated 3 February 2011 (Official Gazette RS, No. 12/11).

25 OJ L 125, 21 May 2010, p. 46.

26 Judgment of the Court of Justice of the European Union, dated 13 July 2004, in *Commission of the European Communities v. Council of the European Union*, C-27/04, ECR, p. I-6679, Para. 70.

introduction of sanctions under the eleventh paragraph of Article 126 of the TFEU.<sup>27</sup> Such sanctions substantially exceed the sanctions that otherwise can be imposed on a Member State that does not fulfil obligations under the law of the European Union.<sup>28</sup> Article 126 of the TFEU precisely determines the course of such proceedings on each individual level and the roles and powers of a particular institution.<sup>29</sup> Where the Council decides that an excessive deficit exists, it adopts, without undue delay, on the recommendation of the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end (the seventh paragraph of Article 126 of the TFEU). The Council adopted recommendations for the Republic of Slovenia on 30 September 2009 and determined therein that in 2010 the state must implement measures for fiscal consolidation, in the period 2010-2013 annually reduce the deficit by 0.75% of GDP, and determine the measures by means of which it will eliminate the excessive deficit by the end of 2013.<sup>30</sup>

48. If a Member State fails to follow the recommendations of the Council, the latter first has the possibility to publish the recommendations in conformity with the eighth paragraph of Article 126 of the TFEU, whereas if the Member State persists in failing to implement the recommendations of the Council, the latter can, under the ninth paragraph of Article 126 of the TFEU, demand the adoption of certain measures for decreasing the deficit which, in its opinion, could improve the situation. At the same time, until the Member State respects the order adopted in conformity with the ninth paragraph of Article 126 of the TFEU, the Council can, in conformity with the eleventh paragraph of the same Article, decide also to adopt one or more additional measures. When the Council, in conformity with the eleventh paragraph of Article 126 of the TFEU, adopts an order on the introduction of sanctions against the participating Member State, as a general rule a fine is imposed, while the Council can decide to supplement this fine with other measures under the eleventh paragraph of Article 126 of the TFEU,<sup>31</sup> including an appeal to the EIB to reconsider its lending policy towards the Member State concerned.<sup>32</sup> The National Assembly expressly

27 *Ibidem*, Para. 77.

28 H. J. Hahn and U. Häde, *Währungsrecht*, 2<sup>nd</sup> edition, Verlag C. H. Beck, München 2010, p. 316.

29 For a description of the course of proceedings and of the intensification of sanctions, see H. J. Hahn, *The Stability Pact for the European Monetary Union: Compliance with Deficit as a Constant Legal Duty*, in: *Common Market Law Review*, Year 35, No. 1 (1998), pp. 93–95.

30 Recommendations of the Council, dated 30 November 2009, available at: [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/pdf/30\\_edps/104-07\\_council/2009-12-02\\_si\\_126-7\\_council\\_en.pdf](http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/104-07_council/2009-12-02_si_126-7_council_en.pdf) (13 December 2012).

31 Article 11 of Council Regulation (EC) No. 1467/97, dated 7 July 1997, on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209, 2 August 1997, p. 6, the special edition in Slovene, Chapter 10, Volume 10, p. 89, with amendments OJ L 174, 7 July 2005, p. 5 and OJ L 306, 23 November 2011, p. 33.

32 In conformity with Article 12 of the Regulation, the amount of the fine is composed of a fixed component equal to 0.2 % of GDP and a variable component. The variable component equals one tenth of the absolute value of the difference between the deficit as a percentage of GDP in the preceding year and the reference value of the deficit as a percentage of GDP or, if such disregard for budgetary discipline includes a measurement of the debt, between the public deficit as a percentage of GDP which would have to be, in conformity

draws attention to the importance of the EIB for the functioning of the Slovene banking system, therefore it is possible to agree that the failure to implement the urgent measures intended to eliminate the excessive public deficit also jeopardises the credibility of the state from the viewpoint of respecting adopted international obligations as well as the obligations that Slovenia has as a Member State of the European Union, and especially as a Member State whose currency is the euro. The credibility of the state influences its capacity to acquire financial resources on the financial markets and consequently its capacity to ensure constitutional values, which is what the National Assembly draws attention to.

49. The Treaty on European Union (consolidated version, OJ C 83, 30 March 2010 – hereinafter referred to as the TEU) binds the Member States to continue the process of reinforcing the ever closer union among the peoples of Europe. The principle of loyal cooperation determined by Article 4 of the TEU, under which the Member States are to respect each other and assist each other in fulfilling the tasks and goals pursued by the European Union, determines the general obligation of Member States to respect the law of the European Union and to adopt general and particular measures necessary to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. One such act is Directive 2011/85/EU, regarding which the National Assembly warns that it has to be transposed by the end of 2013. The third paragraph of Article 288 of the TFEU determines that directives are binding, as regard the result to be achieved, upon each Member State to which they are addressed, but they leave the choice of form and methods to the national authorities. The freedom regarding the execution of directives which proceeds from the second paragraph of Article 288 of the TFEU entails nonetheless that Member States must choose their most appropriate methods and manner of execution.<sup>33</sup> A directive produces legal effects regarding the Member State to whom it is addressed – and consequently regarding all the authorities of the state – upon its publication or, depending on the case, upon the date of notification of it.<sup>34</sup> Directive 2011/85/EU entered into force on 13 December 2011 and as of this Decision, the period for its transposition has not yet expired. However, in conformity with the case law of the Court of Justice of the European Union, it stems from the usage of Article 4 of the TEU, with regard to the third paragraph of Article 288 of the TFEU, that the Member States to whom the directive is addressed must not, during the period for the transposition of the directive, adopt measures which could seriously jeopardise the attainment of the aim determined by the directive.<sup>35</sup> Such entails that the Republic of Slovenia must not, until the period for the transposition of the directive expires, adopt measures

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with the appeal under the ninth paragraph of Article 126 of the TFEU, attained in the same year.

33 Judgment of the European Court of Justice, dated 8 April 1976, in the *Royer* case, 48/75, ECR, p. 497.

34 Judgment of the European Court of Justice, dated 4 July 2006 in *Konstantinos Adeneler and Others*, C-212/04, ECR, p. I-6057.

35 Judgments of the European Court of Justice in *Inter-Environnement Wallonie*, dated 18 December 1997, C-129/96, ECR, p. I-7411, Para. 45; *ATRAL*, dated 8 May 2003, C-14/02, ECR, p. I-4431, Para. 58; and *Mangold*, dated 22 November 2005, C-144/04, ECR, p. I-9981, Para. 67.

which would jeopardise the attainment of the aim of Directive 2011/85/EU, i.e. uniform respect for budgetary discipline, as is required by the TFEU.<sup>36</sup> Therefore, the Court can concur with the National Assembly that disrespect for the aims pursued by the stated Directive could affect the credibility of the state from the viewpoint of the obligations which it carries as a Member State of the European Union.

#### B – IV

50. In the substantiation of its request regarding the inadmissibility of the legislative referenda at issue, the National Assembly thus refers to values which are specifically protected by the Constitution, and demonstrates that at this time we are already faced with them being either jeopardised or substantially limited if the state fails to adopt measures necessary for the elimination of such limitations.
51. The constitutional values that are in collision with the right to request the calling of a legislative referendum include ensuring the undisturbed functioning of the state and respect for rights guaranteed by the Constitution, among them namely those determined by the first paragraph of Article 74, Article 66, the first paragraph of Article 50, the first and second paragraph of Article 51, and Article 52 of the Constitution. Furthermore, respect for the adopted international obligations must be ensured (Article 8 of the Constitution). It has to be taken into consideration that Slovenia is a full member of the European Union, in which, among others matters, it also shares a common currency with some members. Respect for the obligations that arise from membership in the European Union entails not only respect for the law of the European Union, but also respect for the first and third paragraphs of Article 3a of the Constitution. The National Assembly demonstrates that the functioning of such values, which are constitutionally protected, would be substantially damaged without these measures that the state must adopt as urgent measures. Thereby, in a very short period of time, i.e. next year, the situation could deteriorate, and as a consequence the constitutional protection of such values could become jeopardised.
52. The stated constitutionally protected values are those that in this Decision are placed against the right to request the calling of a legislative referendum. Therefore, it has to be assessed whether they have to be given priority over the right determined by the second paragraph of Article 90 of the Constitution in order to ensure the constitutional balance of the protected values.
53. Respect for the fundamental principles of international law and for treaties ensures the international credibility of a state; therefore this value has an important constitutional weight. Ensuring the effectiveness of the law of the European Union is also constitutionally important, to which the state has bound itself on the basis of the third paragraph of Article 3a of the Constitution. Such is true regardless whether we interpret this provision of the Constitution and the law of the European Union<sup>37</sup>

<sup>36</sup> Paragraph 28 of the Preamble to Directive No. 2011/85/EU.

<sup>37</sup> Among the legal sources of European law, so-called primary law is especially important. See V. Trstenjak and M. Brkan, *Pravo EU, Ustavno, procesno in gospodarsko pravo EU* [EU Law; Constitutional, Procedural, and

(even in cases where what is at issue is the so-called secondary legislation<sup>38</sup> of the European Union) to entail that due to the principle of the supremacy of the law of the European Union such law unconditionally also prevails over the provisions of the Constitution,<sup>39</sup> or in a manner such that in certain exceptional cases the law of the European Union has to give way to the Constitution. In the case at issue, it is namely not necessary for the Constitutional Court to take a position on this, as the weight of the constitutional value, i.e. respect for the law of the European Union, is enormous due to the fact that the third paragraph of Article 3a of the Constitution is expressly binding with regard to the above; under this paragraph the legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights – in the case at issue, the acts and decisions of the European Union<sup>40</sup> – are applied in accordance with the legal regulation of these organisations. For such reason, what is at issue is a specifically protected good, which in any case has to be attributed a significant weight.

54. The National Assembly demonstrates the urgency of the need to adopt appropriate measures, which, with reference to the above, include the SNHCA and the MSSBA. In the assessment of the National Assembly, the Acts are urgently needed to ensure the sustainability of the functioning of the state with regard to the public finances in the current circumstances of economic crisis. In light of the reasons stated by the National Assembly and due to the generally known facts regarding the position of the state from the viewpoint of public finances, the financial condition of the banks in state property, and also the condition of other Member States of the so-called euro area from the viewpoint of public finances, the Constitutional Court lacks sensible reasons that would cast doubt over the assessment of the National Assembly. This urgency is demonstrated by the need to ensure the efficient functioning of the state, which has to perform its functions in the public interest and for the welfare of its citizens. It must ensure respect for human rights (the first paragraph of Article 5 of the Constitution) and ensure the effective functioning of two fundamental social subsystems (the second paragraph of Article 50 of the Constitution), it has to perform the adopted international obligations, and ensure the efficiency of the European legal order in its territory, all of which the National Assembly draws attention to.
55. In this Decision, the Constitutional Court is facing a special situation as the SNHCA and the MSSBA are two specific legislative measures among the measures which not only the Government and the National Assembly, but also important international

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Commercial EU Law], GV Založba, Ljubljana 2012, pp. 169–170.

38 The secondary law of the European Union is composed of regulations, directives, orders, recommendations, and opinions (the first paragraph of Article 288 of the TFEU), i.e. the acts adopted by the institutions of the European Union. *Ibidem*, p. 175.

39 Such proceeds from the Judgments of the Court of Justice of the European Union in *Costa v ENEL*, dated 15 July 1964, 6/64, ECR, p. 585, and *Internationale Handelsgesellschaft*, dated 17 December 1970, 11/70, ECR, p. 1125. Such a position is also supported by Dr Trstenjak and Dr Brkan; see V. Trstenjak and M. Brkan, *op. cit.*, pp. 209–211.

40 In this case, Directive 2011/85/EU and the Council Recommendations dated 30 November 2009 (see note 30).

subjects assess to be necessary to ensure the sustainability of the public finances and sufficient resources for enabling the functioning of the state and respect for human rights, which the state has to take care to efficiently ensure. Also at issue is that this concerns statutory measures that are not only important each in itself, but which are even more important as a group of measures by means of which urgent aims are pursued. Therefore, the urgency of each individual measure on the level of the system is convergent with the urgency of the adoption and realisation of other measures. As far as the SNHCA and the MSSBA are concerned, also their mutual interconnectedness is demonstrated.

56. Whether the SNHCA and the MSSBA introduce measures which by their nature constitute the correct answer to the alleged situation existing in the state is not something that the Constitutional Court can assess.<sup>41</sup> Whether these Acts are thus statutory measures that in terms of content are good or bad or the most appropriate for regulating the issues that obviously must urgently be regulated, depends on the suitability and appropriateness of the statutory regulation with which the legislature must respond to the existing social needs. Therefore, the suitability and appropriateness of the statutory regulation cannot have an influence on the decision regarding the existence of unconstitutional consequences itself. As the Constitutional Court has already underlined in Decision No. U-II-1/11, also responsibility for the content of statutory regulation, in the case at issue for the content of two economic policy measures that refer to the functioning of the banking system and to the management of state property, for the stated reasons falls entirely on the National Assembly and the Government.<sup>42</sup> A different position would inadmissibly interfere with the principle of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution).
57. In the framework of this constitutional review of the admissibility of the referenda, what is in the foreground is neither the question of the constitutionality of the statutory regulation in force nor the question of the constitutionality of the adopted statutory regulation, i.e. the constitutionality of the SNHCA and the MSSBA, which would be submitted for approval in a referendum. When the Constitutional Court does not permit the realisation of a referendum and thus the implementation of the newly adopted act occurs as priority must be given to other constitutionally protected values, not to the right to request the calling of a referendum, such does not entail that after the act is implemented, in the case at issue the SNHCA and the MSSBA, it will not be possible to request a constitutional review thereof and to remedy possible unconstitutionality on the basis of an appropriate decision of the Constitutional Court.<sup>43</sup> In this case, the above-mentioned possibility of subsequent assessment of the constitutionality of these Acts works as an argument in favour of the other constitutionally protected values

41 Cf. also Decision No. U-I-91/98, dated 16 July 1999, (Official Gazette RS, No. 40/99, and OdlUS VIII, 196), Paragraph 17.

42 Cf. Decision No. U-II-1/11, Paragraph 19, and Decision No. U-I-178/10, Paragraph 9.

43 See Order No. U-II-3/03, dated 22 December 2003, (OdlUS XII, 101).

which have already been demonstrated to be substantially jeopardised or limited, in comparison to the right to request the calling of a legislative referendum.

58. Due to the mentioned constitutional values, the right to request the calling of a referendum is significantly limited, but it has to be taken into consideration that despite this fact, there exists the possibility to remedy possible unconstitutionality in the newly adopted statutory regulation by applying the institute of a constitutional review to the Acts at issue. However, no efficient legal remedies exist which could, if the National Assembly fails to adopt certain measures, remedy the main limitations of the effective functioning of the state in all fields of social life at the current moment and in the period during which legislative limitations under Article 25 of the RPIA would be in force, i.e. in 2013. Therefore, the Constitutional Court must concur with the National Assembly that, regarding the principle of proportionality, in order for the protection of all constitutional values to be ensured in an appropriate constitutional balance, the right to request the calling of a legislative referendum must give way in order to ensure the reestablishment of appropriate fundamental conditions for the development of free economic initiative and of all the foundations of the functioning of the economic and social system, as well as to ensure the efficient execution of state tasks determined in the constitutional order and in a manner that ensures the sustainability of the functioning of the state regarding the public finances – i.e. to ensure the protection of the values stated in Paragraph 51 of the reasoning of the present Decision. With regard to the reasons demonstrated by the National Assembly, unconstitutional consequences would result already by the subsequent suspension of the implementation of the Acts in order to realise referendum procedures, and, with regard to Article 25 of the RPIA, also due to the rejection of these urgent statutory measures in referenda.
59. With regard to all of the above, the Constitutional Court gave priority to the constitutionally protected values underlined in the requests of the National Assembly over enforcement of the right determined by the second paragraph of Article 90 of the Constitution. On such grounds, it decided that unconstitutional consequences would occur due to the rejection of the adopted Acts in referenda.

### C

60. The Constitutional Court reached this decision on the basis of the first paragraph of Article 21 of the RPIA and the third indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court, composed of: Dr Ernest Petrič, President, and Judges Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The decision was adopted by eight votes against one; Judge Korpič – Horvat voted against and submitted a dissenting opinion. Judge Petrič submitted a concurring opinion.

*Dr Ernest Petrič*  
*President*

1. Let me first underline that in cases U-II-1/12 and U-II-2/12 what is at issue is, of course, not an assessment by the Constitutional Court regarding whether the measures implemented by the Slovene National Holding Company Act (EPA 516-VI – hereinafter referred to as the SNHCA) and by the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (EPA 637-VI – hereinafter referred to as the MSSBA) – which in the opinions of the National Assembly and the Government form an integral part of the urgent reform package – really constitute the best possible solutions or not. An assessment regarding this issue would be an assessment of the suitability of these statutory solutions, which cannot be subject to assessment by the Constitutional Court. The applicants, i.e. the National Assembly and the Government, bear responsibility for whether the SNHCA and the MSSBA are appropriate measures or the best possible solutions. The issue of the quality and appropriateness of these two reform measures remained disputable among the applicants and a part of the profession, on one hand, and the opposition and a part of the profession, on the other. The Constitutional Court is not in the position to act as an arbitrator thereon.
2. In conformity with Article 21 of the Referendum and Popular Initiative Act (Official Gazette RS, No. 26/07 – official consolidated text – hereinafter referred to as the RPIA) and at the request of the National Assembly, the Constitutional Court was only obliged to adjudge whether the referenda on these Acts (one or both) must be allowed. However, I would like to add a few considerations. But first, let me stress that in the [Court's] assessment, the upgrade (or modification) of the test whose essence is the weighing, on one side, of constitutionally protected values (i.e. fundamental human rights, especially the right to social security (Article 50 of the Constitution), the right to health care (Article 51 of the Constitution), and the obligation of the state to provide opportunities for employment and work and to ensure their protection (Article 66 of the Constitution)), and, on the other side, the right to a referendum (Article 90 of the Constitution), constitutes an important step in the development of the doctrine of the Constitutional Court regarding future decision-making on the admissibility of referenda. Hitherto – especially because the Constitutional Court has been faced with such requests – the Constitutional Court assessed whether the rejection of an act in a referendum would lead to the continued existence of unconstitutionality that the new act would eliminate. The Constitutional Court again followed such an approach also when assessing the act regulating pensions because, among other reasons, in that case the urgency aspect, i.e. the existence of a direct and actually existing threat to constitutionally protected values, was not in the foreground.
3. In the case at hand, with an accentuated sense of urgency, the Constitutional Court had to take an approach to weighing the right to a referendum (Article 90 of the Constitution) and other constitutionally protected values or rights. I concur with the outcome of this weighing, which is expressed in the operative provisions and in the reasoning of the Decision. While weighing between constitutionally protected values by means of this new or improved test, the Constitutional Court, in my opinion,

failed to attribute enough weight to the allegations of the National Assembly that the subsequent postponement of the reforms which the SNHCA and the MSSBA are a part of, may lead to the restriction of our country's sovereignty, as by applying for assistance (from the EU and the International Monetary Fund – hereinafter referred to as the IMF), which in the opinion of the National Assembly would be a consequence of a standstill as regards the reform efforts, the state would have to welcome the arrival of the so-called “troika” and its control. I believe that these arguments of the National Assembly are well-founded and should be taken into consideration.

4. Sovereignty is not only a legal category (legal supremacy and the independence of the state power), but it also has content. Such stems already from the right of the nation to self-determination, which is, as a general rule, realised in the form of its sovereign state. Undoubtedly – and such is explicitly expressed in all the most important international acts that determine the right of peoples to self-determination – this includes the determination of its own will (i.e. free!), not only regarding its own political status, but also regarding its economic, cultural, and social development.<sup>1</sup> Such is the essence of the content of the right to self-determination and, subsequently, the content of the sovereignty of the state, after a nation has realised the right to self-determination by establishing its own sovereign state. A sovereign state can, of course, by entering an international organisation and by concluding international treaties, of its own will, transfer a part of its sovereignty. However, when a state finds itself in a position wherein either an international organisation which it is a member of, or other members of the same international organisation, or future contractual partners therein actually dictate the content of the agreement, or in a position wherein it has to accept required conditions, and when such external requirements interfere with the sphere of its internal policy (for instance, the determination of a reduction in salaries and pensions, limitations on budgetary expenditures, etc.), its internal autonomy and independence regarding the determination of the economic, cultural, and especially social policy is undoubtedly damaged. Such “freedom”, which is the primary content and meaning, the *raison d'être*, first of self-determination and then of sovereignty, is limited. The position of Greece, as such is in relation to those in fact dictating (even though in the form of negotiations) its conditions of assistance and then controlling (together with the parliaments of other members of the EU or of the euro group) the exercise of such agreement, entails, from a substantive point of view, an actual limitation of its sovereignty regardless of the fact that it formally remains a sovereign state. Sovereignty, its actual content, not only its form, is, however, an important constitutionally protected value (Article 3 of the Constitution).
5. Sovereignty is one of the fundamental rights of the state under international customary law and, at the same time, on the basis of the Charter of the United Nations

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1 Article 1 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/71 and Official Gazette RS, No. 35/92, MP, No. 9/91 – ICCPR) reads as follows: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The eighth indent of the Helsinki Final Act on security and cooperation in Europe from 1975 reads similarly.

(the right to sovereign equality – Article 2 of the Charter), one of the fundamental principles of modern international law. Precisely for such reason, its limitation is only admissible if such is stated by express provisions of international treaties or decisions of international organisations, which must be interpreted restrictively. If the Republic of Slovenia, due to the postponement of the reform efforts, which could – according to the allegations of the National Assembly and Government, and also to a series of international institutions – be a consequence of the realisation and result of the referenda at issue, entered into a position where international forums (i.e. the EU and the IMF) determined its conditions as well as limitations on its internal economic, financial, social, etc., policy, even if in the form of an agreement, such would entail an evident reduction or limitation of its sovereignty, which is an important constitutionally protected value.

6. In separate opinions to the Decisions of the Constitutional Court regarding the admissibility of a referendum (Decisions Nos. U-II-1/11, dated 10 March 2011, Official Gazette RS, No. 20/11, U-II-2/11, dated 14 April 2011, Official Gazette RS, No. 30/11, and U-II-3/11, dated 8 December 2011, Official Gazette RS, No. 109/11), I substantiated that Article 21 of the RPIA in fact represents an interference of the judicial branch of power, namely the Constitutional Court, with the course of the legislative procedure, which I believe is unacceptable from the viewpoint of the separation and equality of the three branches of power (Article 3 of the Constitution). I am still of the opinion that the Constitutional Court should, under the “principle of correlation”, approach the constitutional assessment of Article 21 of the RPIA from the viewpoint of Article 3 of the Constitution. I hope nonetheless that this question will be resolved in the framework of the planned amendment of the Constitution (and subsequently of the legislation) regarding the regulation of referenda. What would be definitely constitutionally clear and politically appropriate would be a regulation that would sensibly determine and appropriately limit exercise of the right to a referendum. The possibility of abusing the institution of the referendum in order to effect political blockades and to transfer responsibility to the Constitutional Court and to the bearers of the constitutional right to a referendum, i.e. the voters, with regard to matters which should lie in the competence and be the responsibility of the political institutions, i.e. the legislature, the Government, and also the opposition, would thus be eliminated.

*Dr Ernest Petrič*

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#### **DISSENTING OPINION OF JUDGE DR ETELKA KORPIČ – HORVAT**

1. In the hitherto assessment of referendum issues under Article 21 of the Referendum and Popular Initiative Act (Official Gazette RS, No. 26/07 – official consolidated text – hereinafter referred to as the RPIA), the Constitutional Court carried out an assessment of the possibility of the occurrence of unconstitutional consequences by first assessing whether the act currently in force was inconsistent with the Constitution. If it

determined that it was unconstitutional, it proceeded with an assessment of whether the adopted act that was to be the subject of decision-making in a referendum remedied the existing unconstitutionality in a constitutionally consistent manner.

2. In Decision No. U-II-1/12 and U-II-2/12, the Constitutional Court abandoned such an approach. What is especially problematic is that it abandoned an assessment of whether the act to be decided on in a referendum is consistent with the Constitution. The Constitutional Court did not assess at all whether the Slovene National Holding Company Act (EPA 516-VI – hereinafter referred to as the SNHCA) and the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (EPA 637-VI – hereinafter referred to as the MSSBA) are consistent with the Constitution, but was satisfied with the finding that “there exists the possibility to remedy possible unconstitutionality in the [newly] adopted statutory regulation by applying the institute of a constitutional review to the Acts at issue” (Paragraph 58 of the reasoning). I believe that by allowing the implementation of an unconstitutional act, the Constitutional Court itself can contribute to an unconstitutional situation.
3. The issue to which the current Decision of the Constitutional Court refers is, in my opinion, comparable namely to case No. U-II-1/11 (Decision dated 10 March 2011, Official Gazette RS, No. 20/11), by which the Constitutional Court assessed the admissibility of a referendum regarding the Pension and Disability Insurance Act (EPA 1300-V – hereinafter referred to as the PDIA-2). At that time, the allegations of the National Assembly that unconstitutional consequences would occur due to the rejection of the PDIA-2 in a referendum did not convince the Constitutional Court. The Court namely adjudged that the National Assembly did not demonstrate (1) that the applicable statutory regulation, i.e. the Pension and Disability Insurance Act (Official Gazette RS, No. 109/06 – official consolidated text – hereinafter referred to as the PDIA-1) was evidently unconstitutional and (2) that what was at issue was an unconstitutionality that already existed during the decision-making of the Constitutional Court (hereinafter referred to as an actual unconstitutionality), and not an unconstitutionality that would occur in the more or less distant future (hereinafter referred to as a hypothetical unconstitutionality). Therefore, the Constitutional Court allowed the referendum on the PDIA-2.
4. The National Assembly substantiated the request for a review of the constitutionality of the referenda regarding the SNHCA and the MSSBA, *mutatis mutandis*, in the same way as the request for an assessment of the admissibility of a referendum regarding the PDIA-2. As in the case in which the Constitutional Court assessed the admissibility of the referendum regarding the PDIA-2, *mutatis mutandis*, the National Assembly also in this case alleges that the rejection of the adopted Acts in a referendum would worsen the public finance situation of the state, which already is unfavourable, due to which unconstitutional consequences would eventually occur, i.e. in the more or less distant future a situation inconsistent with the Constitution would occur.
5. In my opinion, as in the case where the Constitutional Court assessed the admissibility of the referendum regarding the PDIA-2, the National Assembly also in this case failed to demonstrate the existence of an actual unconstitutionality; it only possibly

demonstrated a hypothetical unconstitutionality. Therefore, I believe that the decision in this case should be the same as that regarding the admissibility of the referendum on the PDIA-2.

6. In the case in which it assessed the admissibility of the referendum on the PDIA-2, the Constitutional Court explicitly requested that the National Assembly demonstrate the existence of the actual unconstitutionality. That was the *ratio decidendi* of the decision in that case, which in my opinion represents a relevant precedent for a decision on the current requests.
7. It is nonetheless true, as Judge Petrič realises in the eighth paragraph of his concurring opinion to Decision No. U-II-1/11, that “a precedent is neither eternal nor unchangeable” and that “even in the Anglo-Saxon legal system, in which a precedent is exalted more than anywhere else [...], it is established that an *ultima ratio* precedent is only worth as much as the reasons which substantiate it are solid and as much as the arguments for it are convincing.” The case law can change “if *compelling reasons* exist for such.” Then, in the tenth paragraph, Judge Petrič adds that “[...] the Constitutional Court’s case law must not blindly follow the hitherto decisions if new understanding and changed social circumstances demonstrate that also the correction of some prior position of the Constitutional Court is needed” (emphasis added by EKH). Such considerations of Judge Petrič did not refer to the *precedent* at issue, as his reflections on *precedent* are true in general.
8. The principle disturbing issue in this decision is not the disregard for the precedent, but that the majority decision in this regard lacks any substantiation whatsoever, even though it is mainly bound by the principle of equal treatment when applying the law and the principle of trust in law.<sup>1</sup> In German constitutional case law, a precedent is not a formal source of law and changes in the case law (even in stable case law) are admissible, as long as they remain in the framework of expected legal development, that is, if the decisions do not represent a surprise (*Überraschungsentscheidung*) to the participants in the procedure, and under condition that they are sufficiently substantiated by the courts.<sup>2</sup> In the case at issue, there was a substantial change in the constitutional assessment, which in my opinion was not sufficiently substantiated.

1 Jarras claims, for instance, that an unsubstantiated departure from the case law of the highest courts in a particular case would entail a violation of the prohibition of arbitrary treatment. See H. D. Jarras in: H. D. Jarras and B. Pieroth (Editor), *Grundgesetz für die Bundesrepublik Deutschland – Kommentar*, 11<sup>th</sup> edition, Verlag C. H. Beck, München 2011, p. 120, Para. 39. See also the Order of the BVerfG, 1 BvR 1557/01, dated 4 August 2004, Paras. 7–9, available at: [http://www.bverfg.de/entscheidungen/rk20040804\\_1bvr155701.html](http://www.bverfg.de/entscheidungen/rk20040804_1bvr155701.html) (17 December 2012). Dürig claims that Article 3 of the German Federal Constitution protects against surprising decisions and requires a certain steadiness of the case law. See G. Dürig in: T. Maunz and G. Dürig (Editors), *Grundgesetz – Kommentar*, book I, Verlag C. H. Beck, München 1973, Article 3, Para. I, p. 187, Para. 407.

2 Order of the BVerfG, 1 BvR 779/85, dated 26 June 1991, Para. 43, available at: <http://www.servat.unibe.ch/dfr/bv084212.html> (17 December 2012); Order of the BVerfG, 2 BvR 2044/07, dated 15 January 2009, Para. 85, available at: [http://www.bverfg.de/entscheidungen/rs20090115\\_2bvr204407.html](http://www.bverfg.de/entscheidungen/rs20090115_2bvr204407.html) (17 December 2012); B. Grzeszik in: T. Maunz and G. Dürig (Editors), *op. cit.*, Article 20, section VII, pp. 40–41, Para. 106.

9. The majority decision does not state the urgent and *compelling reasons* for the fact that in this case the Constitutional Court did not insist that the National Assembly demonstrate that there exists an actual (and not a hypothetical) unconstitutionality. The Constitutional Court does not explain which new understanding and changed social circumstances dictated the modification of the position that it adopted in case No. U-II-1/11. Decision No. U-II-1/11 was adopted less than two years ago (on 10 March 2011). The social circumstances were already very unfavourable at that point (i.e. bad economic circumstances, a credit crunch, the significant indebtedness of the state, a critical situation with regard to public finances, low credit ratings), and yet the Constitutional Court rejected the request with the following statement: “At this time, it is not possible to substantiate the unconstitutionality of the PDIA-1 with the allegations and data by which the National Assembly and Government can, in fact, substantiate that changes in the pension system are necessary in the future due to macroeconomic, public-finance, and demographic reasons. Constitutionally, these reasons are not measurable, therefore the Constitutional Court cannot take them into consideration in its assessment and must also not assess if they are well-founded.”
10. If the Constitutional Court assessed that the social circumstances have deteriorated to such a degree in less than two years that for such reason it had to urgently and inevitably (due to a *compelling reason*) abandon the position that it can only assess whether there exists an actual unconstitutionality, it has thus passed over into the domain of determining a hypothetical unconstitutionality. In other words, it has passed from the domain of assessing the constitutional consistency of the adopted acts to the domain of assessing the suitability of the adopted acts (even though it proceeds from the majority decision that the Court does not address the suitability of such [Paragraph 56 of the reasoning]). This, in my opinion, is not within the competence of the Constitutional Court.
11. The National Assembly alleges that the implementation of the SNHCA and the MSSBA will produce effects that will improve the economic and public finance situation, which will significantly reduce the risk that in the state a situation inconsistent with Articles 1, 2, 3, 8, 34, 50, 51, 86, 87, 89, 90, 91, and 153 of the Constitution will occur; a situation in which the implementation of entire chapters of the Constitution that determine the organisation of the state will be seriously jeopardised and where also ensuring the human rights and fundamental freedoms guaranteed by the Constitution will be jeopardised. In brief, the National Assembly alleges that the SNHCA and the MSSBA are suitable Acts for preventing or at least reducing the risk that a general unconstitutional situation will occur.
12. If I disregard the fact that assessing the suitability of an adopted act does not fall within the competence of the Constitutional Court, I believe that the Constitutional Court should perform such assessment by treating the allegation of the National Assembly as a hypothesis which has to be tested (confirmed or rejected, empirical, epistemological discretion) in an appropriate way. However, it failed to do so. It stems from the Decision that “the Constitutional Court lacks sensible reasons that would cast doubt over the assessment of the National Assembly” and that the SNHCA and the MSSBA “are urgently needed to ensure the sustainability of the functioning of the state with

regard to the public finances in the current circumstances of economic crisis” (Paragraph 54 of the reasoning). However, the Constitutional Court did not refute doubts regarding the assessment of the National Assembly on the basis of an appropriate test of its allegations. It simply accepted the assessment offered by the National Assembly and regarded it as its own. The allegations of the National Assembly regarding the SNHCA, for instance, do not quantify the future profit of the national holding company, which could be the only direct source of income of the budget of the Republic of Slovenia. Therefore I have – in contrast to the majority of the judges of the Constitutional Court – certainly sensible reasons to have doubts regarding the assessment of the National Assembly that the SNHCA is a suitable measure for preventing or at least reducing the risk of the occurrence of a general unconstitutional situation in the conditions of the existing economic crisis. We could say that the National Assembly alleges, as the only proof of the existence of a link between the implementation of the SNHCA and the future situation of the state from the viewpoint of public finances, the by now already popular thesis that even the suspension of the implementation of the SNHCA due to a referendum – let alone its possible rejection in a referendum – would lead the credit agencies to lower the already low credit ratings of the state and of the banks. I hope that such does not entail that henceforth the Constitutional Court will in every similar case suspend the constitutional right to a referendum as soon as the National Assembly or the Government mentions such credit agencies.

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

*Dr Etelka Korpič – Horvat*

<sup>3</sup> Judge of the Constitutional Court Jan Zobec, in Paragraph 11 of his concurring opinion to Decision No. U-II-1/11.

Decision No. **U-I-73/94**, dated 25 May 1995

### DECISION

At a session held on 25 May 1995, in proceedings to review constitutionality and legality initiated upon the petition of Patentna pisarna, d. o. o., Ljubljana, the Constitutional Court

*decided as follows:*

The first and fifth paragraphs of Article 17 of the Rules on the Procedure for the Registration of Industrial Designs (Official Gazette RS, No. 49/93) are annulled in their entirety, and in the second paragraph of the same Article the words “includes” (the second word in the sentence), “elements under the second paragraph of Article 3 of these Rules”, and “however” are annulled.

### *Reasoning*

#### **A**

1. With its petition of 11 April 1994, the petitioner initiated proceedings to review the constitutionality and legality of the first paragraph of Article 17 of the Rules on the Procedure for the Registration of Industrial Designs (hereinafter referred to as the Rules). With its application of 26 April 1994, the petitioner also initiated proceedings to review the constitutionality and the legality of the fifth paragraph of Article 17 of the Rules.
2. The petitioner challenges the first paragraph of Article 17 of the Rules, which determines that an application that does not include all the elements determined by the Rules is not accepted and considered as an application for the registration of a design, and that the Office of the Republic of Slovenia for the Protection of Industrial Property (hereinafter referred to as the Office) indicates on the application that it was not accepted as an application and returns it to the applicant. The petitioner believes that the challenged provision is inconsistent with Articles 2, 8, and 153 of the Constitution, Article 55 of the Industrial Property Act (Official Gazette RS, No. 13/92, and 27/93; hereinafter referred to as the IndPA), and Articles 66 and 68 of the General Administrative Procedure Act (Official Gazette SFRY, No. 47/86; hereinafter referred to as the GAPA). In the petitioner’s opinion, the cited statutory provisions do not au-

thorise the authorities of the state administration to proceed in the above-described manner. Article 55 of the IndPA and Articles 66 and 68 of the GAPA determine that if an application is incomplete, the Office requests that the applicant remedy the established deficiencies within a specified time limit. The petitioner namely believes that the IndPA does not regulate the legal institution “the return of an application”, and therefore the challenged implementing regulation allegedly manifestly and illegally interferes with statutory subject matter and regulates such in a manner for which it has no statutory basis.

3. The petitioner also challenges the fifth paragraph of Article 17 of the Rules, which determines that the Office rejects an application by an order if the applicant fails to remedy its established deficiencies within the specified time limit. In the petitioner’s opinion, the challenged provision is inconsistent with Article 56 of the IndPA, which regulates the conditions for the rejection of an application in a somewhat different manner. In accordance with that Article, an application is rejected by an order if the applicant fails to remedy all the deficiencies that he or she was required to remedy in accordance with the second paragraph of Article 55 of the IndPA and as a result the application cannot be considered. In the petitioner’s opinion, the text of the fifth paragraph [of Article 17] of the Rules is in direct contradiction to the text of Article 56 of the IndPA, as the challenged Article of the Rules penalises any deficiency by rejecting the application, while in accordance with the IndPA, an application may only be rejected if it contains such deficiencies that the application cannot be considered. As the challenged implementing regulation regulated the relevant statutory subject matter in a completely different manner than such is regulated by the IndPA and as there existed no statutory basis for such, the statutory mandate was allegedly exceeded, which is contrary to the second paragraph of Article 120 of the Constitution.
4. The petitioner demonstrated its legal interest to file the petition by the fact that in accordance with the third paragraph of Article 5 of the IndPA it is authorised to represent foreign natural and legal persons in matters related to industrial property before the Office as well as before other state administrative authorities and courts, and that this legal interest is affected by the allegedly illegal provisions of the challenged Rules.
5. In its reply to the petition, the Ministry of Science and Technology, which issued the challenged Rules, contests the petitioner’s claims. The Ministry states that the procedure for granting or registering industrial property rights is a special kind of administrative procedure that applies some solutions that differ from those contained in the GAPA. In the Ministry’s opinion, the filing of an application within the framework of the procedure for granting or registering industrial property rights has a different meaning than an application filed with a view to exercising other rights through an administrative procedure, as upon the formally correct filing of an application [for granting or registering industrial property rights] the applicant is granted a priority right over subsequent applicants. If an applicant wants to obtain such a right, his or her application must satisfy certain conditions that enable its consideration. If the application does not satisfy the determined minimum conditions, it is not accepted

and considered as an application, but is returned to the applicant. According to the Ministry, the challenged provision of the first paragraph of Article 17 of the Rules determines in further detail the content of an application in accordance with the IndPA and is therefore not inconsistent with this Act.

6. In its reply to the petition, the Ministry states that there is no difference as regards the content of the challenged provision of the fifth paragraph of Article 17 of the Rules and of the provision of Article 56 of the IndPA. Both regulations namely determine that an application is rejected if it is established that due to the applicant's failure to remedy the established deficiencies it does not satisfy the formal requirements for consideration.

## **B**

7. The Constitutional Court accepted the petition to review the constitutionality and legality of the challenged provisions of the Rules and, as the conditions determined by the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 15/94) were fulfilled, it immediately proceeded to decide the case on the merits.
8. Questions regarding the content of an application for the registration of a design and its processing are primarily regulated by the provisions of Articles 53, 54, and 55 of the IndPA. Article 53 determines the content of the application and Article 54 the conditions that have to be fulfilled for an application to be deemed complete. In accordance with Article 55 of the IndPA, the Office has to examine whether the application is complete no later than within three months following the receipt of the application. If the Office finds that the application has deficiencies, it requires the applicant to remedy them within a specified period of time by means of a written statement outlining the deficiencies. Upon the applicant's request, this time limit may also be extended. The Article also provides that the date when the application was first filed is to be deemed the filing date of all applications whose deficiencies have been remedied within the specified time limit.
9. It follows from the cited statutory provisions that a procedure for the registration of a design has to be initiated upon the filing of every application, regardless of whether the application is complete or not. In every instance of an incomplete application, the Office has to require the applicant to remedy the deficiencies. The Act namely does not differentiate between two kinds of incomplete applications, i.e. the ones that are not accepted and considered as applications at all (in instances of significant deficiencies) and the ones that have to be completed due to having minor deficiencies.
10. The challenged provisions of the Rules, however, regulate the question of the processing of an incomplete application in a different manner than the Act.  
The Rules differentiate between two kinds of incomplete applications. The first category comprises applications that do not contain certain essential elements and are thus not accepted and considered as applications by the competent authority but are returned to the applicant. The second category comprises applications that, while containing the essential elements, nevertheless have minor deficiencies that must be remedied in the subsequent stages of the procedure. The Ministry alleges that such

differentiation of applications is required due to the specific nature of the design registration procedure and, in this context, in particular the consequences of filing the application for the applicant and potential subsequent applicants.

11. The procedure for the protection of industrial property rights undoubtedly has some specific characteristics that require regulation different than that applied in other instances of enforcing rights through administrative procedures. However, this raises the question of which [legal] act should be used to regulate these specificities.
12. Procedural questions that affect the rights and legal interests of the parties must be regulated by law. The specificities highlighted by the Ministry could certainly be regulated by the IndPA. However, the IndPA currently in force does not regulate such specificities; they are instead regulated directly by the Rules. The Rules define the legal concept “the return of an application”, which is not applied by the IndPA. On the contrary, the IndPA expressly requires that if an application is incomplete, the applicant shall be requested to remedy its deficiencies.
13. The disputed first paragraph of Article 17 of the Rules thus regulates questions regarding the processing of an application in a different manner than the IndPA, which entails that the Rules, in fact, modify statutory provisions.
14. In accordance with the fifth paragraph of Article 17 of the Rules, the Office rejects an application by an order if the applicant, following a request to remedy all the established deficiencies, fails to do so. In accordance with Article 56 of the IndPA, on the other hand, an application may only be rejected by an order if the applicant fails to remedy all the deficiencies and as a consequence the application cannot be considered. The IndPA thus determines the rejection of an application only in the event of a failure to remedy such deficiencies that render further consideration of the application impossible. It follows from the above that the Office may not reject an application even though not all of its deficiencies have been remedied if the remaining deficiencies do not render the continuation of the procedure impossible. Not every deficiency that has not been remedied can thus result in the rejection of an application.
15. The challenged provision of the fifth paragraph of Article 17 of the Rules, however, departs from the mentioned statutory qualification of deficiencies and prescribes the rejection of an application if the applicant fails to remedy all of the established deficiencies (and thus not only those that render the continuation of the procedure impossible). The Rules thus regulate the conditions for the rejection of an application in a different manner than the IndPA and therefore place applicants in a less favourable position than the IndPA.
16. The challenged provisions of the first and fifth paragraphs of Article 17 of the Rules are thus inconsistent with Articles 55 and 56 of the IndPA as well as with the third paragraph of Article 153 of the Constitution, which requires that all regulations be in conformity with the Constitution and laws.  
The cited provisions [of the Rules] are further inconsistent with the provisions of the second paragraph of Article 120 of the Constitution, according to which administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws.

17. Respect for the principle of legality is essential for the relationship between the legislative and executive branches of power in parliamentary democracies. The principle of legality also determines the relationship between the Parliament and the Government as the highest administrative authority. Legal theory defines the principle of legality by defining the relationship between the legislative and executive branches of power by means of the obligation of the executive branch to comply with laws from a substantive point of view. Laws have to constitute the substantive basis for implementing regulations and individual acts issued by the executive branch of power, i.e. the Government and administrative authorities (whereby express statutory authorisation is not required), and such activity also has to remain in its entirety within the statutory framework as regards its content.
18. The second paragraph of Article 120 of the Constitution determines that administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws. The principle that administrative authorities perform their work within the constitutional and statutory framework, and in particular in accordance with the constitutional and statutory basis (the principle of legality), is one of the fundamental constitutional principles. The principle of legality in relation to the work of the state administration is namely linked with other constitutional principles and relies thereon.

The principle of democracy (Article 1 of the Constitution) contains *inter alia* the requirement that the most important decisions, in particular those relating to citizens, are adopted by directly elected members of the Parliament. As a result, the executive branch of power (i.e. the Government and administrative authorities) can only operate legally when working on the substantive basis of and within the framework of laws, and not on the basis of its own regulations or even on the basis of its own function within the system of the separation of powers. In this respect, the priority of laws as the priority of the legislature also plays an important role in delimiting the competences of the legislative and executive branches of power in accordance with the principle of the separation of powers (Article 3 of the Constitution). The principle of a state governed by the rule of law (Article 2 of the Constitution) requires that legal relations between the State and its citizens be regulated by laws. These do not only determine the framework and basis of the work of the executive power in accordance with administrative law, but its work also becomes known, transparent, and foreseeable for the citizens, thus increasing their legal certainty. The principle of the protection of human rights and fundamental freedoms (the first paragraph of Article 5 of the Constitution) requires that, in accordance with the principles of democracy and a state governed by the rule of law, these may only be limited by the legislature in the instances and to the extent allowed by the Constitution, and not by the executive power. At the same time, this principle is also important for the effective protection of the rights and legal interests of individuals, including the effective control of the constitutionality and legality of individual administrative acts.

19. In accordance with the Constitution (Article 120), administrative authorities are bound by the framework determined by the Constitution and laws when performing

their work, including the issuance of regulations, and may not issue regulations that do not have a substantive basis in law; however, an express statutory authorisation is not required. The so-called implementing clause (i.e. a statutory provision requiring that certain types of implementing regulations be issued within a specified period of time) only entails that the legislature did not leave the issuance of implementing regulations (entirely) to the discretion of the executive power, but by statute required it to regulate certain questions and specified a time limit for such. The principle of the separation of powers also excludes the possibility that administrative authorities could modify or independently regulate statutory subject matter. Legal theory also maintains that general acts that are inferior to laws may not include provisions that have no basis in a law and that, in particular, they may not independently determine rights and obligations.

As a result, the challenged provisions of the first and fifth paragraphs of Article 17 of the Rules had to be annulled. The Constitutional Court has already adopted similar decisions in several cases, for example Cases No. U-I-1/92, No. U-I-72/92, and No. U-I-82/92 (OdlUS 48/I, 56/II, and 101/II), and it found no reason to change its position in the case at issue.

20. As the challenged provision of the first paragraph of Article 17 of the Rules also refers to the second paragraph of the same Article, the Constitutional Court also annulled the part of the provision of the second paragraph of Article 17 that allows the procedure for remedying deficiencies to be carried out only in the case of minor deficiencies (i.e. if the application does not include all of the elements required by the IndPA and the Rules, but it does include the essential elements that are preconditions for its acceptance and the initiation of the procedure). Following the annulment of the mentioned part, the second paragraph of Article 17 of the Rules reads as follows: "If the application does not contain all of the elements required by statute or by these Rules, the Office shall inform the applicant of the established deficiencies and request that the applicant complete the application. The Office shall specify the time period for completing the application, which may not exceed two months following the day the request has been served."
21. The Constitutional Court annulled the challenged provisions of the Rules because it determined that the negative consequences that resulted from their illegality have to be eliminated. Due to the retroactive effect of the annulment, the petitioner will be able to enforce its interests as if the challenged provisions had never been in effect.

## C

22. The Constitutional Court adopted this Decision on the basis of Article 45 of the Constitutional Court Act, composed of: Dr Tone Jerovšek, President, and Judges Mag. Matevž Krivic, Mag. Janez Snoj, Dr Janez Šinkovec, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. The Decision was adopted unanimously.

*Dr Tone Jerovšek*  
*President*

Decision No. **Up-624/11**, dated 3 July 2014

### DECISION

At a session held on 3 July 2014 in proceedings to decide upon the constitutional complaint of Primož Skerbiš, Slovenske Konjice, represented by Saša Jenčič, attorney in Maribor, the Constitutional Court

*decided as follows:*

**The constitutional complaint against Supreme Court Judgment No. VIII Ips 2/2011, dated 21 February 2011, is dismissed.**

### *Reasoning*

#### **A**

1. On 24 June 2004, the complainant's employer warned the complainant, in written form and on the basis of the first paragraph of Article 83 of the Employment Relationship Act (Official Gazette RS, Nos. 42/02 and 103/07 – hereinafter referred to as the ERA/02), of violations of the obligations stemming from the employment relationship. By this warning, the complainant was also warned, in conformity with the law, that his employment contract would be terminated if the violations were repeated. Due to further violations of the employment obligations, the employment contract of the complainant was terminated on 19 December 2005 for breach of obligations.
2. The court of first instance dismissed the complainant's claim that the termination of the employment contract with notice for breach of obligations was illegal. It established that the employer acted in conformity with the first paragraph of Article 83 of the ERA/02 when it warned the complainant in writing to fulfil his employment obligations and of the possibility of the termination of the employment contract in the event of a new violation. The Higher Labour and Social Court dismissed the complainant's appeal and the Supreme Court dismissed his revision by Judgment No. VIII Ips 360/2007, dated 6 April 2009. By Decision No. Up-803/09, dated 9 December 2010 (Official Gazette RS, No. 2/11), the Constitutional Court abrogated this Judgment and remanded the case to the Supreme Court for new adjudication. In this Decision, the Constitutional Court established that at the time of the decision-

making of the Supreme Court, Decision of the Constitutional Court No. U-I-45/07, Up-249/06, dated 17 May 2007 (Official Gazette RS, No. 46/07, and OdlUS XVI, 28), had already taken effect. It assessed that the complainant's right to effective judicial protection (the first paragraph of Article 23 of the Constitution) had been violated because the Supreme Court based its judgment on the first paragraph of Article 83 of the ERA/02, which the Constitutional Court had already established was inconsistent with the first paragraph of Article 23 of the Constitution by Decision No. U-I-45/07, Up-249/06 – which had been published in the Official Gazette of the Republic of Slovenia already before the revision was filed and should have been known to the Supreme Court when deciding.

3. By Decision No. U-I-45/07, Up-249/06, the Constitutional Court established that the first paragraph of Article 83 of the ERA/02 did not determine how much time after a written warning an employer could, on the basis of such warning and in the event of a new violation, terminate the employment contract of an employee. At the same time, the ERA/02 did not envisage special judicial protection against a written warning; it was only possible to claim that such written warning was unfounded in the procedure for the review of the legality of the termination of the employment contract. In such manner, the judicial protection was somewhat distant in time from when the warning was issued, therefore its effectiveness could be questionable. However, the Constitutional Court stressed that the mere fact of the passage of time does not by itself mean that such judicial protection is always ineffective. It may only be ineffective if such passage of time was so long that proving that the written warning was unfounded would be made substantially difficult. With the intention to prevent violations of the right to effective judicial protection in the procedures for terminating an employment contract with notice on grounds of a breach of obligations until the ERA/02 is harmonised with the Constitution, the Constitutional Court also determined the manner of the implementation of its declaratory decision. It determined that an employer can only terminate an employee's employment contract for breach of obligations on the basis of a written warning issued within a period of one year at most before a new violation by the employee occurs.
4. In the case at issue, the Supreme Court decided for the second time, by the challenged Judgment, on the complainant's revision and once again dismissed it. In its Judgment it explained that it did not observe Decision of the Constitutional Court No. U-I-45/07, Up-249/06 in such a manner so as to abrogate or modify the final judgment just because the termination of the employment contract with notice was not communicated within the time limit of one year after the initial written warning was issued. It is of the opinion that due to its action after the [expiration of the] one-year time limit one cannot reproach the employer for acting unlawfully, because in 2005 the employer was not able to expect that in 2007 the unconstitutionality of the statutory regulation would be established. In its judgment, the Supreme Court assessed that a decision of the Constitutional Court that would have retroactive effects is not recognised by either the Constitution or the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter

referred to as the CCA). In conformity with the first paragraph of Article 161 of the Constitution and on the basis of Article 43 of the CCA, an abrogation of a law only has *ex nunc* effect, i.e. from the day following the publication of the decision of the Constitutional Court in the Official Gazette of the Republic of Slovenia or from the expiration of the time limit imposed by the Constitutional Court. In accordance with the position of the Supreme Court, all that applies regarding a Constitutional Court decision on abrogation allegedly also applies regarding a declaratory decision of the Constitutional Court. Therefore, Decision of the Constitutional Court No. U-I-45/07, Up-249/06, which established the unconstitutionality of the first paragraph of Article 83 of the ERA/02, allegedly cannot affect the legality of the termination of an employment contract that was communicated two years before this Decision was adopted. The Supreme Court is of the opinion that it would be contrary to the principle of legal certainty (Article 2 of the Constitution) if decisions on the establishment of an unconstitutionality applied without time limitations, i.e. also for all the past relations that were based on the statutory provision that was later established to be inconsistent with the Constitution. In [such] labour disputes, courts assess whether the employer's conduct was in conformity with the law that was in force when it adopted the decision to terminate the employment contract; subsequent legislative amendments, as well as how a decision of the Constitutional Court determines its manner of implementation, cannot have an influence on the decision-making in a labour dispute. In the opinion of the Supreme Court, in accordance with literal and teleological interpretations, also the manner of implementation determined by Decision of the Constitutional Court No. U-I-45/07, Up-249/06 can only refer to future relations, i.e. it can only apply to those employers who are yet to terminate the employment contracts of their employees. The application of the mentioned manner of implementation in the judicial proceedings at issue would allegedly entail conduct contrary to the prohibition of the retroactive validity of legal acts determined by the first paragraph of Article 155 of the Constitution and the principle of finality determined by Article 158 of the Constitution.

5. Regardless of the above, the Supreme Court adds that it observed Decision of the Constitutional Court No. U-I-45/07, Up-249/06 in such manner that it based its decision on the reasons from that Decision and in conformity therewith assessed whether it was substantially difficult for the complainant to challenge the written warning in the judicial proceedings. It assessed that the complainant's right determined by the first paragraph of Article 23 of the Constitution had been not violated, because the passing of time had no influence on his right to effective judicial protection, and in addition it established that in the judicial proceedings the complainant did not even allege that the written warning was unfounded.
6. In his constitutional complaint, the complainant claims a violation of the right to judicial protection (the first paragraph of Article 23 of the Constitution) and the right to the equal protection of rights (Article 22 of the Constitution) as the procedural expression of the general principle of equality before the law (the second paragraph of Article 14 of the Constitution). His right to judicial protection was allegedly violated

due to the length of the period (18 months) that passed between the [issuance of the] written warning issued due to the violation of employment obligations and the termination of the employment contract due to new violations. Allegedly, due to the fact that too much time had passed since the events, he was not able to effectively challenge before the courts the well-foundedness of the written warning. He also warns that at the time when he received the written warning there existed no statutory possibility to challenge it and also the case law did not allow it. Allegedly, his right to the equal protection of rights was violated, because the Supreme Court failed to observe Decision of the Constitutional Court No. U-I-45/07, Up-249/06, by which the Constitutional Court established the inconsistency of Article 83 of the ETA/02 with the right to effective judicial protection. The complainant is of the opinion that the manner of implementation determined by this Decision of the Constitutional Court should also apply to him, because his case allegedly concerns an equal state of the facts and statutory basis. He also refers to the Act Amending the Employment Relationships Act (Official Gazette RS, No. 103/07 – ERA-A), by which also the legislature determined the period that still ensures effective judicial protection to be one year.

7. By Order of a panel of the Constitutional Court No. Up-624/11, dated 25 April 2012, the Constitutional Court accepted the constitutional complaint for consideration. It informed the Supreme Court thereof.
8. The constitutional complaint was sent to the opposing party in the labour dispute, which proposes that the Constitutional Court dismiss the constitutional complaint, because the alleged violation of Article 23 of the Constitution is not demonstrated. It alleges that the complainant used judicial protection to admit before the courts the violations alleged in the written warning, whereas he could have challenged the validity of the written warning as regards the passage of time since its issuance by means of at least three proceedings, which he did not initiate. In the opinion of the opposing party, the complainant's allegation of a violation of the right to effective judicial protection after seven years of judicial proceedings entails an abuse of rights. By finding for the [complainant's] constitutional complaint, also the principle of legality would be violated, in the opinion of the opposing party, because the opposing party acted in conformity with the legislation in force at the time. The subsequent amending of legislation should not retroactively affect its past conduct. The complainant did not reply to the allegations of the opposing party.

### **B – I**

9. In the case at issue, the complainant substantiates the allegation regarding the violation of Article 22 and the first paragraph of Article 23 of the Constitution by alleging that the Supreme Court did not act in conformity with Decision of the Constitutional Court No. U-I-45/07, Up-249/06, by which the inconsistency of Article 83 of the ERA/02 with the right to effective judicial protection was established. In light of that, two important constitutional questions arise in the case at issue that the Constitutional Court must provide answers to: (1) what would the constitutionally consistent conduct of regular courts be when they are faced with a so-called declaratory decision

of the Constitutional Court and (2) what, in concrete judicial proceedings, are the legal effects of the manner of implementation that the Constitutional Court can determine in its decisions on the basis of the second paragraph of Article 40 of the CCA.

10. The Constitution contains no provisions on declaratory decisions of the Constitutional Court.<sup>1</sup> They were only introduced by the CCA, whose Article 48 determines that if an unconstitutional or unlawful regulation does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, the Constitutional Court shall adopt a declaratory decision on such.<sup>2</sup> There are no special provisions in the CCA on the legal effects of declaratory decisions; however, the Constitutional Court has adopted several decisions on that matter. In Decision No. Up-758/06, dated 6 December 2007 (Official Gazette RS, No. 119/07, and OdlUS XVI, 118), the Constitutional Court stressed that a declaratory decision that refers to statutory provisions cannot have more strict (more severe) legal consequences than those of a decision on abrogation determined by Article 44 of the CCA.<sup>3</sup> In the same Decision, the Constitutional Court also repeated the position from the previous constitutional case law that the determination of the unconstitutionality of a statutory provision does not entail that in (administrative and judicial) procedures such a provision may no longer be applied.<sup>4</sup> The establishment of unconstitutionality entails that such a provision must be applied in such a manner that its application will not be contrary to the reasons that led the Constitutional Court to

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1 The first paragraph of Article 161 of the Constitution determines that the Constitutional Court abrogates an unconstitutional law in whole or in part. Such abrogation takes effect immediately or within a period of time determined by the Constitutional Court, with regard to which this period of time may not exceed one year. The Constitutional Court can abrogate or annul *ab initio* implementing regulations. The third paragraph of Article 161 of the Constitution determines that the legal consequences of Constitutional Court decisions shall be regulated by law. The Constitution does not contain other provisions on the types of decisions of the Constitutional Court and the legal effects thereof.

2 Article 47 of the CCA envisages a special declaratory decision. Such declaratory decision is adopted if a regulation ceased to be in force before or during the proceedings, and the consequences of its unconstitutionality or unlawfulness were not remedied. With respect to statutory provisions, such declaratory decision has the effect of abrogation, whereas with respect to implementing regulations, the Constitutional Court decides whether its decision has the effect of abrogation or annulment.

3 The legal consequences of the abrogation of a law are regulated by the CCA. Article 43 of this Act envisages that such abrogation takes effect the day following the publication of the decision on the abrogation, or upon the expiry of a period of time determined by the Constitutional Court (i.e. abrogation with suspended effect), whereas Article 44 determines that the abrogation of a law or a part thereof by the Constitutional Court applies to relations that had been established before the day such abrogation took effect, if by that day such relations had not been finally decided. The Constitutional Court can abrogate or annul an implementing regulation. The legal consequences of the abrogation of an implementing regulation are, *mutatis mutandis*, the same as with respect to laws (the third paragraph of Article 45 of the CCA). The legal consequences of the annulment of an implementing regulation are determined by Article 46 of the CCA.

4 The Constitutional Court stated this already in Paragraphs 9, 10, and 11 of the reasoning of Order No. U-I-168/97, dated 3 July 1997 (OdlUS VI, 103), and in Paragraph 24 of the reasoning of Decision No. U-I-92/96, dated 21 March 2002 (Official Gazette RS, No. 32/02, and OdlUS XI, 45).

establish its inconsistency with the Constitution. When reviewing the constitutionality of regulations, the operative provisions and the reasoning of the decision form a whole, therefore not only are the operative provisions binding, but also the reasons and positions contained in the reasoning. With respect to declaratory decisions, this also applies in the event the operative provisions of the decision do not explicitly refer to the reasons contained in the reasoning.<sup>5</sup> Therefore, a declaratory decision entails the duty of the courts to interpret the law in a constitutionally consistent manner, which is what on the constitutional level follows already from Article 125 of the Constitution, in accordance with which judges are not only bound by law when judging, but also and foremost by the Constitution. From the above it follows that with regard to statutory provisions, declaratory decisions – as is the case regarding decisions on abrogation – do not have retroactive (*ex tunc*) effects such as the annulment of an implementing regulation, but only have *ex nunc* effects. *Ratione temporis*, the effects of a declaratory decision are the same as the effects of an abrogation. This also means that Article 44 of the CCA, which explicitly determines only the legal effects of the abrogation of a law, is *mutatis mutandis* also applicable regarding declaratory decisions.<sup>6</sup> In such context, the hitherto positions of the Constitutional Court that otherwise were adopted with regard to the effects of decisions on abrogation must also be *mutatis mutandis* observed with regard to declaratory decisions.<sup>7</sup>

11. On the basis of the above, it is possible to establish that from Article 125 of the Constitution and *mutatis mutandis* application of Article 44 of the CCA it follows that a declaratory decision of the Constitutional Court applies to all relations that had been established before the day such declaratory decision took effect if by that day such relations had not been finally decided. Therefore, in all proceedings that have not hitherto been finally decided, the courts must observe the declaratory decision of the Constitutional Court, namely in such a manner that they apply the unconstitutional statutory provision in such a manner that its application is not contrary to the reasons that led the Constitutional Court to establish its unconstitutionality.
12. Due to the institute of constitutional complaints,<sup>8</sup> in conformity with which it is possible, in conformity with the Constitution and the CCA, to affect final decisions,<sup>9</sup>

5 See also Paragraph 6 of the reasoning of Decision of the Constitutional Court No. Up-2597/07, dated 4 October 2007 (Official Gazette RS, No. 94/07, and OdlUS XVI, 108).

6 Cf. Order of the Constitutional Court No. Up-2436/08, U-I-42/08, dated 26 March 2009, Paragraph 10 of the reasoning.

7 Also interpretation by analogy confirms such an approach, because from Article 47 of the CCA it clearly follows that declaratory decisions adopted with regard to laws that ceased to be in force have the effect of an abrogation.

8 On the basis of the sixth indent of the first paragraph of Article 160 of the Constitution, the Constitutional Court has jurisdiction to decide on constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts.

9 Article 158 of the Constitution determines that legal relations regulated by the final decision of a state authority may be annulled *ab initio*, abrogated, or amended only in such cases and by such procedures as are provided by law.

an established position of the Constitutional Court with regard to the legal effects of decisions to abrogate adopted in proceedings for the review of the constitutionality and legality of regulations is that the abrogation of a statutory provision must also be observed in constitutional complaint proceedings<sup>10</sup> and consequently – due to the fact that in order to file a constitutional complaint also the formal and substantive exhaustion of all (including extraordinary) legal remedies is required<sup>11</sup> – also in extraordinary legal remedy proceedings.<sup>12</sup> Extraordinary legal remedies filed in conformity with the conditions determined by procedural laws and a constitutional complaint filed in conformity with the conditions determined by the CCA ensure that the effects of abrogation also extend to final cases.

13. What applies to decisions to abrogate also applies to declaratory decisions of the Constitutional Court. In constitutional complaint proceedings, the Constitutional Court can penalise failure to observe its declaratory decisions – especially if the unconstitutionality was established due to an inadmissible interference with human rights and fundamental freedoms. Due to the fact that in a state governed by the rule of law it is necessary to ensure the effectiveness of legal remedies, including the constitutional complaint, it is clear that declaratory decisions apply to constitutional complaint proceedings, and consequently they also must be observed appropriately in legal remedy proceedings before regular courts. Therefore, what is at issue with regard to observing the decisions of the Constitutional Court is not the issue of whether certain conduct was legal at the time when it was performed (i.e. whether it was in conformity with the law in force at that time), but the question of whether such conduct was in conformity with the Constitution. In conformity with Article 125 of the Constitution, the assessment of this question also falls within the jurisdiction of the regular courts. In assessing legality, courts must also observe the Constitution, i.e. they must interpret laws in conformity with the Constitution and always keep questioning themselves whether the legislation in conformity with which they adjudicate is consistent with the Constitution.<sup>13</sup> Consequently, what is at issue with

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10 See, e.g., Decisions No. Up-252/96, dated 30 September 1999 (Official Gazette RS, No. 86/99, and OdlUS VIII, 293), Paragraph 6 of the reasoning, and No. Up-295/97, dated 13 October 1999 (OdlUS VIII, 294), Paragraph 6 of the reasoning. See also, e.g., Decisions No. Up-425/03, dated 20 October 2005 (Official Gazette RS, No. 96/05, and OdlUS XIV, 101), No. Up-699/05, dated 5 July 2007 (Official Gazette RS, No. 65/07, and OdlUS XVI, 102), No. Up-791/10, dated 8 December 2011 (Official Gazette RS, No. 4/12), and No. Up-1136/11, dated 15 March 2012 (Official Gazette RS, No. 26/12).

11 The third paragraph of Article 160 of the Constitution determines that unless otherwise provided by law, the Constitutional Court decides on a constitutional complaint only if legal remedies have been exhausted. On such basis, the first paragraph of Article 51 of the CCA determined that a constitutional complaint may be lodged only after all legal remedies have been exhausted. The second paragraph of Article 51 of the CCA determines an exception that allows for the lodging of a constitutional complaint before all extraordinary remedies have been exhausted.

12 See, e.g., Order No. U-I-249/00, dated 19 September 2002 (OdlUS XI, 181), Paragraph 2 of the reasoning, and Decision No. U-I-201/99, dated 30 January 2003 (Official Gazette RS, No. 15/03, and OdlUS XII, 3), Paragraph 10 of the reasoning.

13 Article 156 of the Constitution determines that if a court deciding some matter deems a law which it should

regard to the effects of the decisions of the Constitutional Court (those to abrogate and declaratory decisions) is also the question of the effectiveness of legal remedies (regular and extraordinary legal remedies, as well as constitutional complaints) regarding constitutional issues. In fact, in the case at issue, the position of the Supreme Court that a declaratory decision adopted two years before the employment contract was terminated has no effect on the legality of such conduct is indeed correct; however, what is key in this context is that it can have an effect on the constitutionality of such conduct. Due to the fact that the termination of the employment contract was based on a law that the Constitutional Court subsequently established was unconstitutional because it inadmissibly interfered with the right to judicial protection, in addition to [the question of] legality, also the question of whether the termination of the employment contract was at that time in conformity with the Constitution arises. When assessing this question, the courts on all levels should also take into consideration the reasons from Decision of the Constitutional Court No. U-I-45/07, Up-249/06, regardless of which phase the judicial proceedings were in when this Decision took effect. The position of the Supreme Court that this would be contrary to the principles of a state governed by the rule of law is thus unconstitutional.

14. In addition to adopting a decision by which it assesses the constitutionality of a law (or the constitutionality and legality of another regulation), the Constitutional Court may, on the basis of the second paragraph of Article 40 of the CCA, determine the manner of the implementation of a decision.<sup>14</sup> In conformity with the established constitutional case law, it also may adopt, on this legal basis, a temporary legal regulation in conformity with which its addressees (individuals or state authorities) must act until the legislature regulates such question by law in an equal or some other constitutionally consistent manner.<sup>15</sup> The Constitutional Court has already adopted the position that the part of the operative provisions by which the manner of the implementation of its decision is determined has the [binding] power of a statutory norm.<sup>16</sup> Therefore, on the basis of the authorisation determined by the second paragraph of Article 40 of the CCA, the Constitutional Court can temporarily regulate a certain question by the same legal power as if it were regulated by the legislature.
15. The CCA does not determine what are, in concrete (judicial) proceedings, the legal effects of the manner of implementation by which a certain question is temporarily

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apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision.

- 14 The CCA does not determine the conditions that should be fulfilled in order for such authorisation to be exercised; this is left to the assessment of the Constitutional Court in each individual case (such is stated in Decision No. U-I-163/99, dated 23 September 1999, Official Gazette RS, No. 80/99, and OdlUS VIII, 209). The determination of the manner of implementation is most often connected with declaratory decisions of the Constitutional Court, although the Constitutional Court also exercises this authorisation in other types of decisions (see, for instance, Decision No. U-I-313/13, dated 21 March 2014, Official Gazette RS, No. 22/14).
- 15 Decision No. U-I-163/99, Paragraph 10 of the reasoning; Order No. U-II-3/03, dated 22 December 2003 (OdlUS XII, 101), Paragraph 24 of the reasoning.
- 16 *Ibidem*.

legally regulated. The manner of implementation undisputedly has an influence on the legal relations that only emerge after the decision of the Constitutional Court takes effect. However, whether and how the manner of implementation has an influence on ongoing legal proceedings (non-final or concluded with finality) depends on the factual and legal circumstances of the concrete proceedings. In accordance with the established position of the Constitutional Court, the regulation determined by the manner of implementation has the same legal power as law. Such entails that the interpretation and the implementation of such regulation are subject to established methods of legal interpretation that otherwise apply to the interpretation and implementation of laws, and also to certain fundamental constitutional principles that represent constitutional limitations with regard to the interpretation of laws (e.g. the prohibition of retroactive effects determined by Article 155 of the Constitution).

16. In accordance with the above, failure to observe a determined manner of implementation can primarily entail a violation of “statutory” law. However, ignoring the manner of implementation may also reach the level of a violation of the Constitution.<sup>17</sup> Refusal to apply the manner of implementation determined by a decision of the Constitutional Court must, above all, be substantiated, especially if the party to proceedings expressly refers thereto. The absence of reasons can entail that the court acted arbitrarily or that the ignoring of a decision of the Constitutional Court was manifestly erroneous, which in itself entails a violation of Article 22 of the Constitution. However, if the court does state reasons why it considers the manner of implementation of a decision of the Constitutional Court to not be relevant to the concrete case, those reasons must, on the one hand, follow from established rules and methods of legal interpretation or from constitutional limitations that otherwise are applicable regarding the interpretation and implementation of laws. On the other hand, it is clear that when interpreting and implementing a certain manner of implementation it is also necessary to meticulously take into consideration the reasons due to which the Constitutional Court adopted the decision that the law [at issue] is inconsistent with the Constitution, because the reason for a “legislative” intervention by the Constitutional Court is precisely the unconstitutionality of the statutory regulation. It is admissible to ignore the manner of implementation if such does not entail a violation of human rights and fundamental freedoms or if the court can adopt, by taking into consideration the constitutional reasons from the decision of the Constitutional Court, a decision consistent with the Constitution. Otherwise a decision adopted contrary to the manner of implementation may be challenged before the Constitutional Court by a constitutional complaint.

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17 By Order No. Up-901/08, dated 24 February 2009 (Official Gazette RS, No. 20/09, and OdlUS XVIII, 188), the Constitutional Court explained that when deciding on constitutional complaints due to an alleged violation of the manner of implementation determined by the Constitutional Court it is necessary to distinguish between an “ordinary” violation of the manner of implementation of a decision of the Constitutional Court (which substantively equals a violation of law) and a violation that at the same time is also a violation of human rights and which may be successfully claimed in constitutional complaint proceedings.

## B – II

17. In the case at issue, the complainant opposes the position of the Supreme Court that the period of 18 months that passed from [the issuance of] the written warning due to the violation of employment obligations until the termination of the employment contract due to new violations is not so lengthy as to render effective judicial protection impossible with regard to the assessment of whether the written warning was well founded. In the opinion of the complainant, such position violates his right to effective judicial protection determined by the first paragraph of Article 23 of the Constitution. The complainant refers to Decision of the Constitutional Court No. U-I-45/07, Up-249/06.
18. The complainant's understanding of Decision No. U-I-45/07, Up-249/06, insofar as it refers to the one-year time limit that the Constitutional Court determined in the manner of implementation of its Decision, is not correct. From this Decision it does not follow that there exists a violation of the right to effective judicial protection already because more than one year passed from the issuance of the written warning to the termination of the employment contract. In every concrete case, "the effectiveness of judicial protection" is the constitutional standard for the assessment of a [possible] violation of the right to judicial protection determined by the first paragraph of Article 23 of the Constitution. The Constitutional Court determined the one-year time limit by its own discretion and as a temporary regulation until the legislature eliminates the unconstitutional situation consisting of the fact that the law did not determine any time limit. The purpose of the manner of execution determined in such manner was to prevent possible violations of the right to effective judicial protection in procedures for the termination of an employment contract with notice for breach of obligations. However, the Constitution does not provide for a precisely determined time limit in such cases, therefore this one-year time limit as such is not an integral part of the right to effective judicial protection. As the Constitutional Court emphasised in Decision No. U-I-45/07, Up-249/06, the fact that judicial protection is ensured after a long period of time does not in itself entail that such judicial protection is always ineffective. It would only be ineffective if such period of time was so long that proving that the written warning was unfounded would be rendered substantially difficult. From the above it follows that the mere fact that more than one year passed between the [issuance of the] written warning and the termination of the employment contract does not necessarily mean that there was also a violation of the right to effective judicial protection. Precisely the question of whether the judicial protection of the complainant with regard to the written warning was rendered substantially difficult and thus ineffective must be at the centre of the [relevant] court's assessment.
19. In the challenged Judgment, the Supreme Court assessed that a period of one and a half years, which was the period of time that passed from the issuance of the written warning to the termination of the employment contract, is not so long as to render impossible the effective judicial review of whether the written warning was well founded. The Supreme Court carried out such assessment by observing the constitutional reasons stated in Decision No. U-I-45/07, Up-249/06. With regard to the question of whether the complainant was ensured an actual and effective possibility of proving

that the written warning was unfounded, the Supreme Court accepted the finding of the court of first instance that at the main hearing the complainant admitted violations of employment obligations (repeatedly coming late to work and disrespecting safety at work instructions). The Supreme Court assessed that the complainant did not even challenge whether the written warning was well founded and did not allege that due to the length of time that had passed he did not have the possibility to prove it was unfounded. Therefore, the Supreme Court decided – with regard to the reasons from Decision of the Constitutional Court No. U-I-45/07, Up-249/06 – that in the case at issue the question of effective judicial protection does not even arise. The complainant does not concur with the allegation that he did not challenge whether the written warning was well founded, but he does not explain in what point the position of the Supreme Court is allegedly inconsistent with the right to judicial protection. The Constitutional Court has already explained a number of times that mere disagreement with a decision does not of itself suffice to conclude that a violation of a [particular] right has occurred.

20. With regard to the allegation that the Supreme Court did not observe the manner of implementation determined by point 3 of the operative provisions of Decision of the Constitutional Court No. U-I-45/07, Up-249/06, the Constitutional Court assesses that it cannot be alleged that such conduct was arbitrary, which would entail a violation of Article 22 of the Constitution. The Supreme Court presented sound (constitutional) legal reasons for its decision. It assessed that the manner of implementation – such as determined by the Constitutional Court in Decision No. U-I-45/07, Up-249/06 – can only refer to future relations and that its application in the complainant's case would entail conduct contrary to the principle of legal certainty determined by Article 2 of the Constitution, the prohibition of the retroactive validity of legal acts determined by the first paragraph of Article 155 of the Constitution, and the principle of finality determined by Article 158 of the Constitution. Furthermore, by such positions the Supreme Court did not violate the complainant's right to effective judicial protection. Precisely such a violation would have a decisive influence on [deciding] whether the Supreme Court observed the Constitution when deciding. As stated above, the Supreme Court assessed whether effective judicial protection was ensured and established – by taking into consideration the reasons stated in Decision No. U-I-45/07, Up-249/06 – that this right of the complainant was not violated.
21. With regard to the above, the Constitutional Court dismissed the constitutional complaint.

## C

22. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The decision was reached unanimously.

*Mag. Miroslav Mozetič*  
*President*

**DECISION**

At a session held on 26 November 2010, in proceedings for the review of constitutionality initiated upon the petition of the Ankaran Local Community, the Mirna Local Community, and others, represented by Mag. Miha Šipeč, attorney in Ljubljana, the Constitutional Court

*decided as follows:*

1. The Establishment of Municipalities and Municipal Boundaries Act (Official Gazette RS, No. 108/06 – official consolidated text) is inconsistent with the Constitution.
2. The National Assembly of the Republic of Slovenia must remedy the inconsistency referred to in the preceding point of these operative provisions within a time limit of two months following the publication of this Decision in the Official Gazette of the Republic of Slovenia.
3. The Decree of the President of the National Assembly of the Republic of Slovenia Calling the Regular Elections to Municipal Councils and the Regular Elections of Mayors (Official Gazette RS, No. 60/10) is annulled insofar as it refers to the elections in the Urban Municipality of Koper and the Municipality of Trebnje.
4. Within a time limit of 20 days following the entry into force of the law by which the National Assembly will fulfil the requirement referred to in the second point of these operative provisions, the President of the National Assembly shall call the elections of municipal councils and the elections of mayors of the new Municipalities of Ankaran and Mirna, and the Urban Municipality of Koper and the Municipality of Trebnje in accordance with the rules that apply for early elections of a municipal council if such is dissolved before the termination of its four-year term of office.
5. The term of office of the members of the municipal councils and the mayors of the Urban Municipality of Koper and the Municipality of Trebnje is to be extended until the first session of the newly elected municipal councils.

**A**

1. The petitioners challenge the Establishment of Municipalities and Municipal Boundaries Act (hereinafter referred to as the EMMBA), as it does not contain any provisions regarding the Municipality of Ankaran and the Municipality of Mirna. The National Assembly of the Republic of Slovenia adopted the assessment that the territories in question fulfil the statutory conditions for the establishment of a municipality, and, on the basis of this assessment, it called referenda for the determination of the will of the residents of these territories. In both referenda the residents supported the establishment of a new municipality. On this basis, the Government of the Republic of Slovenia submitted a draft of the Establishment of the Municipality of Ankaran and the Municipality of Mirna and the Determination of their Territories Act (EPA 943-V, hereinafter referred to as the EMMBA-G), which was not adopted; furthermore, a subsequently submitted draft law on the establishment of the Municipality of Ankaran was not adopted, while a subsequently submitted draft law on the establishment of the Municipality of Mirna is still in the legislative procedure. The rejection of these draft laws or failure to adopt them without a substantiated reason would allegedly entail arbitrary decision-making by the National Assembly as well as a violation of the principles of a state governed by the rule of law and the principle of the equality of the residents of the territories in question (Article 2 and the second paragraph of Article 14 of the Constitution), a violation of the fairness of the proceedings in which their proposals would be considered (Article 22 of the Constitution), and would prevent the exercise of the right to judicial protection and to a legal remedy (Articles 23 and 25 of the Constitution), as the law does not prescribe a legal remedy for such a situation. Since the legal situation is not consistent with the will of the people expressed in a referendum, the challenged Act allegedly also violates the principle determined by the second paragraph of Article 3 of the Constitution, according to which power is vested in the people. Such a situation allegedly unconstitutionally interferes with Articles 9 and 38 of the Constitution, according to which local self-government is guaranteed in Slovenia and the residents exercise it in local communities, and it allegedly also violates the third paragraph of Article 139 of the Constitution, according to which a municipality is established by law, following a referendum in which the will of the residents of a particular territory is determined. At the same time, it allegedly violates Article 44 of the Constitution, as the will of the residents of the territories in question determined in a referendum was nullified and as they cannot participate in the governance of public affairs in a manner that they themselves chose in accordance with the law and the Constitution. The petitioners emphasise that the creation of such an unconstitutional situation just before the local elections entails its perpetuation for another four years, as the possible subsequent amendment of the EMMBA as such could only have effect at the first regular local elections [following its entry into force]. They draw attention to the still on-going unconstitutionality of the Urban Municipality of Koper and

the Constitutional Court decisions regarding the protection of specific parts of the territory of Ankaran. They enclose an expert opinion regarding the constitutional aspects of the establishment of the Municipality of Ankaran with the petition.<sup>1</sup> They suggest absolute priority consideration. They propose that the Constitutional Court [issue a Decision] establishing the existence of an unconstitutional legal gap in the challenged Act, that, by determining the manner of the implementation of the Decision until the inconsistency of the Act with the Constitution is remedied, it ensures the establishment of municipalities on the two territories in question (they refer to Decision of the Constitutional Court No. U-I-294/98, dated 12 October 1998, Official Gazette RS, No. 72/98, and OdlUS VII, 185), and that it suspend the regular local elections in the Urban Municipality of Koper and the Municipality of Trebnje, which will allegedly enable their transformation into municipalities that are in conformity with the Constitution.

2. In its reply, the National Assembly summarises the course of the procedure for the establishment of municipalities in the years 2009 and 2010, namely from the viewpoint of the law in force as well as from the viewpoint of the actual course of the procedure. It states that in such procedure the National Assembly decides on the basis of expert assessments and the proposals of the Government, which, within the framework of its responsibility with regard to the National Assembly (the first paragraph of Article 4 of the Act on the Government of the Republic of Slovenia, Official Gazette RS, No. 24/05 – official consolidated text, and 109/08 – AGRS), also implements the entire concept of local self-governance. Regarding the proposal to establish the Municipality of Ankaran, the Government thus established that the proposed territory fulfils the conditions for the establishment of a municipality and that the proposal goes in the direction of implementing the Constitutional Court decisions in relation with the unconstitutionality of the Urban Municipality of Koper, and it suggested that the National Assembly postpone a decision on the proposals for the establishment of municipalities and urban municipalities until the competences of regions and municipalities are defined on the basis of an expert analysis, and within this framework, especially the competences of urban municipalities. The Government made a statement regarding the proposal on the establishment of the Municipality of Mirna in the framework of a common opinion on several proposals; therein it found that the proposal satisfies the conditions, but an end must be put to the process of breaking municipalities into smaller parts, as this leads to an increase in the number of municipalities that are unable to fulfil their tasks in accordance with the principles of functional and financial autonomy, and therefore it does not support the further process of establishing municipalities. After carrying out the preliminary procedure, the Government submitted a draft of the EMMBA-G to the National Assembly with a delay with regard to its agenda, which allegedly prevented the National Assembly, as the legislature, from concluding the procedure for establishing new municipalities

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1 Prepared by C. Ribičič with the cooperation of I. Kaučič and L. Ude and through consultations with F. Grad, Institute for Comparative Law at the Faculty of Law in Ljubljana, 17 May 2010.

within the statutory time limit. When this draft law was not adopted at a second vote, two separate draft laws on the establishment of each of the municipalities and the determination of their borders were introduced into the legislative procedure; the National Assembly rejected the draft law on the establishment of the Municipality of Ankaran already upon its first reading, while the consideration of the draft law on the establishment of the Municipality of Mirna came to a standstill in the second reading within the framework of the legislative procedure. The National Assembly is of the opinion that the petitioners' statements regarding the "finality" and thereby the binding effect of a referendum on the establishment of a municipality are not substantiated. It stresses that the legal nature of such a referendum as consultative and non-binding on the National Assembly must be taken into account, and it also quotes constitutional case law on this issue. From such it allegedly follows that it falls within the constitutional competence of the National Assembly to establish a municipality by law and determine its territory, thereby taking into account the constitutional concept, statutory criteria, and within this framework, the will of the residents (Decision of the Constitutional Court No. U-I-144/94, dated 15 July 1994, Official Gazette RS, No. 45/94, and OdlUS III, 95),<sup>2</sup> as well as the fact that the National Assembly is not unconditionally bound by such a referendum (Decision of the Constitutional Court No. U-I-183/94, dated 9 November 1994, Official Gazette RS, No. 73/94, and OdlUS III, 122).<sup>3</sup> It emphasises that the National Assembly conducted the procedures in accordance with the Local Self-government Act (Official Gazette RS, No. 94/97 – official consolidated text, 76/08, and 79/09 – hereinafter referred to as the LSA) (with the exception of observing the time limit for their conclusion), and that it cannot be bound by its previous decisions on the establishment of municipalities, as each such procedure is allegedly independent (it refers to Decision of the Constitutional Court No. U-I-104/02).<sup>4</sup> With regard to such, the petitioners' allegations that the EMMBA violates Article 2 and the second paragraph of Article 14 of the Constitution because it did not establish the two municipalities in question are allegedly not substantiated. The National Assembly is also of the opinion that there is no violation of Articles 23 and 25 of the Constitution, as, in light of the opinion of the Government as the executive authority responsible for the implementation of the concept of local self-government, the National Assembly allegedly had the possibility to exercise political

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- 2 In this Decision the Constitutional Court abrogated the first and third paragraphs of Article 14 of the Local Self-government Act (Official Gazette RS, No. 72/93), according to which the National Assembly was required to establish a municipality in accordance with the will expressed by the adult residents who voted in a referendum, because it deemed that it is possible to derive a process from such by which local communities could be created in Slovenia that do not fulfil the constitutional and statutory conditions for their establishment.
  - 3 The Constitutional Court established that Articles 2 and 3 of the EMMBA are inconsistent with the Constitution as they establish municipalities that do not fulfil the constitutional and statutory requirements.
  - 4 Correctly: Decision of the Constitutional Court No. U-I-103/02, dated 18 April 2002, Official Gazette RS, No. 39/02, and OdlUS XI, 64, which drew attention to the fact that the conduct of the National Assembly must always be consistent with the Constitution and the laws, regardless of its prior illegal conduct (since it led to the establishment of municipalities that were not consistent with the constitutional concept of a municipality).

discretion and take into account the broader public interest in adopting this law, even though such entails a decision of a concrete nature. Also with regard to this law, legal protection is therefore allegedly ensured in the proceedings for the review of its consistency with the Constitution before the Constitutional Court, which would decide whether there exist substantiated and convincing reasons for “the decision adopted by the National Assembly”.

3. In its opinion, the Government emphasises that the process of establishing municipalities in Slovenia resulted in a large number of municipalities, therefore it does not support their further establishment. Continuing to break up municipalities into smaller parts would further diminish their ability to fulfil their tasks in accordance with the principle of functional and financial autonomy, which in particular is not observed by very small municipalities. As a result, the regulation regarding the establishment of new municipalities was already amended by law (the Act Amending the Local Self-Government Act, Official Gazette RS, No. 51/10 – hereinafter referred to as the LSA-R). In relation with the proposals on the establishment of the Municipalities of Ankaran and Mirna, the Government prepared a draft amendment of the EMMBA in which, taking into account Order of the Constitutional Court No. U-I-239/98, dated 15 March 2001 (Official Gazette RS, No. 28/01, and OdlUS X, 51), it found that all constitutional and statutory conditions for the establishment of the municipalities in question are fulfilled. It also forwarded such an opinion regarding the subsequently submitted proposals for the establishment of these municipalities.

#### **B – I**

4. By Order No. U-I-137/10, dated 3 September 2010 (Official Gazette RS, No. 72/10), the Constitutional Court accepted the petition for consideration and decided to consider it with absolute priority. At the same time, it suspended the Decree of the President of the National Assembly of the Republic of Slovenia Calling the Regular Elections to Municipal Councils and the Regular Elections of Mayors (Official Gazette RS, No. 60/10 – hereinafter referred to as the Decree calling regular local elections) insofar as it refers to the elections in the Urban Municipality of Koper and the Municipality of Trebnje.
5. On 4 November 2010, the Constitutional Court held a public hearing. The petitioners supported the allegation regarding the National Assembly’s arbitrary decision-making in relation to the establishment of the Municipalities of Ankaran and Mirna with documents that allegedly indicate the presence of political bargaining and not only the application of the National Assembly’s political discretion, the territorial completeness and independence of the Ankaran settlement, the fact that the authorities of the Urban Municipality of Koper neglect the Ankaran settlement, the support of the Italian national community, and the initial support of the Municipality of Trebnje, which was allegedly withdrawn as a result of the subsequent political influence of the authorities of the Urban Municipality of Koper. The representative of the National Assembly stated that in the preliminary proceedings the National Assembly adopted the assessment that several territories fulfilled the conditions for the establishment of a municipality, however due to political influence it allegedly

called referenda only on the two territories in question and not on the other territories. Upon reconsideration [of this matter] on the basis of a request submitted by the National Council that it again decide on the EMMBA-G in new proceedings, the majority of the National Assembly, in accordance with the positions and the warnings of the Government, allegedly realised that decisions in the direction of breaking municipalities into smaller parts are no longer feasible. The Government reiterated its assessment that Slovenia has a large number of municipalities, some of which are not able to perform their tasks due to their small size, and assessed that the two territories at issue fulfil the statutory and constitutional conditions for the establishment of a municipality. The representatives of the Urban Municipality of Koper stressed that there is neither a constitutional right to establish a municipality nor a constitutional concept of a municipality, and that the establishment of the Ankaran Municipality would be unconstitutional; such is allegedly also substantiated by the expert opinions submitted at the public hearing.<sup>5</sup> The establishment of a municipality is allegedly a matter of the National Assembly's political discretion and if its decisions were bound in any manner it would also entail an impediment to the functioning of the National Council of the Republic of Slovenia. The representatives of the Municipality of Trebnje objected to the allegations regarding the withdrawn support and stated they had problems due to the suspended elections. The replies to the questions of the Constitutional Court judges showed that when the National Assembly decided again [on the draft Act], the Government's new political concept of local self-government prevailed as a broader interest, the Government was caught between political and expert assessments of the proposals on the establishment of new municipalities, and that it determined that the proposals then in procedure which had successfully completed the preliminary stage were to be concluded according to the rules of the same procedure that was in force at the time of their submission, as well as that in the event of the establishment of the Municipality of Ankaran the special rights of the members of the Italian national community in accordance with the Constitution and the law would be guaranteed.

## B – II

6. The fundamental question that the Constitutional Court must answer in the case at issue is whether the National Assembly may decide not to adopt a law after calling a referendum in which the residents [of part of the municipality] decided in favour of establishing a municipality. Before this question can be answered, the substance of the concept of local self-government, as guaranteed by the Constitution (Article 9), and of a municipality, in the framework of which the residents of Slovenia exercise the former (Article 138 of the Constitution), must be defined.
7. Already in Decision No. U-I-13/94, dated 21 January 1994 (Official Gazette RS, No. 6/94, and OdlUS III, 8), the Constitutional Court stated the following: "Although the Slovene Constitution does not explicitly refer to the right to local self-govern-

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5 The expert opinion was prepared by M. Cerar, J. Čebulj, I. Kristan, M. Senčur, J. Šmidovnik, and S. Vlaj.

ment in the chapter on fundamental rights and freedoms, the principle of local self-government was incorporated into the fundamental provisions of the Constitution and defined in more detail in a separate chapter on local and other forms of self-government. The 'right to local self-government', however, is inherent in the fundamental constitutional guarantee of local self-government ('Local self-government shall be guaranteed in Slovenia', Article 9 of the Constitution) as the institutional framework for deciding on local public affairs, on the one hand, and in the fundamental constitutional right of every citizen to participate in the management of public affairs (Article 44 of the Constitution), on the other." It especially emphasised that the process of the deconstruction of the old communes or the establishment of new municipalities entails a process "in the sense of an 'upward reform' based on the democratically expressed will of citizens regarding the territory in which they wish to establish 'their' municipality as a natural and functional local community." It may be established that from the launch of the reform of local self-government the Constitutional Court understood such as a process in which the main role is played by the persons residing in a particular territory.

8. In Decision No. U-I-90/94, dated 20 May 1994 (Official Gazette RS, No. 29/94, and OdlUS III, 58), the Constitutional Court rejected the claim that "the people may freely decide on the size of a municipality in a referendum." It further stated the following: "The establishment of municipalities is the basic condition for the actual exercise of local self-government. In Chapter V a), the Constitution namely defines the status of a municipality, an urban municipality, and a region as local communities (Articles 138 through 144). The fundamental local community is a municipality, whose constitutional concept is conditioned by (1) the common needs and interests of the (2) residents of (3) one or a number of settlements (4) who participate in the management of public affairs of a local nature (5) independently, i.e. self-governing in relation to the state. A municipality is therefore a residential community of persons living in the territory of one settlement or a number of interconnected settlements. It is particularly characterised by territorial links that are the basis for the formation of a network of interpersonal and neighbourly relations and the awareness of belonging to a municipality as the fundamental territorial community." It again emphasised that "[s]uch entails the process of the establishment of new municipalities on the basis of the democratically expressed will of the people as to the local territory where they would like to establish a municipality as a natural and functional local community." In Decision No. U-I-85/94, dated 20 May 1994 (Official Gazette RS, No. 29/94, and OdlUS III, 57), the Constitutional Court referred to Decision No. U-I-90/94 regarding the definition of the concept of a municipality and explicitly pointed out "territorial links" as an essential element of the constitutional concept of a municipality that the National Assembly must consider when establishing municipalities.
9. The Constitutional Court defined the substance of the right to local self-government most clearly in Decision No. U-I-322/98, dated 15 March 2001 (Official Gazette RS, No. 28/01, and OdlUS X, 44). After quoting Article 9 and the third paragraph of Article 139 of the Constitution, it stated that "[t]he Constitution guarantees the right

to local self-government that belongs to the residents of a particular territory. It authorises the National Assembly to establish municipalities, but only after the will of the residents has been established,” and it proceeds by stating that “[t]he authorised petitioners are determined very broadly, so as to allow the residents to exercise their right to local self-government (their right to establish municipalities) to the greatest possible extent.” It follows from this Decision that the Constitutional Court also understood the constitutional right to local self-government as the right of the residents living in a particular territory to exercise such right in a municipality of their “own”. Such is also indicated by the requirement determined by the same Decision that the procedure for the establishment of a municipality must be regulated in such a manner so as to prevent the potential arbitrariness of the National Assembly in determining the constitutional and statutory conditions for the establishment of a municipality and that judicial protection against the decisions of the National Assembly must be provided. Arbitrary conduct of the National Assembly preventing the residents of a particular territory from exercising their constitutional right to express their will to establish a municipality in a referendum would consequently also entail an interference with their constitutional right to local self-government.

10. Order of the Constitutional Court No. U-I-254/06, dated 10 April 2008, entails a certain divergence from the position expressed in Decision No. U-I-322/98 and a clearer answer to the question of whether the constitutional right to local self-government also entails the right to one’s own municipality. The Order states the following: “It follows from the constitutional concept of a municipality (the second paragraph of Article 139, the first paragraph of Article 140, and Article 142 of the Constitution) that local self-government is the right of local authorities to manage common local affairs. Although the establishment of a municipality is an essential condition for the exercise of local self-government, such does not entail that the legislature is not entitled to determine the criteria (conditions) and the procedure for the establishment (and changes in the boundaries) of municipalities [...]. Therefore the provisions of Articles 138 and 139 cannot be interpreted in the sense that they guarantee the residents of Slovenia the right to their own municipality, but only the right to exercise local self-government in a municipality that is established in accordance with the conditions and according to the procedure determined by law.”
11. On the basis of the constitutional provisions regarding local self-government and considering the Constitutional Court decisions that also defined the substance of these provisions, the legislature determined the conditions and procedure for the establishment of municipalities. The procedure can be divided into two parts (two stages). The first part is initiated by a petition or proposal for the establishment of a new municipality and is concluded by a decision of the National Assembly on whether or not an individual proposal fulfils the constitutional and statutory conditions for the establishment of a municipality, and, if these conditions are fulfilled, a referendum is carried out in which the residents express their will to establish a municipality. If the proposal does not fulfil the conditions, the procedure is concluded by an order against which judicial protection is guaranteed in instances of potential arbitrary

conduct of the National Assembly (the second and third paragraphs of Article 14a of the LSA). “The requirement that arbitrariness must be prevented at all levels of the legal decision-making process, especially when it could threaten rights safeguarded by the Constitution, is consistent with the principles of a state governed by the rule of law.” (Decision of the Constitutional Court No. U-I-322/98.) If the National Assembly acted arbitrarily in making this decision, it would prevent the residents from expressing their will to establish a municipality in a referendum and such would also entail an interference with the right to local self-government (Decision No. U-I-322/98.) The holding of a referendum determining the will of the residents is a constitutional condition for the second part of the procedure for the establishment of a municipality, i.e. the initiation of the procedure for the adoption of the law by which the municipality will be established. It is not possible to establish a municipality or achieve a change in the territories of municipalities without carrying out a referendum (held by the Constitutional Court in Decision No. U-I-285/98, dated 17 September 1998, Official Gazette RS, No. 67/98, and OdlUS VII, 160). Before the referendum is carried out, all questions in relation to the fulfilment or non-fulfilment of the constitutional and statutory conditions for the establishment of a municipality have to be resolved and also, in a potential judicial dispute, all potentially disputable questions have to be resolved and potential unconstitutionality and illegalities have to be remedied. Legal protection must therefore be regulated in such a manner that it will effectively protect the constitutional rights and legal position of the participants in the procedure (See Decision of the Constitutional Court No. U-I-322/98). In the second part of the procedure, i.e. the procedure for the adoption of the law by which a municipality is established, the National Assembly does not decide on whether the conditions for the establishment of a municipality or for a change in its territory are fulfilled. In proceedings to review the potential unconstitutionality of the law by which municipalities are established or their territories are changed and to review the constitutionality of the procedure in which the law was adopted, only violations that were committed in the legislative procedure may be assessed, and not violations committed in the preliminary procedure, against which special legal protection is provided (See Order of the Constitutional Court No. U-I-239/98).

12. A municipality is established by law following a referendum by which the will of the residents in a given territory is established (the third paragraph of Article 139 of the Constitution). The Constitutional Court has been considering the question of the legal nature of the mentioned referendum since the launch of the implementation of local self-government. Thus already in Decision No. U-I-85/94 it stated the following: “The third paragraph of Article 139 of the Constitution requires the legislature only to carry out a referendum to ‘establish the will of the people in a certain territory’ before establishing new municipalities, without thereby defining the term ‘territory’ and without explicitly binding the legislature to observe such will. In accordance with the spirit of this constitutional provision, by the first paragraph of Article 14 of the LSA the legislature bound itself to establish (by law) the territories of municipalities ‘in accordance with the will expressed [...] in a referendum’

– of course, provided such will is not contrary to the letter and spirit of the constitutional provisions regarding local self-government, since the legislature must above all else abide by the Constitution.” In Decision No. U-I-144/94, by which it abrogated the “self-imposed restriction” under Article 14 of the LSA in force at that time, the Constitutional Court repeated the position from the abovementioned Decision. “The third paragraph of Article 139 of the Constitution, however, does not prescribe such referendum [with binding effect], but it requires that prior to determining the territory of a municipality by law the will of the residents be determined in a referendum. It is, however, within the constitutionally defined sphere of competence of the National Assembly to establish a municipality by law and determine its territory, thereby taking into account the constitutional concept, statutory criteria, and within such framework the will of the residents.” And it offered the National Assembly the following practical instruction: “The will expressed in a referendum by the population of the entire referendum area as well as by the residents of its individual parts will have to be taken into account insofar as the municipality established on its basis will conform to the constitutional concept of local self-government and statutory provisions.” A similar position, which the Constitutional Court developed further, is found in Decision No. U-I-183/94: “Referenda in the sense of Article 139 of the Constitution express the will of the residents of a particular territory which is not necessarily consistent with the interests of adjacent territories and wider public interests, which the legislature must take into consideration in defining such territorial division of the state as will enable not only the implementation of local self-government but also the fulfilment of those administrative tasks of the state which the latter will exercise through municipalities and the powers of the state vested in them. Therefore, the Constitution provides for a consultative referendum, which leaves the final determination of the territory of a municipality to the legislature. In determining the territory of a municipality the legislature is thus not bound by the will of the residents expressed in a referendum in an absolute or unconditional manner.” Thereby the Constitutional Court explicitly underlined that “constitutional authorisations could be exceeded if the National Assembly failed to establish a municipality in a territory which fulfils the constitutional and statutory conditions and whose residents voted in favour of establishing their own municipality.”

13. In Decision No. U-I-294/98, the Constitutional Court adopted a very clear position on whether the National Assembly is bound [by the result of a referendum], namely: “When establishing municipalities and changing their territories, the National Assembly is bound by the will of the voters expressed in a referendum regarding the establishment of a municipality or a change in its territory – except in two instances:
  - when respecting the will of the voters expressed in a referendum would lead to the establishment of a municipality that would not be in accordance with the constitutional and statutory provisions on municipalities, and
  - when it is objectively not possible to respect the will of the voters expressed in a referendum due to the conflicting results of referenda.

Conduct contrary to the will of the voters expressed in a referendum also in other instances would entail a violation of the principle that Slovenia is a democratic republic (Article 1 of the Constitution), the principle that in Slovenia power is vested in the people (the second paragraph of Article 3 of the Constitution), the right to participate in the management of public affairs (Article 44 of the Constitution), and the constitutional provisions regarding local self-government (Article 9, Article 138 of the Constitution).” It repeated the cited position in Decision No. U-I-288/98, dated 14 October 1998 (OdlUS VII, 189), and most recently in Order No. U-I-246/06, dated 10 May 2007.

14. In the course of their implementation, the constitutional provisions that refer to local self-government (in particular, Articles 9, 138, and 139 of the Constitution) must be applied in a manner that derives from Constitutional Court decisions. That also the legislature is bound by the interpretation of the Constitutional Court follows already from the foundations of the principle of the separation of powers. The authorisation of the Constitutional Court to provide interpretations of constitutional provisions that have legally binding effects derives from its constitutionally defined position. It follows from the hitherto interpretations of the Constitutional Court that Articles 138 and 139 must be interpreted as ensuring the residents of Slovenia the right to exercise local self-government in a municipality established in accordance with the conditions and according to the procedure determined by law, and that the National Assembly is – regarding the establishment of municipalities and any change in their territory – bound by the will of the voters expressed in a referendum on the establishment of a municipality or a change in its territory, except in two instances: when respecting the will of the voters expressed in a referendum would lead to the establishment of a municipality that would not be in accordance with the constitutional and statutory provisions on municipalities and when it is objectively not possible to respect the will of the voters expressed in a referendum due to the conflicting results of referenda. In its decisions, the Constitutional Court emphasised that the National Assembly was entitled to determine the conditions under which it assessed specific proposals for the establishment of municipalities, but the principle of a state governed by the rule of law requires that the legislature follow the rules it has itself created and that it does not act arbitrarily in its decisions regarding the establishment of municipalities (See Decision No. U-I-103/02). Conduct contrary to these principles entails a violation of the principle of a state governed by the rule of law (Article 2 of the Constitution) and the general principle of equality before the law (the second paragraph of Article 14 of the Constitution).

15. The following may be derived from the presented positions of the Constitutional Court:

- when deciding on proposals for the establishment of municipalities, the National Assembly has to respect the constitutional concept of local self-government and the statutory conditions and procedure it itself determined. Such entails that if the National Assembly establishes that the conditions are not fulfilled, it is neither obliged to establish a municipality nor to call a referendum. If the National Assembly, however, establishes that the conditions are fulfilled, and the residents

- express their will to establish a municipality in a particular territory in a referendum and there exist no reasons to disregard the will expressed in such manner, the National Assembly is required to establish the municipality;
- the National Assembly is required to respect the will of the residents to establish a municipality in a particular territory expressed in a referendum unless it has substantiated (constitutional law) reasons to act in a different manner;
  - it may not act arbitrarily in deciding on the establishment of municipalities.

### **B – III**

- 16.** The procedure for the establishment of the Municipality of Ankaran through its secession from the Urban Municipality of Koper and of the Municipality of Mirna through its secession from the Municipality of Trebnje was conducted in accordance with the LSA in force before its amendment (LSA-R) and as it continues to govern the two proposed municipalities according to the transitional provisions (Article 8 of the LSA-R). Such entails that the provision of the LSA that enabled the establishment of a new municipality through the secession of a part of a municipality from an existing municipality (the third paragraph of Article 15) is still applicable to the two proposed new municipalities. The National Assembly found that both proposed territories fulfilled the constitutional and statutory conditions for the establishment of a municipality and following such conclusion it called a referendum in which the residents of the two territories expressed their majority will that they wish to establish a new municipality. No judicial dispute was initiated against the Decree calling the referendum. Following the referendum, the National Assembly also established the two municipalities by law. The National Council requested that the National Assembly vote again [on this matter]. In the new vote, however, the law was not adopted. The draft law for the establishment of the Municipality of Ankaran was also rejected in a newly initiated procedure, while the draft law for the establishment of the Municipality of Mirna came to a standstill in the legislative procedure.
- 17.** As has already been mentioned, the petitioners' main allegation is that the National Assembly acted arbitrarily when it did not establish the two municipalities, even though in the relevant procedure it itself found that both territories fulfilled all constitutional and statutory conditions for the establishment of a municipality, which in the case at issue entails a violation of the second paragraph of Article 14 and Article 2 of the Constitution, and as a consequence it also violated Articles 9, 138, and 139 of the Constitution. The National Assembly's objection is that it is completely free when deciding on the establishment of a municipality, as such concerns full political discretion. However, at the public hearing it added that it also had the right to change its mind. The representative of the Municipality of Koper argued above all that there is no constitutional right to one's own municipality, that the referendum on the establishment of a municipality is of a consultative nature, and that the proposed new Municipality of Ankaran also otherwise does not fulfil the conditions for a municipality.

18. As regards the objections that the proposed Ankaran municipality does not fulfil the constitutional and statutory conditions, attention should be drawn to the position of the Constitutional Court that holds that all questions in relation to the fulfilment of such conditions have to be resolved in the procedure leading to the calling of a referendum, also through the use of judicial protection. The Urban Municipality of Koper could have challenged the Decree calling the referendum.<sup>6</sup> Therefore, the allegation of the non-fulfilment of the conditions cannot be taken into account. By Order No. U-I-239/98, the Constitutional Court adopted the clear position that “in the procedure for the adoption of a law the National Assembly does not establish the fulfilment of the conditions for the establishment of a municipality or a change in its territory, but proceeds from the results of the referendum in accordance with Articles 25 and 26 of the [Act regulating the procedure for establishing municipalities and municipal boundaries]. In proceedings to review a potential unconstitutionality of the law by which municipalities are established or their territories are changed and to review the constitutionality of the procedure in which the law was adopted it is only possible to assess violations committed in the legislative procedure, and not violations committed in the preliminary procedure, for which special legal protection is prescribed.”
19. The objection that the right to one’s own municipality does not exist and that the National Assembly is completely free in deciding upon the establishment of a new municipality, even though it itself established that the constitutional and statutory conditions for the establishment of the two new municipalities were fulfilled, and in spite of the affirmative will expressed by the residents, is also not substantiated. Such position is not consistent with Articles 138 and 139 of the Constitution. The National Assembly is not obligated to establish a new municipality if it finds that the constitutional and statutory conditions for its establishment are not fulfilled. However, as the National Assembly established that the constitutional and statutory conditions were fulfilled, and following the fulfilment of the last condition – the affirmative will of the residents expressed in the referendum – and the finding that no reasons exist due to which it would not be required to take into account the result of the referendum, it should have established the two municipalities, in accordance with the procedure it itself had prescribed. The National Assembly’s position that in adopting a law by which it establishes a municipality it is bound by neither the result of a referendum nor the finding from the preliminary procedure that the conditions are fulfilled, in connection with the concurrent position that legal protection against such law is guaranteed before the Constitutional Court, which will assess primarily if substantiated and convincing reasons for the decision adopted by the National Assembly derive from the entire procedural documentation, is unclear and even contradictory. What these reasons may be and why the Constitutional Court would establish them at all, since, given the National Assembly’s position that it is bound by neither the result of the referendum nor by the findings from the preliminary procedure, the National Assembly would not even be required to state them, is not evident from the National Assembly’s reply.

6 See Decision of the Constitutional Court No. U-I-322/98.

20. Already in Decision No. U-I-13/94 the Constitutional Court stated that it is a task of a state governed by the rule of law to enable residents of municipalities to express their interests and exercise their appropriately determined will in a legally regulated manner. By a special law the National Assembly prescribed the conditions and procedure for the establishment of a municipality. Following the prescribed procedure conducted by the National Assembly, a municipality is established by a law. It is true that the legislature is completely autonomous when adopting laws by which it regulates social relations in a general and abstract manner, and bound only by the Constitution. It undoubtedly had such broad autonomy regarding the establishment of municipalities when adopting the laws by which it defined, in conformity with the Constitution, the conditions and procedure for the establishment of municipalities. However, it does not have such broad autonomy when adopting a law by which it decides on the establishment of a municipality.
21. “The establishment of a municipality by the constitutionally and statutorily defined procedure is an essential condition for the exercise of the constitutional right to local self-government.<sup>7</sup> It is the constitutional right of the residents living in a particular territory who are connected by common needs and interests to govern local affairs by themselves.”<sup>8</sup> An integral part of the right to local self-government is also the possibility of the residents of a particular territory to exercise this right in a municipality that they establish independently in accordance with the statutory conditions. That is the intention of the constitutional provision providing that the National Assembly establish a municipality following the prior determination of the will of the residents. By a decision adopted at the end of such procedure, the National Assembly decides precisely on this constitutional right, namely on the basis of the finding that according to the procedure that was carried out, the obtained documents, and the established facts, as well as according to the result of the referendum, the constitutional and statutory conditions for the establishment of a municipality as the fundamental self-governing local community are fulfilled. Therefore, such does not entail an “abstract right to a municipality” in whatever territory, but only in the territory that fulfils the constitutional and statutory conditions for the establishment of a municipality.
22. According to an explicit provision of the Constitution, the National Assembly adopts the decision on the establishment of a municipality in the form of a law. However, such constitutional competence of the National Assembly does not change the fact that, despite the prescribed formal form, such in substance entails a decision on a constitutional right in a concrete, individual case following the prior execution of the procedure prescribed by the Constitution and the LSA. Therefore, in such an instance the legislature, despite using the form of a law, nevertheless does not have a wide margin of appreciation in the sense of political discretionary decision-making, so as to be able to – having drawn its democratic legitimacy from general elections – decide on

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7 Held by the Constitutional Court in Order No. U-I-254/06, dated 10 April 2008, Paragraph 5 of the reasoning.

8 See Decision of the Constitutional Court No. U-I-163/99, dated 23 September 1999, Official Gazette RS, No. 80/99, and OdlUS VIII, 209, Paragraph 13 of the reasoning.

whether to establish a municipality or not only on the basis of a value-oriented and interest-oriented assessment. The margin of the legislature's appreciation is present in the general and abstract legal regulation of rights and obligations, as only there – taking into account the constitutional framework – may the democratically elected legislature freely decide on the most appropriate legal regulation. In deciding on whether in a concrete case the residents of a particular territory may exercise their constitutional right to local self-government in the framework of a new municipality, however, the legislature enjoys less freedom, as it has to respect the rules that it itself defined. As soon as the legislature defined the conditions for the exercise of its constitutional competence to establish municipalities, which have to be fulfilled and the existence of which it establishes itself, and the special procedure, in accordance with the principle of legality and trust in the law as well as the general principle of equality, it also had to observe these rules.<sup>9</sup> The statutory regulation of the conditions and the procedure for the establishment of municipalities as well as the guarantee of legal protection in such procedure require not only that the regulation be observed, including by the legislature (Article 2 of the Constitution), but also that all residents (petitioners) who want to establish a municipality in a particular territory be treated equally (the second paragraph of Article 14 of the Constitution). The principle of equality of course does not require that the National Assembly break the law (i.e. that it establish a municipality even though the conditions for such are not fulfilled), it does however require that it apply the prescribed conditions in all cases equally. If a territory fulfils the conditions, it must act in the same manner as it acted in other cases where the conditions had been fulfilled. Citizens, in the case at issue, the residents of the two territories in which the new municipalities are to be established, legitimately expected that the legislature would adhere to the defined rules and would, provided that all prescribed conditions are fulfilled, establish a municipality, as it had done in similar cases. Conduct contrary to the described principles entails a violation of the principle of legality and trust in the law (Article 2 of the Constitution), as well as the general principle of equality under the second paragraph of Article 14 of the Constitution.

23. As the National Assembly did not establish the Municipalities of Ankaran and Mirna, it acted arbitrarily and thereby violated the general principle of equality (the second paragraph of Article 14 of the Constitution) and the principle of legality and trust in the law (Article 2 of the Constitution). The refusal to establish the two municipalities consequently also entails a violation of Articles 138 and 139 of the Constitution. The Constitutional Court therefore decided that the EMMBA is inconsistent with the Constitution (point 1 of the operative provisions).

#### B – IV

24. The National Assembly is required to remedy the established inconsistency with the Constitution within a period of two months (point 2 of the operative provisions). In determining the time limit for remedying the inconsistency, the Constitutional Court

<sup>9</sup> See also Decision of the Constitutional Court No. U-I-103/02.

considered that the content required to remedy the law is already known and it is not necessary to carry out a new preliminary procedure for the establishment of the fulfilment of the constitutional and statutory conditions or to carry out a referendum, but only the legislative procedure for adopting an amendment to the EMMBA. The transitional provision of the LSA-R (Article 8) can also be understood in such a manner, as it determines that procedures regarding proposals for the establishment of new municipalities regarding which a referendum had been called before this Act (the LSA-R) was adopted are to be continued and concluded under the provisions that governed these procedures before the entry into force of this Act. The Act defines the “calling of a referendum” as a condition for the application of the previously valid law, not that “a referendum had already been carried out”. In the case at issue, the results of the referendum had even already been proclaimed. The Act, however, does not define the term “conclusion of the procedures”. However, as it links the application of the LSA-R or the law in force before the amendment to the “calling of a referendum”, which entails the conclusion of the preliminary procedure, it is absolutely clear that the term “conclusion of the procedure” refers to the legislative procedure. Therefore, all actions carried out in the preliminary procedure, including the referendum, remain legally valid. Thereby it also has to be emphasised that the established inconsistencies refer only to the legislative procedure, not the preliminary procedure.

#### **B – V**

25. The Constitutional Court found that the EMMBA is inconsistent with the Constitution and ordered that it be harmonised with the Constitution, but such does not suffice for remedying the established unconstitutionality. The goal of procedures for the establishment of a municipality is the exercise of local self-government in a particular territory, which, however, may only be ensured through elections of mayors and municipal councillors, which in essence entail the final stage before the constitution of a municipality. Therefore, the EMMBA is directly linked to the Local Elections Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the LEA). The regulation by which the execution of these elections is ensured is the decree calling the regular local elections that is issued by the President of the National Assembly within the time limits defined by statute.<sup>10</sup> Therefore, with regard to the established unconstitutionality of the EMMBA, on the basis of the mandate under Article 30 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court also reviewed the constitutionality of the Decree calling the regular local elections insofar as it refers to elections in the Urban Municipality of Koper and the Municipality of Trebnje. By Order No. U-I-137/10, dated 3 September 2010, the Constitutional Court suspended the execution of the mentioned Decree insofar as it refers to the Urban Municipality of Koper and the Municipality of Trebnje. As the Constitutional Court

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<sup>10</sup> See Order of the Constitutional Court No. U-I-403/98, dated 19 November 1998, OdlUS VII, 206, regarding the suspended regular elections in the Urban Municipality of Koper.

decided that the EMMBA is unconstitutional, because it did not establish the new municipalities, the Decree calling the regular local elections is also unconstitutional in the part in which its execution was suspended, and thus the elections in the Urban Municipality of Koper and the Municipality of Trebnje were not carried out. By carrying out the elections in the Urban Municipality of Koper and the Municipality of Trebnje without previously establishing the new municipalities, the unconstitutional state of affairs established by this Decision would be perpetuated and the residents of the new municipalities would be prevented from exercising local self-government therein, which would entail a violation of the principle of legality and trust in the law under Article 2 of the Constitution. Therefore, as in the Urban Municipality of Koper and the Municipality of Trebnje certain acts in relation to elections have already been carried out, the Constitutional Court annulled the Decree calling the regular local elections insofar as it refers to the elections to the authorities of the Urban Municipality of Koper and the Municipality of Trebnje (point 3 of the operative provisions). Such entails that also all actions carried out in relation to the elections on the basis of this part of the Decree calling the regular local elections and all acts adopted on its basis also lost their legal validity.

#### **B – VI**

26. After the EMMBA is harmonised with the Constitution, local elections have to be carried out as soon as possible in the new municipalities that will be established by their secession from the Urban Municipality of Koper and the Municipality of Trebnje, as well as in the latter two municipalities. On the basis of Article 40 of the CCA, the Constitutional Court thus determined that within a time period of 20 days following the entry into force of the law the President of the National Assembly is to call local elections in both newly established municipalities as well as the Urban Municipality of Koper and the Municipality of Trebnje in accordance with the rules for early elections (point 4 of the operative provisions). The Constitutional Court chose such a manner of implementation [of its Decision] because the time limit the LSA defines for the conclusion of the procedures had already expired. Delaying the implementation of this Decision would, however, entail disregard for a Constitutional Court decision and therefore a violation of Articles 2 and 3 of the Constitution as well as a perpetuation of the established unconstitutionality.

#### **B – VII**

27. In order to ensure legal certainty regarding the functioning of the Urban Municipality of Koper and the Municipality of Trebnje in the period until the local elections are carried out on the basis of the EMMBA, which will be harmonised with the Constitution, in spite of Articles 41 and 42 of the LSA,<sup>11</sup> an extension of the terms of office [of

11 Article 41 of the LSA determines that the four-year term of office of members of a municipal council lasts until the first session of the newly elected council, which applies to both regular and early elections, as well as elections that, for whatever reason, are carried out later than the regular elections to municipal councils.

the members of the municipal councils and the mayors of these municipalities] was determined, namely until the first session of the newly elected municipal councils of these municipalities. In this period the members of the municipal councils and the mayors of these municipalities are to retain their regular mandates to decide on all affairs within the competence of the municipalities (point 5 of the operative provisions).

28. The Constitutional Court is aware that the periodic nature of elections is one of the more important elements of the right to vote and the principle of democracy. However, the extension of the [mentioned] terms of office in the Urban Municipality of Koper and the Municipality of Trebnje is necessary in order to ensure that the residents who proposed the establishment of the new municipalities (regarding which the National Assembly in the prescribed procedure determined that all the conditions for their establishment are fulfilled and their residents expressed the will to establish a municipality) can enforce and exercise the right to local self-government, including elections, in a municipality “established in accordance with the conditions and the procedure determined by law”, even though as a result elections will be held after the term of office expires.<sup>12</sup> Making the territory of a municipality consistent with the Constitution without also carrying out elections in the (new) municipality does not entail of itself that the exercise of local self-government is ensured in such a municipality. The residents predominantly exercise the rights (competences) of local self-government through elected authorities (the municipal council and the mayor). Therefore, the Constitutional Court deems that a shorter delay in the holding of elections does not entail an inadmissible interference with the right to vote, and in no instance does it cause its hollowing out.

### C

29. The Constitutional Court adopted this Decision on the basis of Article 40, the second paragraph of Article 45, and Article 48 of the CCA, as well as the third indent of the third paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, and 54/10), composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, Jože Tratnik, and Jan Zobec. It adopted the Decision by seven votes against one. Judge Sovdat, who submitted a dissenting opinion, voted against. Judge Petrič submitted a concurring opinion.

*Dr Ernest Petrič*  
*President*

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Article 42 of the LSA determines that the four-year term of office of mayor lasts until the first session of the newly elected council, which applies to both regular and early elections, as well as elections that, for whatever reason, are carried out later than the regular elections to municipal councils.

12 See Decision of the Constitutional Court No. U-I-254/06.

1. By the constitutional complaint the petitioners attacked the conduct of the National Assembly of the Republic of Slovenia in the procedure for the adoption of an amendment to the Establishment of Municipalities and Municipal Boundaries Act and the veto of the National Council of the Republic of Slovenia regarding the amendment of this law that had initially been adopted by the National Assembly. At the same time, they submitted a petition by which they challenge the Establishment of Municipalities and Municipal Boundaries Act (Official Gazette RS, No. 108/06 – official consolidated text – hereinafter referred to as the EMMBA) alleging an unconstitutional legal gap, as the law does not include the Municipalities of Ankaran and Mirna, and, subsequently, the Decree calling the regular local elections, published in the Official Gazette RS, No. 60/10. The Constitutional Court has already decided on the submitted constitutional complaint and rejected it by Panel Order No. Up-604/10, dated 13 September 2010, as the conduct of the National Assembly and the National Council's veto in the legislative procedure are not individual acts against which a constitutional complaint is allowed. As the constitutional complaint has already been decided, the subject matter of these proceedings is thus only deciding on the constitutionality of the EMMBA on the grounds of the alleged unconstitutional legal gap, as it does not contain the Municipalities of Ankaran and Mirna, whereby the decision-making process was initiated by Order of the Constitutional Court No. U-I-137/10, dated 3 September 2010, by which the petition was accepted for consideration. As by this Order the Constitutional Court suspended the implementation of the Decree of the President of the National Assembly calling the regular elections insofar as it refers to the Urban Municipality of Koper and the Municipality of Mirna, the subject matter of this decision-making process is also the petitioners' proposal to assess the constitutionality of this regulation, provided the Constitutional Court deemed such to be necessary.
2. I did not participate in the adoption of the Order on the acceptance of the petition and the decision to suspend the holding of elections in the mentioned municipalities. Such of course is not an obstacle that would prevent me from joining the majority in this Decision. However, reasons of constitutional law, which in my opinion oppose the arguments by which the majority decision substantiates the unconstitutionality of the Act, do not permit me to do so. In addition, I cannot agree with the interference with the right to vote.

I

3. Article 9 of the Constitution determines that local self-government is guaranteed in Slovenia and Article 138 determines that the residents of Slovenia exercise local self-government in municipalities and other local communities. The second paragraph of Article 139 defines the territorial aspect of a municipality when it determines that its territory encompasses one or more settlements that are connected by the common needs and interests of their residents. The Constitution defines the other

aspects<sup>1</sup> of local self-government, insofar as it defines them, in Articles 140 and 142. The European Charter of Local Self-Government (Official Gazette RS, No. 57/96, MP, No. 15/96 – hereinafter referred to as the ECLSG) defines the concept of local self-government in the first paragraph of Article 3 as “the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.” The second paragraph of this Article *inter alia* determines that this right is exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal,<sup>2</sup> and universal suffrage which may have executive organs responsible to them.

4. According to the third paragraph of Article 139 of the Constitution, a municipality is established by law following the prior holding of a referendum by which the will of the residents of a particular territory is determined, whereby the law also determines the territory of the municipality. The ECLSG refers to the territory of municipalities only insofar as it determines in Article 5 that the boundaries of local governments should not be changed without prior consultation with the local communities to which they refer, if possible by referendum, where such is permitted by law. At the time of its entry into force, the third paragraph of Article 139 of the Constitution had a special meaning in particular due to the fact that on the basis of constitutional provisions local self-government with the competences accorded to it by the Constitution and the ECLSG had yet to be established. The decision in the case at issue also essentially depends on the definition of its content. However, such is not possible without previously clarifying what local self-government in essence is and what the nature of rights and obligations deriving from this constitutionally-defined institution is and who the holder of such is. Understanding the latter namely enables us to understand the former. In comparison to the majority, I hold an essentially different position regarding the former as well as the latter.
5. It appears that since the enactment of the constitutional basis for the establishment of local self-government there have been two opposing concepts, whereby according to the first, local self-government is only a public law institution, having rights (only) as such, while according to the second, it is the right of the local residents to manage local public affairs on their own. If the Constitution ensures the second, the question naturally arises whether as an individual living on a particular territory I have the right to demand local self-government, and, if I do, what type of local self-

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1 Regarding the characteristics of local self-government, which along with a territorial element, also contains functional, organisational, material-financial, legal, and subjective elements, see F. Grad, *Lokalna demokracija* [Local Democracy], Uradni list Republike Slovenije, Ljubljana 1998, p. 14. On the same subject, see also F. Grad and I. Kaučič, *Ustavna ureditev Slovenije* [The Constitutional System of Slovenia], Gospodarski vestnik, Ljubljana 1999, pp. 322–324, and J. Šmidovnik, *Lokalna samouprava* [Local Self-Government], Cankarjeva založba, Ljubljana 1995, pp. 27–29.

2 It would have been more appropriate if when translating the ECLSG the English word “equal” had been translated as the Slovene word “enako” [translator’s note: equal] rather than “enakopravno” [translator’s note: equal in terms of rights].

government do I have the right to demand. Do I have a constitutionally protected right to demand a municipality? We thus appear to be dealing with two questions: Is local self-government as “a legal systemic institution that defines the position (status) of the local community”<sup>3</sup> or “a legal systemic quality that has to be explicitly accorded [...] to a local community by an appropriate state act”<sup>4</sup> only the right (and ability) of local governments to manage local public affairs, as is stated in the first paragraph of Article 3 of the ECLSG, namely a right belonging to a local community as an independent entity of public law? Or, does local self-government entail (only or also) the constitutional right of the inhabitants of Slovenia who reside in a particular territory and who are connected by common needs and interests to manage their local affairs on their own in a local community? These questions have been present since the writing of the Constitution and, in light of everything seen thus far, the statement of one of the discussion participants [at a meeting of] the Commission for constitutional questions that such concerns a “great question that will be debated at length by law”<sup>5</sup> has proven to be truly prophetic. Evidently, no clear answers to these questions have been provided until today. Had they been provided, the issue probably would not have been highlighted once again as central in the adoption of the last amendment to the Local Self-government Act.<sup>6</sup> And evidently it is also central in the case at issue. It appears that in spite of numerous Constitutional Court decisions that were adopted in particular in the process of the establishment of municipalities in the function of establishing a system of local self-government and that were especially burdened by the establishment of a so-called network of municipalities, i.e. the question of the territorial division of the state territory in order to ensure local self-government, we have no clear constitutional answers to these questions, which also blurs the constitutional content of the third paragraph of Article 139 of the Constitution. There even appears to be an attempt to resolve the issue of the quality of local self-government through the quantity of municipalities. I am afraid that this process will only continue also after this Decision.

6. Let us begin by reviewing the relevant decisions of the Constitutional Court. Its interpretations of Articles 9 and 138 of the Constitution are namely binding on the National Assembly. The Decision in the case at issue refers to them as well. In Decision No. U-I-13/94, dated 21 January 1994 (Official Gazette RS, No. 6/94, and OdlUS III, 8), the Constitutional Court deemed that “the right to local self-government” (*also*

3 J. Šmidovnik, *op. cit.*, p. 27.

4 *Ibid.*

5 At the 18<sup>th</sup> Session of the Commission for Constitutional Questions on 12 December 1990, an unknown speaker thus *inter alia* stated the following: “The first question is if, for example, some village may request that the National Assembly adopt such a law and transform it into a municipality, this great question that will be debated at length by law [...]” in M. Cerar, G. Perenič (eds.), *Nastajanje slovenske Ustave, izbor gradiv Komisije za ustavna vprašanja 1990–1991* [The Process of Creating the Slovene Constitution, a Selection of Documents of the Commission for Constitutional Questions 1990–1991], Book No. III, Ljubljana 2001, p. 1065.

6 See the Report of the Committee on Local Self-Government and Regional Development on the Draft of the Act Amending the Local Self-Government Act (LSA-R) – the second reading on 7 June 2010.

written in quotations in the Decision itself, comment by J. S.) “is the inevitable result of observing the fundamental constitutional guarantee of local self-government under Article 9 of the Constitution as the institutional framework for deciding on local public affairs under Article 44 of the Constitution.” In addition to this definition, the Constitutional Court immediately summarises from the preamble of the ECLSG that local governments are one of the main foundations of every democratic rule, that the right of citizens to participate in the management of public affairs that may be exercised in the most direct manner at the local level is a democratic principle, and it adds the content of the first paragraph of Article 3 of the ECLSG. In Decision No. U-I-90/94, dated 20 May 1994 (Official Gazette RS, No. 29/94, and OdlUS III, 58), when stressing that a municipality is the fundamental local community, the Constitutional Court stated that its **constitutional conception is conditioned** (*emphasis added by J. S.*) by 1) common needs and interests 2) of the residents of 3) one or more settlements 4) who participate in the management of public affairs of a local (...) nature 5) independently, i.e. self-governing in relation to the state.<sup>7</sup>

7. In my opinion, it already follows from the quoted positions of the Constitutional Court that local self-government is undoubtedly the institutional framework for deciding local public affairs (as the state is the institutional framework for deciding state affairs<sup>8</sup>), whereby self-governance in the performance of public affairs is the right – the right of the local community as an independent entity of public law – by which it will assert and protect itself (in particular) against the state when the latter would inadmissibly interfere with its position as protected by the Constitution. However, this institution is not an end in itself. It is intended to enable the persons who live in a particular territory, to which it is limited, to self-govern local affairs for their benefit – either through direct forms of decision-making or in the manner that is predominantly applied, i.e. through a system of representative democracy with elections, which may also be inferred from the second paragraph of Article 3 of the ECLSG. Therefore, these persons are a constitutive integral element of local self-government and they undoubtedly belong in the legal definition of this institution.<sup>9</sup> Within the framework of such, they exercise their right to participate in the management of public affairs, which the ECLSG defines as a principle and which the Constitution in Article 44 elevated to the level of a human right. **However, what is**

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7 Or, as it added in other words: “The municipality, then, is a community of people living within the area of one or more mutually interconnected settlements. Its particular characteristic is territorial integration, which is the basis for the development of a network of interpersonal and neighbourly relations and of an awareness of belonging to the municipality as a basic territorial entity.” The Constitutional Court repeated the same definition also in Decision No. U-I-144/94, dated 15 July 1994 (Official Gazette RS, No. 45/94, and OdlUS III, 95).

8 It appears logical that also in Decision No. U-I-144/94 the Constitutional Court speaks of the fact that precisely the division of competences between the state and a municipality is the first characteristic of local self-government and it adds that the territorial connection of the residents in a certain area is its second equally important characteristic due to the awareness of the residents that they form a community in which they decide on matters of common importance.

9 This is how I understand Prof. Šmidovnik, *op. cit.*, pp. 27–29, and other above cited authors.

most important thereby is that even though within this framework also (this and other) rights are exercised, local self-government in itself is not yet a human right,<sup>10</sup> just as the state is not [a human right], even though (this and all other) rights are exercised within its framework. Thus, also Article 138 does not speak of “the exercise of the right to local self-government”, but of “the exercise of local self-government”. However, we can nevertheless speak of a constitutional (but not human!) right to local self-government. We can speak of a constitutional right to local self-government in the sense that is probably undisputable when we speak of the rights of local communities to self-government in relation to the state. Perhaps we can also speak of it in **the sense of the constitutional right of the persons** who live in the territory of the Republic of Slovenia **to decide on common issues of local importance in a manner that is guaranteed by the institution of local self-government**. If we can speak of a constitutional right of persons at all, then, in my opinion, we can do so only in this sense. Namely, if the state, in spite of constitutional provisions, did not establish local self-government at all, but established such only fictitiously, or even abolished it, its citizens could demand that it guarantee them such right – namely that it guarantee them the right to decide local public affairs in the framework of local self-government and not in the framework of the state.

8. It is, however, not possible to say that the content of this constitutional right from the viewpoint of an individual also entails that a group of persons in a particular territory has the right to establish “its” local community to which the state shall acknowledge the status of self-government and all competences linked to this characteristic. It is hence not possible to say that from the Constitution there derives “a constitutional right of individuals to their own municipality”. The content of local self-government defined in such a manner, in my opinion, also logically follows from the definitions of the Constitutional Court in Decisions No. U-I-13/94, and No. U-I-90/94. In Decision No. U-I-322/98, after the introductory statement, according to which the competence of the National Assembly derives from the Constitution, as municipalities are established and their territories changed only by law, we may, however, also read the following: “The entitled proposers (*in accordance with Article 3 of the [Act regulating the procedure for establishing municipalities and municipal boundaries] in force at that time, comment by J. S.*) are, however, determined very broadly so that the residents may ex-

10 As it is not a human right, it is unusual that by Decision No. U-I-322/98, dated 15 March 2001 (Official Gazette RS, No. 28/01, and OdlUS X, 44), the Constitutional Court established the inconsistency of the then valid act on the procedure for establishing municipalities with the fourth paragraph of Article 15 of the Constitution, as the act allegedly did not guarantee judicial protection against decisions adopted by the National Assembly in the preliminary procedure in which the conditions for the establishment of municipalities are determined, even though the decision of the National Assembly, as the Constitutional Court held, allegedly has a direct influence on the exercise of a constitutional right. The fourth paragraph of Article 15 explicitly guarantees judicial protection of human rights and fundamental freedoms (and is, from this perspective, a special provision in relation to the first paragraph of Article 23 of the Constitution) and the right to have the consequences of their violations remedied; therefore it can have no connection with local self-government. Already at this point, the dissenting opinion of Judge Ribičič with regard to this Decision should be explicitly mentioned.

ercise their right to local self-government (the right to establish a municipality) to the greatest possible extent.” If in this Decision the Constitutional Court stopped at only this note, we could still, even if with some difficulty due to the addition in the parentheses, speak of an interpretation in one or another manner, but as the Court at the same time required that judicial protection be ensured against decisions of the National Assembly in the preliminary procedure for the determination of the existence of the constitutional and statutory conditions for the establishment of a municipality, this Decision cannot be understood any differently than that it substantially leaned in the direction of local self-government as a right of residents to demand the establishment of a municipality. The Decision in the case at issue clearly confirms such. The constitutional law reasons against such position have already been explained by Judge Ribičič in his separate opinion with regard to Decision No. U-I-322/98. Here I quote from his separate opinion: “The right to local self-government [...] does not entail the right to establish a municipality. I am deeply convinced that such a right cannot be inferred from the third paragraph of Article 139 of the Constitution [...]. Article 138 of the Constitution contains a somewhat sterner, even though in my opinion likewise insufficient basis for the right of the residents to establish a municipality [...]. The insufficiency of such constitutional basis for constructing the human constitutional right to establish a municipality becomes especially evident if someone attempted to derive from the mentioned constitutional provision a right to establish broader local communities, provinces, regions, or states, which may be regarded as ‘other’, broader local communities.” In his opinion, the denial of the existence of a constitutional right to establish a municipality does not also entail a negation of the right to local self-government, as such may be exercised in different forms and in very diverse manners, and by no means, as he says, “only in the framework of a municipality that is established to suit the image of a local community, a group of persons, or an individual.” I cannot but agree with these constitutional law arguments. We cannot speak of local self-government as a right that guarantees “the possibility of the residents of a particular territory to exercise this right in a municipality that they establish individually in accordance with statutory conditions,” or as “the right of the residents living in a particular territory to exercise this right in ‘their own’ municipality,” as is stated in the Decision. In my opinion, **we can only speak of local self-government as a constitutional right of the people to decide common issues of local importance in a manner as is guaranteed by the institution of local self-government.** That is how I see the constitutional law content of local self-government.

9. And, in my opinion, this is the content that one must have in mind also when interpreting the third paragraph of Article 139 of the Constitution. According to this provision, a municipality is established by law following a referendum by which the will of the residents in a particular territory is determined; the territory of the municipality is also defined by law. The interpretation of this provision is importantly affected by the legal nature of the referendum it requires. Also with regard to such, let us first have a look at what the Constitutional Court stated regarding this subject. The majority of Constitutional Court decisions [in this area] namely refer precisely

to this. In Decision No. U-I-144/94, the Constitutional Court stated that the will of the residents is decisive for the establishment of a municipality, of course provided it is in accordance with the constitutional and statutory concept of a municipality.<sup>11</sup> Thereby, the referendum under the third paragraph of Article 139 is not binding, but merely requires that the National Assembly first establish the will of the voters, “it, however, lies within the competence of the National Assembly to establish a municipality and determine its territory by law, taking into account the constitutional concept, the statutory criteria, and within this framework, the will of the residents.” This position was expressed even more clearly in Decision No. U-I-183/94, dated 9 November 1994 (Official Gazette RS, No. 73/94, and OdlUS III, 122),<sup>12</sup> where the Constitutional Court stated: “Referenda in the sense of Article 139 of the Constitution namely express the will of the residents in a particular territory that is not necessarily consistent with the interests of adjacent territories **and the wider public interests, which the legislature must take into consideration in defining such territorial division of the state as will enable not only the implementation of local self-government but also the fulfilment of those administrative tasks of the state which the latter will exercise through municipalities and the powers of the state vested in them.** Therefore, the Constitution provides for a consultative referendum that leaves the final determination of the territory of a municipality to the legislature (*emphasis added by J. S.*)” However, already in this Decision the Constitutional Court added the warning that constitutional authorisations could be exceeded if the National Assembly fails to establish a municipality in a territory which fulfils the constitutional and statutory conditions and whose residents voted in favour of establishing their own municipality. This *obiter dictum* became the *ratio decidendi* in Decision No. U-I-294/98, dated 12 October 1998 (Official Gazette RS, No. 72/98, and OdlUS VII, 185), in which the Constitutional Court held that the National Assembly is bound by the will of the voters expressed in a referendum when establishing municipalities and changing their boundaries, except in the following two instances: 1) when respecting the will of

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- 11 Even if we do not accept the position Prof. Šmidovnik presented at the public hearing entailing that no particular concept of a municipality follows from the Constitution, despite numerous Constitutional Court decisions, the notion of a “constitutional and statutory concept of a municipality” remains “evasive” to say the least. Such is only reinforced by the legislature’s wide margin of appreciation when filling it [with meaning]. The definition according to which a local community is a community of persons living in the territory of one or several mutually connected settlements, a particular characteristic of which is a territorial connection, on the basis of which a network of interpersonal and neighbourly relations as well as the awareness of belonging to a municipality as the fundamental territorial community are formed, and which also presupposes that the future municipality will be capable, with regard to the number of its residents and other circumstances, of independently handling local affairs, namely allows for one or another solution in the case at issue.
- 12 Also in Decision No. U-I-285/98, dated 17 September 1998 (Official Gazette RS, No. 67/98, and OdlUS VII, 160), the Constitutional Court stated, regarding the legal nature of such referendum, that through the referendum the Constitution guarantees the residents of areas where territorial changes to the network of municipalities have been proposed the right “to be heard” or to take a position regarding the proposed changes in a democratic manner.

the voters expressed in a referendum would lead to the establishment of a municipality that would not meet the constitutional and statutory provisions on municipalities, and 2) when it is objectively not possible to respect the will of the voters expressed in a referendum due to the conflicting results of referenda. Conduct contrary to referenda results also in other instances allegedly entails a violation of Article 1, the first sentence of the second paragraph of Article 3, and Articles 44 and 9 of the Constitution.

10. Is it still possible to say that a referendum is consultative and the result of the referendum is not legally binding on the legislature in accordance with this position when the Constitutional Court in the same breath speaks of a consultative referendum that remains such if the residents decide against the establishment of a municipality or other changes, while the referendum is no longer consultative if the residents of the territory in question (in the event that in the procedure for the establishment of a municipality the legislature deemed that otherwise the conditions for establishing a municipality are fulfilled and that also in the remaining part [of the municipality] the conditions exist for the further existence of a municipality) decide in favour of establishing a municipality? All of a sudden this referendum becomes legally binding on the legislature – from which we could derive that thereby a constitutional obligation to establish a municipality arises for the legislature. Such namely follows from the Constitutional Court position, whereby, if we refer to the case at issue, in my opinion, the third paragraph of Article 15 of the LSA before the adoption of the LSA-R amendment (or even before that, Article 26 of the then valid [Act regulating the procedure for establishing municipalities and municipal boundaries]) did not even require such. The LSA determined that a part of a municipality encompassing the territory of a settlement or a number of neighbouring settlements **may** secede from the municipality and be established as a new municipality, provided that in a referendum the majority of the voters who voted decide in favour of such and if the remaining part of the municipality also fulfils the conditions for a new municipality. By such statutory provision the legislature bound itself to the obligation not to establish a municipality in instances when it deemed that the conditions for such are fulfilled while such is opposed by the will of the residents in the affected territory. By means of its interpretation, however, the Constitutional Court in addition bound it to the obligation to establish a municipality when the will of the residents in favour of such exists, despite the explicit word “may” in the text of the law, and even though in my opinion such an obligation was not provided for. This position could only be reached on the basis of an understanding of the content of the right to local self-government that I believe to not be correct from a constitutional law perspective. In my opinion, it is not possible to say that the referendum is consultative while at the same time finding that the National Assembly is required to establish a municipality by law in the event of a “positive” result of the referendum.
11. It is interesting that the majority of legal theorists insisted on the clear position that a referendum is of a consultative nature before and after the mentioned Decision as well as in the light of the numerous statutory amendments of the LSA and the special law on the procedure for the establishment of municipalities. In 1996, Prof.

Kaučič spoke of a relative consultative referendum, even though he stated that the third paragraph of Article 139 of the Constitution “on the one hand demands the application of a referendum, while on the other hand it presupposes its consultative, i.e. non-binding power.”<sup>13</sup> While in 1998, Prof. Grad stated the following: “A municipality thus cannot be established without carrying out a referendum, therefore its use is mandatory (...). In its consequences, however, such a referendum is not binding, as it does not require the National Assembly to observe the decision adopted in the referendum. Such entails that the referendum is not legally binding on the National Assembly, which, however, does not entail that it is not politically bound by such a decision, as it is an expression of the popular will in a particular territory.”<sup>14</sup> And he added with complete clarity: “If the residents in the corresponding territories where referenda were carried out decided in favour of establishing a municipality, the National Assembly may establish it by law, **but it is not obliged to do so** (*emphasis added by J. S.*).” In the same manner, in 2002, Dr Vljaj perfectly clearly explained the following in the Commentary on the Constitution: “The referendum is of a consultative nature and does not require the [National Assembly] to establish a municipality only in accordance with the referendum result. The Constitution prescribed a consultative referendum and **left the final determination of the territory of a municipality to the National Assembly** (*emphasis added by J. S.*).”<sup>15</sup>

12. How then should, in my opinion, the third paragraph of Article 139 of the Constitution be understood? As a constitutional court judge, I certainly cannot agree that the referendum in this provision is an “error in the Constitution”, as Prof. Šmidovnik wrote,<sup>16</sup> since I have sworn to uphold the Constitution and adjudicate in accordance therewith. The constitutional law content of the relevant provision must be determined and the meaning of its integral parts and of the provision as a whole must be established. The referendum, which the National Assembly is required to call, is without a doubt intended to enable the residents to state their position regarding proposed changes in the territory of a municipality in a democratic manner, as the Constitutional Court held in Decision No. U-I-285/98. As such, it has a consultative nature that cannot legally bind the National Assembly, but it may, as is also argued by Prof. Grad, have political effects. However, the latter are not and cannot be the subject of a review of constitutionality. If the referendum result had binding legal effect, the part of the provision of the third paragraph of Article 139 of the Constitution that assigns the National Assembly the competence to establish a municipality by law would be completely nullified. This law is not a law governing a concrete case,

13 I. Kaučič, *Pravna narava referenduma za ustanovitev občine* [The Legal Nature of a Referendum with regard to the Establishment of a Municipality], in: Zbornik referatov III. srečanja upravnih delavcev Slovenije, Univerza v Ljubljani, Visoka upravna šola, Ljubljana 1996, pp. 152–153.

14 F. Grad, *op. cit.*, pp. 108–109.

15 S. Vljaj in: L. Šturm (ed.), *Komentar Ustave Republike Slovenije* [The Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 956.

16 As it appears to be democratic, but in fact conceals a practice of severe disregard for the will the residents expressed in a referendum, J. Šmidovnik, *op. cit.*, pp. 177–178.

even though such might seem to follow from it at first glance given its content that defines the boundaries of a municipality and, as Dr Šmidovnik states, accords to an individual municipality the characteristic of being part of the legal system. Such by its nature results in essential general effects. On its basis, the municipality will be able to regulate – with the power of local public authority and in a general manner – all issues in the performance of its competences, and not only its residents, but everyone falling within the scope of its authority will have to act in accordance with its regulations. On the basis of such characteristic, it will derive its original power directly from its constitutional position. Such power is not accorded by “laws governing a concrete case”. As thereby the legislature must not only keep in mind local interests, but also general interests, the legitimacy of which it was granted in a democratic manner, i.e. through elections, due to which it itself is the legitimate representative of all citizens who through it exercise their right to manage the public affairs determined by Article 44 of the Constitution, it is not [the legislature’s] right, but its competence and duty to respect local interests to such an extent as is allowed by the general interest. In adopting laws, it is, in my opinion, bound by the Constitution in an equal manner regardless of whether it regulates other issues by means of statutory content or by law accords to a municipality “the characteristic of being a part of the legal system”.

13. On the basis of all of the above, I can draw the conclusion that the right of the residents of a particular territory to have their own municipality does not derive from the constitutional definition of local self-government and that the obligation of the National Assembly to adopt a law on the establishment of a municipality if in a procedure for the establishment of a municipality the residents decide in favour of its establishment in a referendum does not derive from the Constitution. A different interpretation of the third paragraph of Article 139 of the Constitution would nullify the position of the democratically elected representative body, which is bound by the Constitution when making decisions in the legislative procedure. The deputies are representatives of all the people and are not bound by any instructions, as is determined by the first paragraph of Article 82 of the Constitution. They are, however, bound by the Constitution itself and obligated to respect it until they amend it by the prescribed procedure, as such is an elementary part of the rule of law. The Constitution, or in the case at issue the third paragraph of Article 139, however, does not require that they give priority to partial local interest in relation to general state interests, unless they themselves deem that different measures are required.
14. In past decisions, in light of the passionately debated issue of establishing a network of municipalities (which should have allegedly been concluded in 1998, even though it was evident from numerous further proposals that the process was only going to continue), the Constitutional Court stopped the “avalanche” of newly established municipalities by Decision No. U-I-103/02, dated 18 April 2002 (Official Gazette RS, No. 39/02, and OdlUS XI, 64), but from the viewpoint of the issues under consideration here, that Decision is not of essential importance, even though the Constitutional Court recognised the position of petitioner to individual local communities precisely in relation to Decision No. U-I-322/98; exactly the latter went the farthest re-

garding the positions that I do not agree with. What appears to be more important to me is that, in my opinion, **the presented constitutional law reasons exist, i.e. the reasons on the basis of which the Constitutional Court should have changed its position on the constitutional law content of local self-government and on the constitutional law content of the third paragraph of Article 139.** Unfortunately, such is also not going to be effected by the present Decision of the Constitutional Court. On the contrary, this Decision only additionally affirms the hitherto positions, with which I cannot agree.

## II

15. In accordance with the principle of the separation of powers determined by the second paragraph of Article 3 of the Constitution, the Constitutional Court only restricts the National Assembly in the exercise of its legislative function from the viewpoint of constitutionality. In this sense, we speak of constitutional democracy, as in the event that unconstitutionality is established, the will expressed in a law, even though it was adopted in a procedure defined in advance and by a democratically established representative body, must give way to a higher value – the Constitution, with the Constitutional Court being the guardian thereof. Thereby the Constitutional Court must not review the political correctness of the legislature's acts and, in accordance with the principle of self-restraint, it must not encroach upon its margin of appreciation in the regulation of relationships in society. However, it may review the constitutionality of the procedure in which a law was adopted, but only in the form of a so-called *a posteriori* constitutional review.
16. In the case before us, the petitioners allege that the EMMBA is unconstitutional, as it does not contain provisions regarding the Municipalities of Ankara and Mirna, and the unconstitutionality is alleged to originate from the fact that in the procedure for the adoption of an amendment of this law, which has not been adopted, there allegedly occurred violations that resulted in an unconstitutionality. The Constitutional Court can assess a procedure for the adoption of a law only from the viewpoint of constitutionality on the basis of the third paragraph of Article 21 of the CCA, which entails that the Constitutional Court must have before it a regulation that it is competent to review and an assessment of the constitutionality of the procedure in which it was adopted may be a part of this review. With regard to such, in hitherto decisions the Constitutional Court as clearly as possible highlighted that in the case of a law the subject of the review can only be the constitutionality of the procedure, and not a potential violation of the rules of procedure or a law. Potential violations of laws could reach the constitutional level if we were dealing with an instance where the procedure for [adopting] a law was regulated by a special law and there could have been a violation of Article 2 of the Constitution if the legislature breached the procedural rules it had determined itself. In my opinion, however, we are not dealing with such a case. The legislative procedure regarding which the petitioners allege certain violations had been concluded (to be precise, such is not yet clear in the case of Mirna – the procedure allegedly “came to a standstill”, as the Decision states) and did

not result in a valid law that could be the subject of a constitutional review. As this is the case, we cannot review the procedure for the adoption of a non-existent law. Such an independent competence namely does not derive from the third paragraph of Article 21 of the CCA, which is logical, as otherwise the competence to carry out an *a priori* review of the constitutionality of a law would have been established without a constitutional basis. Also a review of the National Assembly's actions that could apply the same working method as, e.g., a constitutional complaint, but which could have decisively more far-reaching consequences – an order requiring the National Assembly to adopt a law – cannot be construed in such a manner. The Constitutional Court, however, did exactly this, to be precise, it ordered [the National Assembly] to adopt a law with precisely defined content.

17. As a result, in my opinion the petitioners' statements may only be reviewed from the aspect of the [reasons] for which they can challenge the currently valid EMMBA. Such could only be unconstitutional if the petitioners demonstrated that it is unconstitutional, because it does not define Ankaran and Mirna as independent municipalities. They could only substantiate such by demonstrating that from the Constitution (from Articles 138 and 139 of the Constitution) there derives the obligation to establish these two municipalities. As in my opinion, in accordance with the reasons presented above, such does not derive from the Constitution, it is not possible to address such allegations to the currently valid EMMBA.
18. It is true that the currently valid EMMBA contains an unconstitutionality in relation to Decision of the Constitutional Court No. U-I-301/98, dated 17 September 1998 (Official Gazette RS, No. 67/98, and OdlUS VII, 157) – the Municipality of Koper is unconstitutional, as according to the position the Constitutional Court took in the cited Decision its territory considerably exceeds the territory of the city and its direct surroundings, as it also includes the deep hinterland with settlements that do not belong to the suburban area. With regard to such, the Constitutional Court held that while the second paragraph of Article 139 of the Constitution provides the legislature with a relatively broad margin of appreciation, it does not allow for such evident deviations as are present in the case of the Urban Municipality of Koper. The Decision in the case at issue does not state a position regarding the presented arguments in relation to the cited Decision. Even though in Order No. U-I-245/06, dated 29 May 2008, the Constitutional Court again notified the legislature of the violation of Article 2 and the second sentence of the second paragraph of Article 3 of the Constitution, as the legislature had not yet remedied this unconstitutionality, I believe that that Decision has no effect on the Decision in the case at issue, as the petitioners do not have legal interest to again establish the same unconstitutionality. Namely, no obligation to establish precisely the Municipality of Ankaran derives from Decision No. U-I-301/98.<sup>17</sup> Therefore, regardless of what position one takes with regard

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17 As is evident from the dissenting opinion of Judge Krivic with regard to the cited Decision, the petitioner allegedly contended that in addition to the proposed establishment of three municipalities (i.e. the Municipalities of Ankaran-Škofije, Dekani, and Šmarje-Marezige), the proposal should have included five even smaller municipalities, while leaving Ankaran in the Municipality of Koper.

to Decision No. U-I-301/98, even if the Constitutional Court were to establish the same unconstitutionality once again, such would still not lead to the result that the petitioners are seeking.<sup>18</sup> With regard to the Municipality of Mirna, no such elements even exist.

19. The Constitutional Court thus, in my opinion, does not have at its disposal appropriate constitutional law arguments and tools on the basis of which it could agree with the petitioners, establish the unconstitutionality of the EMMBA because it does not provide for the establishment of the Municipalities of Ankaran and Mirna, and order the National Assembly to adopt a law with precisely such content. The National Assembly may establish the Municipalities of Ankaran and Mirna. Such falls within the margin of its appreciation and its responsibility for the quality of local self-government, but it may not be ordered to do so by the Constitutional Court. Therefore, I voted against the first two points of the operative provisions of the Decision.

### III

20. As the Constitutional Court issued an order and suspended elections in the Municipalities of Koper and Mirna, it could by no means avoid future decision-making regarding this question. Therefore, I may even have been able to agree with the mere abrogation of the act calling the elections in these two municipalities, as nothing else can be done at the moment. However, I also voted against the third point of the operative provisions, because I disagree with the other parts of the Decision. The fourth point is the continuation of the first and second points, with which I do not agree. In the fifth point, however, the Constitutional Court intervened with the principle of periodic elections. Already in Decision No. U-I-106/95, dated 25 January 1996,<sup>19</sup> by which the Constitutional Court decided on the constitutionality of the so-called national lists, it defined certain fundamental principles of elections. It outlined that in the field of elections, the principles of free, universal, and equal suffrage as well as of direct and secret elections derive from the principle of democracy in relation to indirect (representative) democracy; if the election system corresponds to the listed principles and if **the periodic nature of elections** and the equal right of all political parties in the state to compete are **guaranteed by law**, the elections are democratic.<sup>20</sup> “Alongside human rights and the rule of law, democracy is one of the three pillars of the European constitutional heritage [...]. Democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status. These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the ‘European electoral heritage’. This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, and the second the principle that truly democratic elections can only be held

18 Prof. Čebulj presented the reasons why the establishment of the Municipality of Ankaran would not entail remedying the unconstitutionality established by Decision No. U-I-301/98 in an opinion on the constitutional law framework of the establishment of the Municipality of Ankaran, which was provided by the Urban Municipality of Koper.

19 Official Gazette RS, No. 14/96, and OdlUS V, 12.

20 Paragraph 7 of the reasoning of the cited Decision.

if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met.” In this manner and six years after the Constitutional Court defined the fundamental electoral principles in the same manner the Venice Commission welcomed by an Explanatory Report the adoption of the new Code of Good Practice in Electoral Matters (adopted 5–6 July 2002), which already in the introduction supplements the five fundamental principles with the requirement of periodic elections. The introduction to point I, entitled Principles of Europe’s electoral heritage, namely reads as follows: “The five principles underlying Europe’s electoral heritage are *universal, equal, free, secret and direct suffrage*. **Furthermore, elections must be held at regular intervals** (*emphasis added by J. S.*)” Why this is the case was amply explained by Prof. Jambrek when he stated that “The competences and functions of state authorities must be legitimated in such a manner that they originate in the people and that they are an expression of the will of the people reached in a definable manner. There must namely exist an uninterrupted chain of democratic legitimacy and appropriate responsibility running from the people towards the state authority and from the latter back to its origin.”<sup>21</sup> And precisely the latter is ensured by elections held at regular intervals, also at the level of local self-government. Therefore, **the principle of periodic elections is not only a principle, it is an integral part of the right to vote as such**, which completely clearly also follows from Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>22</sup> which determines as follows: “The High Contracting Parties undertake to hold free elections **at reasonable intervals** (*emphasis added by J. S.*) by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” That the principle of periodic elections is an integral part of the right to vote is also stated in the Decision. Such entails a human right, which the Constitutional Court considered in Decision No. U-I-163/99, dated 23 September 1999 (Official Gazette RS, No. 80/99, and OdlUS VIII, 209), when it held that the periodicity of elections must be given precedence over the otherwise established unconstitutionality of the statutory regulation with regard to the establishment of the municipality under Decision No. U-I-301/98.

21. Also in the case at issue, the Constitutional Court interfered with a constitutional right of the voters in the territories of the Municipality of Koper and the Municipality of Trebnje. In my opinion, the Constitutional Court has to be extremely careful with regard to such interferences with this political human right. Especially following Decision No. U-I-163/99, it must carry out a constitutional law weighing of the conflicting values, whereby, in light of the above, for me the periodicity of elections ranks high on the ladder of constitutional values, as it concerns the very foundations of the democratic order. In the light of such, I voted against point 5 of the operative provisions of the Decision.

*Mag. Jadranka Sovdat*

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21 P. Jambrek in: L. Šturm, *op. cit.*, p. 48.

22 Official Gazette RS, No. 33/94, MP, No. 7/94.

I voted for the operative provisions of this Decision as a whole, but I would like to stress that by no means do I support the further breaking up of the territory of Slovenia into municipalities.

The Decision (in Paragraph 20 of the reasoning) summarises the position of the Constitutional Court from the beginning of the process of establishing local self-government in Slovenia as that it is the task of a state governed by the rule of law to set up a regulation according to which this process is to be carried out in a legally regulated and foreseeable manner (Decision No. U-I-13/94, dated 21 January 1994). The establishment of this legal framework is the National Assembly's responsibility and, as far as the question of the appropriateness of the criteria and rules of the procedure are concerned, it falls within its margin of appreciation. The Constitutional Court may not interfere with this margin of appreciation. It may, however, review constitutional law questions with regard to the observance of the prescribed criteria and the implementation of the procedure for establishing municipalities. I would like to emphasise that it is the National Assembly's political and professional responsibility to lay down reasonable and developmentally appropriate conditions for the formation and functioning of local self-government and that it is its responsibility under constitutional law to observe and implement these conditions to the letter. Even though such concerns the legislature, its responsibility to observe existing norms cannot be any less than that of everyone else.

From hitherto Constitutional Court positions it follows that all questions in relation to the fulfilment of the conditions for establishing a municipality have to be resolved in the procedure leading up to a referendum, including by means of judicial protection, which is also summarised in the reasoning of this Decision (Paragraph 18 of the reasoning, Decision No. U-I-322/98, dated 15 March 2001). It is precisely the quality of the implementation of this part of the procedure that is essential for controlling the process of establishing local self-government and its further organisation. Regardless of the announcement of a policy change and regardless of the already amended procedure for future potential changes to the network of municipalities, the appropriate preparation of the "new municipality" project is a substantial precondition for the quality of the development and functioning of local self-government.

In order to create municipalities that are capable of performing their tasks effectively and for the benefit of the residents of their territory, a thorough and comprehensive assessment procedure has to be carried out, in which the National Assembly must adopt its finding of either the fulfilment or non-fulfilment of the criteria for the establishment of a municipality on the basis of expert information and analyses of all relevant issues regarding the establishment of a municipality. An examination of the parliamentary materials does not demonstrate such. Regardless of the applicant's identity, the submitted proposals for new municipalities should be strictly and comprehensively reviewed already in the first stage of the procedure in order to establish if they fulfil the predetermined statutory criteria for the existence and functioning of a municipality as a community of residents that enables the realisation of common needs at the local

level. Already at this stage, it is also necessary to examine the wider aspects, i.e. the effects in the region, as well as at the national level. Regarding such, I particularly underline the public finance perspective, since the National Assembly should be particularly diligent in ensuring that the existence and functioning of municipalities is to be based on the constitutional principle of their self-financing in accordance with Article 142 of the Constitution and Article 9 of the European Charter of Local Self-Government (Official Gazette RS, No. 57/96, MP, No. 15/96 – ECLSG). Only when the National Assembly finds, on the basis of conclusions supported by data, that the proposed municipality fulfils the statutorily determined criteria so that it will function effectively and perform its constitutionally defined tasks may it proceed to the calling of a referendum, at which the will of the residents in the area is to be established. The National Assembly cannot pass the responsibility for the establishment of a new municipality and its future functioning on to the residents of the area at issue. It has to perform its part of the constitutional and statutory tasks of the “new municipality” project responsibly. However, once the National Assembly is already in the stage of the procedure for establishing or setting up a municipality where a referendum has been called, such entails that it has already applied and exhausted its substantive jurisdiction to establish a municipality. The return of the National Assembly to a previous stage of the procedure is no longer possible, as it has already taken decisions by which it itself is also bound in the remaining part of the procedure (*Venire contra factum proprium nemini licet*). Therefore, from here on only the question of the consideration of the will of the residents of a particular territory remains. Only such can still influence the implementation of the legislative competence of the National Assembly. The will that the residents express in the referendum is thus a signpost for the implementation of the final stage of the National Assembly’s constitutional competence in the procedure for establishing a new municipality and determining its territory by law. I am convinced that the National Assembly can only prevent the excessive breaking up of the territory of Slovenia into municipalities by respecting the statutorily determined criteria and conditions as well as strict assessment of the information necessary for the establishment of a municipality. The voting on the operative provisions of this Decision of the Constitutional Court, which will eventually bring about two new municipalities, might at first glance contain an inconsistency. However, the Constitutional Court cannot substitute for the National Assembly as regards its most important competence regarding the establishment of a municipality, i.e. in the assessment of the fulfilment of the criteria and conditions for the establishment of a municipality. In the case at issue, the conduct of the National Assembly did not correspond to the constitutional law criteria, as is exhaustively and reasonably substantiated in the reasoning of the Decision. Therefore, in spite of my opposition to the further breaking up of municipalities into smaller pieces, I cannot find a constitutional law basis for voting against the operative provisions of this Decision.

*Dr Ernest Petrič*

*Jan Zobec*

**DECISION**

At a session held on 3 February 2011 in proceedings to review constitutionality initiated upon the request of a group of deputies of the National Assembly of the Republic of Slovenia, the Constitutional Court

*decided as follows:*

**The Act on Guarantees of the Republic of Slovenia for the Purpose of Maintaining Financial Stability in the Euro Area (Official Gazette RS, No. 59/10) is not inconsistent with the Constitution.**

*Reasoning***A**

1. A group of thirty-seven deputies of the National Assembly (hereinafter referred to as the applicants) requests a review of the constitutionality of the Act on Guarantees of the Republic of Slovenia for the Purpose of Maintaining Financial Stability in the Euro Area (hereinafter referred to as the AGMFSEA). The applicants allege that the challenged Act is inconsistent with Articles 2 and 3, the second paragraph of Article 120, and Articles 148, 149, and 153 of the Constitution. The applicants allege that a special act should be adopted for every guarantee granted in the framework of maintaining financial stability in the euro area, unlike in the case under consideration, where only the AGMFSEA, which determines only the total amount and duration of guarantees while not providing for other elements mandatory for guarantees, was adopted for all future guarantees. The AGMFSEA is therefore allegedly inconsistent with Article 149 of the Constitution, which allegedly requires that all guarantees be precise and permitted on the basis of law. The challenged Act also allegedly encroaches upon the position of the National Assembly and violates the principle of the separation of powers determined in Article 3 of the Constitution and the principle of proportionality determined in Article 2 of the Constitution, as its role is allegedly excessively reduced to merely being informed of granted guarantees in accordance with individually adopted funding programmes. As funds for the commitments

adopted under the AGMFSEA were allocated in neither the 2010 nor 2011 budgets, whereas Article 5 of the Public Finance Act (Official Gazette RS, No. 79/99 as amended – hereinafter referred to as the PFA) stipulates that the amount of borrowing and all planned state guarantees, borrowing requirements of the public sector at the central government level in an individual year, other elements stipulated by the Act, and the special powers of the Government and the ministry responsible for finance in implementing the budget for an individual year shall be laid down by the act on the implementation of the state budget, the AGMFSEA is also inconsistent with Article 148 of the Constitution. The applicants further state that the guarantees granted under the AGMFSEA lack the fundamental elements required under the Code of Obligations (Official Gazette RS, No. 97/07 – official consolidated text; hereinafter referred to as the CO) for guarantees. In the opinion of the applicants, a guarantee is an ancillary obligation conditional on the existence of a principal obligation, whereas in this case the principal obligation does not yet exist or, as they allege, is a future, imprecisely determined, and uncertain obligation. Moreover, the debtor is allegedly imprecisely determined as well, and the guarantee will not be granted to a debtor but to the company specified in Article 1 of the AGMFSEA. The applicants therefore allege that the AGMFSEA is imprecise, unclear, and inconsistent with Article 2 of the Constitution.

2. In its reply to the request, the National Assembly states that in the course of the legislative procedure, amendments were adopted which altered the wording so that the Act now refers to one guarantee, not multiple guarantees. The AGMFSEA allegedly determines the procedure for granting the guarantee and clearly defines the interference with the position of the persons to whom it refers by limiting the absolute amount of the guarantee. In the opinion of the National Assembly, this satisfies the principle of clarity and precision under Article 2 of the Constitution. Concerning the allegation of the applicants that the conditions required for a guarantee under the CO have not been taken into consideration, the National Assembly believes that they are not applicable, as this does not entail a question of constitutionality but one of the relationship between two acts. Notwithstanding this, the CO allegedly addresses guarantees for future liabilities and in the case of the AGMFSEA, both conditions stemming from Article 1016 of the CO are allegedly fulfilled, i.e. the precision of the liability and the precision of the time in which the liability should originate. The National Assembly further notes that the challenged Act has allowed the Republic of Slovenia to participate in the financial aid mechanism, while at the same time the Republic of Slovenia contributed to the financial stability of the euro. It states that the principle of cooperation in good faith and observance of Article 3a of the Constitution prevailed in the decision to participate in the European mechanism and to adopt the challenged Act.
3. The Government of the Republic of Slovenia submitted an opinion on the request for a review of constitutionality opposing the positions of the applicants with regard to the nonconformity of the challenged provisions with the Constitution. It is of the opinion that the civil-law regulations which govern the guarantee are not legally relevant in reviewing the consistency of the AGMFSEA with the Constitution. A guarantee in the sense of Article 149 of the Constitution should allegedly be interpreted independent-

ly, taking into account that a state guarantee has a multitude of public-law elements, which allegedly entails that CO rules may be used as supporting materials, but are not essential to the interpretation of this constitutional notion. Regarding the applicants' allegation of the absence of an ancillary character in the guarantee under the AGMFSEA, the Government states that even if this was a civil-law guarantee, Slovene law provides for derogations from the rule that a guarantee must be ancillary. It emphasises that the guarantee under the AGMFSEA is a single guarantee, not multiple guarantees as the applicants mistakenly state, but is granted for multiple liabilities, which is allegedly the norm for state guarantees. The Government is of the opinion that an interpretation of Article 149 of the Constitution which would require the adoption of a special law for every single liability in cases such as this one, where a single guarantee is being granted for all liabilities, would be too narrow and render it impossible to create a system that would allow the state to respond rapidly. The Government calls for an interpretation of Article 149 of the Constitution whereby an act creates merely a basis for subsequent implementing regulations, i.e. so-called guarantee agreements, and determines in abstract terms the conditions for borrowing and guarantees, as these conditions were allegedly intentionally left out of the original wording of Article 149 of the Constitution. The Government is also of the opinion that the AGMFSEA is clear and precise in that it provides enough elements with regard to liabilities originating from the guarantee that the liability may be considered to be precise. It alleges that the total amount of the guarantee, the types of transactions for which the guarantee is being granted, and the debtor, i.e. the Luxembourg-based European Financial Stability Facility, Société anonyme, are all precisely determined. Furthermore, the purpose for which the guarantee is being granted is also allegedly determined.

4. The reply of the National Assembly and the opinion of the Government were sent to the applicants, who responded to them. They disagree with the claims of the Government and the National Assembly that they are alleging the nonconformity of the AGMFSEA with the CO, they do, however, insist that the AGMFSEA is unclear and imprecise as the guarantee is being granted for a future, uncertain, and imprecisely determined liability, which they allege the CO does not permit for a guarantee. They reiterate that a special act should be adopted for every individual guarantee, not only the AGMFSEA as the framework act for all guarantees to be granted under the European mechanism. This will allegedly result in an encroachment on the powers of the National Assembly and a violation of the principle of the separation of powers determined in Article 3 of the Constitution.

## B – I

### Starting Point for Constitutional Court Review

5. Money is coined liberty.<sup>1</sup> The existence of money is a necessary condition for a func-

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1 F. M. Dostoevsky, *Zapiski iz mrtvega doma* [The Dead House], Matica Slovenska, Ljubljana 1912, p. 19. English translation from: Dover Thrift Editions, 2004, Mineola, NY. See also the German Federal Constitutional Court in the case BVerfGE 97, 350, p. 371.

tioning economy in which goods are traded with money acting as the medium.<sup>2</sup> The value of money is tied to and dependent on society. It is determined by decisions of monetary authorities and financial policy, while also being affected by individuals, who are holders of human rights and fundamental freedoms. Of particular importance are prices, loans, interest rates, economic forecasts, valuations, etc. The external value of money depends on the relationship between the national currency and other currencies, and their sovereign, economic, and social foundations. It is this interdependence that makes it impossible for a state to constitutionally guarantee the value of money. Just as the right to private property determined in Article 33 of the Constitution can guarantee only freedom of conduct in the field of property rights (Decision of the Constitutional Court No. U-I-199/02, dated 21 October 2004, Official Gazette RS, No. 124/04, and OdlUS XIII, 65) for the person offering property, while having no bearing on the demand for the offered property, in monetary affairs the state can only provide institutional frameworks for money, but it cannot guarantee its value.

6. When the Republic of Slovenia adopted the euro as its currency,<sup>3</sup> the sovereign guarantor vouching for the stability and convertibility of money changed, as did the legal framework providing for the freedom associated with money. In this era of economic and monetary union, these are issues that, at least insofar as monetary policy is concerned, are in the exclusive domain of the European Union (hereinafter: the EU),<sup>4</sup> but economic policy issues have nevertheless remained in the domain of the Member States. A separation of powers traditionally exercised by the state has thus occurred between the EU and the Member States.<sup>5</sup>
7. The Treaty of the European Union (consolidated version, Official Journal C 83, dated 30 March 2010 – hereinafter referred to as the TEU) bound Member States to continue the process of creating an ever closer union among the peoples of Europe. It follows from the preamble to the TEU that the Member States are firmly resolved to achieving the strengthening and convergence of their economies and to establishing an economic and monetary union including a single and stable currency. The EU's objectives listed in Article 3 again make mention of the economic and monetary union whose currency is the euro. The EU shall strive for sustainable development of Europe based on balanced economic growth and price stability. Economic policy, although not in the exclusive domain of the EU as is monetary policy, has become a matter of common interest and is carried out in the context of broad guidelines adopted by the Council of the EU (Article 120 of the TFEU). Following accession to the EU and the adoption of the euro, the Republic of Slovenia and its economy is no longer the sole guarantor of money, the guarantors now are the members of the euro area and their economies. The Government and the National Assembly are thus subjects which

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2 The classical notion of money in A. Smith, *Wealth of Nations: An Inquiry into the Nature and Causes of the Wealth of Nations*, A Selected Edition, Oxford University Press, Oxford 2008, p. 282.

3 See Article 1 of the Euro Introduction Act (Official Gazette RS, No. 114/06 – hereinafter referred to as the EIA).

4 See Article 3(1)c of the Treaty on the Functioning of the European Union (consolidated version, OJ C 83, 30 March 2010 – hereinafter referred to as the TFEU).

5 H. J. Hahn and U. Häde, *Währungsrecht*, 2<sup>nd</sup> edition, Verlag C. H. Beck, Munich 2010, p. 310.

must adopt their economic decisions in a manner that contributes to the objectives pursued by the EU. In view of the membership of the Republic of Slovenia in the monetary union, however, even the Government and the National Assembly cannot evaluate the economic, social, and political factors and forecasts of future economic trends independently; they must act in conjunction with other Member States.

8. As the euro is the single currency, the bankruptcy of one of the participating Member States may jeopardise not only the euro as a single currency, but also the economies of the participating Member States. The state of the monetary system is a symptom of the state of society and its economy as a whole.<sup>6</sup> It is precisely because the euro is a single currency that coordination among participating Member States is all the more necessary. This is in keeping with the principle of sincere cooperation among Member States (the third paragraph of Article 4 of the TEU) which respect each other and provide each other assistance in fulfilling the tasks and objectives that the EU pursues. It therefore follows that in a case such as the case under consideration, which involves the interdependence of the Member States and their economies, concerted action among euro area Member States is required even though the conduct of the Member States is based on their national competences.
9. It needs to be taken into account that long-term economic impacts and their consequences on the stability of money cannot be evaluated based on a single intervention, they must be monitored on an ongoing basis and continually verified. This is, however, a task for the government and legislature, not the courts. Since it is impossible to predict with certainty how the market will react and what the future development will be, political actors need to be given broad enough discretion in their decisions. As a consequence, constitutional review of such issues is by necessity reserved.
10. It was based on these starting points, with due consideration of the necessity of the euro area Member States to take concerted action with regard to measures to ensure the financial stability of the euro area, and in view of the current period of severe economic crisis and downturn that has affected economic growth and financial stability, worsening the debt and deficit positions of the Member States, that the Constitutional Court reviewed the alleged unconstitutionality of the AGMFSEA.

## B – II

### European Financial Stabilisation Mechanism

11. The AGMFSEA regulates the equity participation of the Republic of Slovenia in the joint-stock company founded for the purposes of funding financial stability in the euro area in accordance with the resolutions of the Council of the EU (ECOFIN) dated 7 May 2010, and the granting of guarantees by the Republic of Slovenia for the liabilities of this company. The Act thus allowed the Republic of Slovenia to participate in the special mechanism created by the euro area Member States to safeguard the financial stability of the area. The EU's previous institutional arrangements had not provided for an effective mechanism of financial assistance to the Member States whose common currency is the euro (the members of the euro area). The EU only

<sup>6</sup> J. A. Schumpeter, *Das Wesen des Geldes*, Vandenhoeck & Ruprecht, Göttingen 1970, p. 1.

had a mechanism, created by Council Regulation 332/2002,<sup>7</sup> for balance of payments financial assistance for states which have not yet introduced the euro,<sup>8</sup> which had been adopted pursuant to Article 143 of the TFEU.

12. Therefore, at the 7 May 2010 meeting of euro area Member States, the heads of state or government decided to create a special mechanism for financial assistance to euro area Member States in the event that a Member State cannot secure sufficient financing on the market. The mechanism comprises two elements: 1) a regulation on the European financial stabilisation mechanism and 2) a standing-by-facility which, under an agreement made between the members of the euro area, will be based on a special-purpose vehicle (Ger.: *Zweckgesellschaft*). The financial arrangement also includes the International Monetary Fund (hereinafter referred to as the IMF), which is to contribute a sum equalling at least a half of the EU's contribution via its established mechanisms.<sup>9</sup>
13. At an extraordinary session held on 10 May 2010, the Council of the EU (ECOFIN), acting on the proposal of the European Commission pursuant to the second paragraph of Article 122 of the TFEU,<sup>10</sup> adopted Regulation No. 407/2010 establishing a European financial stabilisation mechanism (OJ L 118, 12 May 2010, pp. 1–4 – hereinafter referred to as Regulation No. 407/2010). The regulation provides for financial assistance to the Member State concerned, contracted on the capital markets by the European Commission on behalf of the EU, limited to the margin available under the own resources ceiling for payment appropriations (Article 2 of Regulation No. 407/2010), which equals approximately EUR 60 billion. At the same extraordinary session of the Council of the EU (ECOFIN) on 10 May 2010, it was agreed that euro area Member States would establish a special-purpose vehicle to contract borrowings or issue debt securities with the purpose of providing financial assistance in the form of loans to euro area Member States with the guarantee of other euro area Member States. The challenged AGMFSEA was adopted to provide for the participation of the Republic of Slovenia in the special-purpose vehicle, not for the implementation of the measures pursuant to Regulation No. 407/2010. In accordance with Article 288 of the TFEU, a regulation has general application, which means it is binding in its entirety and directly applicable in all Member States. This means that the Member States do not transpose adopted and published regulations into their national law.<sup>11</sup>

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7 Council Regulation (EC) No. 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, OJ L 53, 23 February 2002, pp. 1–3, Special edition in Slovene: Chapter 10, volume 3, pp. 81–83.

8 Hungary, Latvia, and Romania presently receive this assistance.

9 All summarised from the Conclusions of the Council of the EU, dated 9 May 2010, Council documents No. 9602/10 and No. 9614/10, both available at <http://www.consilium.europa.eu>.

10 The second paragraph of Article 122 of the TFEU states: "Where a member state is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the member state concerned. The President of the Council shall inform the European Parliament of the decision taken."

11 In *Fratelli Variola Spa v Amministrazione Italiana delle Finanze*, 34/73 of 10 October 1973, the Court of Justice of

14. The special-purpose vehicle with the registered name *European Financial Stability Facility, société anonyme* (hereinafter referred to as the EFSF)<sup>12</sup> was founded on 7 June 2010 by the Grand Duchy of Luxembourg acting as sole partner in order to speed up its incorporation.<sup>13</sup> All euro area Member States reaffirmed their commitment to participate in the mechanism. To this end, the Member States and the EFSF signed the EFSF Framework Agreement, which determines the conditions under which the EFSF may make loans to euro area Member States in financial difficulties, the conditions for the funding of such loans by issuing or contracting debt securities, loans and financing arrangements, and the terms and conditions under which the euro area Member States issue guarantees for the debt securities, loans, and other financing arrangements issued by, contracted by, or entered into by the EFSF.<sup>14</sup> EFSF shares will be transferred to other Member States once they have completed all the requisite internal procedures. The company is incorporated under Luxembourg law. The EFSF was founded with a subscribed capital of EUR 31,000<sup>15</sup> and authorised share capital of EUR 30 million.<sup>16</sup> The equity share of the Republic of Slovenia in the EFSF is 0.4711%,<sup>17</sup> equalling the share of the Bank of Slovenia in the capital of the European Central Bank (hereinafter referred to as the ECB), with regard to which only the euro area Member States are taken into consideration.<sup>18</sup> Each euro area Member State is to have one member on the EFSF Board of Directors, the financial assistance mechanism will be operational for three years or until 30 June 2013, and the EFSF will be dissolved and liquidated when it has received full payment of the funding granted to the Member States, and its liabilities under the debt securities issued, loans contracted, and other financing arrangements issued with the guarantees of euro area Member States, and any guarantor liabilities thereunder, have been fully repaid.
15. If a euro area Member State requests a loan from the EFSF, the European Commission, in liaison with the ECB and the IMF, will start negotiating conditions regard-

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the EU took the position that Member States may not convert the content of regulations to national law in a manner such that the legal nature of the rules from the regulation may be concealed.

- 12 See European Financial Stability Facility, *société anonyme*, Grand-Duché de Luxembourg, Mémorial C – No. 1189, 8 June 2010, p. 57026, available at: <http://www.etat.lu/memorial/memorial/2010/C/Pdf/c1189086.pdf#Page=2>.
- 13 See Terms of reference of the Eurogroup, European Financial Stability Facility, 7 June 2010, available at: [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/misc/114977.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/misc/114977.pdf).
- 14 The agreement does not have a supranational character. See also: J.-V. Louis, Guest Editorial: The No-Bailout Clause and Rescue Packages, *Common Market Law Review*, Volume 47, No. 4 (2010), p. 973.
- 15 The company's share capital was raised to EUR 17.5 million on 21 July 2010. See Mémorial C – No. 1566, 31 July 2010, p. 75122, available at: <http://www.etat.lu/memorial/memorial/2010/C/Pdf/c1566317.pdf#Page=2>.
- 16 All summarised from EFSF Articles of Incorporation, published in Grand-Duché de Luxembourg, Mémorial C – No. 1189, see note 12.
- 17 See Annex 2, EFSF Framework Agreement, available at: <http://www.efsf.europa.eu/documents/efsf-framework-agreement.htm>.
- 18 The share of the Bank of Slovenia in ECB capital is 0.3288%. See Decision of the ECB, dated 12 December 2008, on the national central banks' percentage shares in the key for subscription to the ECB's capital (ECB/2008/23), OJ L 21, 24 January 2009, pp. 66–68.

ing economic policy management with the borrower, which will be written down in a memorandum of understanding and will need to be fulfilled or shown as being fulfilled by the borrower as a condition for receiving the loan. After the approval of the memorandum of understanding, the European Commission, in liaison with the ECB, will present to a Eurogroup<sup>19</sup> working group a proposal of the main terms of the loan agreement, which will take into consideration the current financial market conditions and the terms determined in the memorandum of understanding. When the Eurogroup working group confirms the main terms of the loan agreement, the EFSF, in liaison with the Eurogroup working group, will negotiate the other (detailed) terms of the loan agreement with the borrower. The loan agreement with the borrower will be signed by the EFSF subject to prior unanimous approval by all guarantor Member States.

16. The EFSF, in liaison with the Eurogroup working group, will structure a funding programme that includes the key funding terms (interest, maturity, currency, etc.) under which the EFSF may borrow, issue debt securities, or enter into other financing arrangements to obtain funding in order to fund the making of loans in accordance with the loan agreement. The funding programme is unanimously approved by all guarantor states. In the event that a guarantee is enforced, each guarantor state will contribute to the indemnification of creditors in proportion to its respective share of the issued guarantee (*pro rata pari passu*). These are individual, not joint guarantees.<sup>20</sup> In the event that a guarantor state cannot fulfil its obligations under the granted guarantee, other guarantor states will cover its share of the liability to creditors (but only up to a maximum of their share of the liability increased by 20%). These guarantor states can then attempt to recover a part of the unfulfilled obligation under the granted guarantee from the stepping out guarantor state. In the event that a guarantee is enforced because a borrower cannot repay its loans, the EFSF will assign or transfer its claim with respect to the borrower to the guarantor states in proportion to the fulfilled obligations stemming from the guarantee of each guarantor state.<sup>21</sup>
17. The euro area Member States which participate in the special-purpose vehicle and thus in the established mechanism as a general rule adopt decisions unanimously. However, in accordance with the fifth paragraph of Article 10 of the EFSF Framework Agreement, unanimity means a positive or negative vote of all guarantors which are present and participate in the relevant decision, provided that any Member State which is not participating in a guarantee is not entitled to vote on any decision to make a new loan agreement. It is a precondition of the validity of any such vote that a quorum of a majority of the Member States able to vote whose guarantee commitments represent no less than two-thirds of the total guaranteed commitments are present at the meeting. Other (less important) decisions are adopted by a two-thirds majority, in accordance with the sixth paragraph of Article 10 of the EFSF Framework Agreement.

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19 In accordance with Protocol (No. 14) on the Eurogroup to the TFEU, it is a group for informal meetings of the ministers of the Member States whose currency is the euro.

20 Cf., J.-V. Louis, *ibidem*, p. 974. The same in H. Kube and E. Reimer, *Grenzen des Europäischen Stabilisierungsmechanismus*, Neue Juristische Wochenschrift, Volume 63, No. 27 (2010), p. 1911.

21 All summarised from the EFSF Framework Agreement.

## B – III

### State Borrowings (Article 149 of the Constitution)

18. The applicants allege that the challenged AGMFSEA encroaches on the position of the National Assembly; in their opinion a special act should be adopted by the National Assembly for each individual guarantee. Currently, however, the Government will adopt all decisions with respect to the guarantees and inform the National Assembly thereof quarterly. In the opinion of the applicants, the AGMFSEA is therefore inconsistent with Article 3, the second paragraph of Article 120, the third paragraph of Article 153, and Article 149 of the Constitution.
19. The constitutional provision on state borrowing in Article 149 of the Constitution is – with regard to the relationship between the legislature and the executive and their powers, and hence with regard to the relationship to the second paragraph of Article 120 and the third and fourth paragraphs of Articles 153 of the Constitution – a special provision inasmuch as it refers only to state borrowings. The Constitutional Court, therefore, reviewed the alleged unconstitutionality of the AGMFSEA from the viewpoint of this constitutional provision.
20. Article 149 of the Constitution determines that state borrowings and state guarantees for loans are only permitted on the basis of law. This provision is part of Chapter VI of the Constitution, which regulates the complete system of public finances and state financing. Taxes and other charges form the bedrock of public finances and hence of state financing.<sup>22</sup> Articles 146 and 147 of the Constitution provide for the full fiscal sovereignty of the state, which encompasses the power and the right to create sources of fiscal revenue, enforce its collection, and determine the amount thereof (see also Decision of the Constitutional Court No. U-I-233/97, dated 15 July 1999, Official Gazette RS, No. 61/99, and OdlUS VIII, 188). The second method of financing state expenditure is borrowing. When the state does so is a political and not a legal issue.<sup>23</sup> Whereas the financing of state expenditure by taxes and other charges is carried out in the present,<sup>24</sup> financing through borrowing entails a deferral of the burden to the future,<sup>25</sup> to subsequent budgetary periods. Borrowing thus affects future budgets and hence future assets and revenue from taxes and other charges, and, consequently, future decisions on state expenditure,<sup>26</sup> which requires that the matter be regulated at the level of the Constitution.<sup>27</sup> The Constitution regulates this issue in Article 149.

22 German legal theory refers to it as the *Steuerstaatsprinzip*. See C. Seiler, *Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel*, Juristenzeitung, Volume 64, No. 14 (2009), p. 722.

23 W. Heun, Artikel 115, in: H. Dreier (ed.), *Grundgesetz Kommentar, Band III, Artikel 83–146*, Mohr Siebeck, Tübingen 2008, p. 1109.

24 According to Musgrave, this is the pay-as-you-use rule. R. A. Musgrave, Should we have a capital budget?, *The Review of Economics and Statistics*, Volume 45, No. 2 (1963), pp. 134–137.

25 H. Kube, *Artikel 115* (October 2009), in: T. Maunz and G. Dürig (eds.), *Grundgesetz Kommentar, Band VII, Artikel 107–146*, Verlag C. H. Beck, Munich, p. 11.

26 These are the anticipated material effects (*sachliche Vorgriffswirkung*). C. Seiler, *ibidem*, p. 722.

27 The future effects of borrowing are one of the principal reasons, according to legal theory, for institutional control of state borrowing. For details, see H. Fischer-Menshausen, *Artikel 115*, in: I. von Münch and P. Kunig

21. Article 149 of the Constitution uses the words and phrases “state borrowings”, “guarantees by the state for loans”, “permitted”, and “on the basis of law”. This raises the questions of what the subject of this constitutional provision entails and what constitutional law demands arise thereby. In Article 149, the Constitution does not create an explicit authority for the state to borrow, it merely permits borrowing in principle, just as Article 147 of the Constitution determines that the state imposes taxes, customs duties, and other charges by law. From a constitutional law perspective, therefore, the decisive issue is not the permissibility of borrowing but its limits.

*State Guarantees for Loans*

22. With regard to the terms used in Article 149 of the Constitution, it is not possible to draw on their civil-law definitions where, for example, the term guarantee (Lat. *fideiussio*) is defined as the guarantor’s obligation to honour the debtor’s obligation if the debtor is unable to do so itself.<sup>28</sup> Even though the terms are linguistically equal to the civil law terms, they need to be given independent meaning and defined as a constitutional law category based on the intention of the constitution framers and taking into account the nature of state borrowings and guarantees. These are important instruments of economic<sup>29</sup> and fiscal<sup>30</sup> policy that affect economic development,<sup>31</sup> which requires that the terms loan and guarantee be interpreted broadly and that it be allowed, with an appropriate breadth of meaning, that the mentioned terms also include new instruments that will be created on the market in the future and facilities that the law and economic policy do not yet recognise at present.
23. Given this starting point, the term state guarantees for loans needs to be defined as any category of security or guarantee under which the state assumes the risk of (potential) liability for third-party liabilities, thus affecting the scope of borrowing (public debt) and, by extension, the amount of state assets.<sup>32</sup> Such an effect may be achieved with a variety of instruments, including surety, guarantee, lien, letter of comfort, etc., whereby the legal form (structure) for assuming liabilities is not constitutionally relevant. What various state guarantees generally have in common is that they do not always correspond to civil law instruments,<sup>33</sup> they are hybrid legal acts

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(eds.), *Grundgesetz-Kommentar*, Volume 3, C. H. Beck’sche Verlagsbuchhandlung, Munich 1996, p. 1210.

28 S. Cigoj, *Teorija obligacij* [Theory of Obligations], Časopisni zavod Uradni list SR Slovenije, Ljubljana 1989, p. 370.

29 H. Heuer, Artikel 115 (March 1996), in: E. Heuer et al. (eds.), *Kommentar zum Haushaltsrecht*, Volume 1, Hermann Luchterhand Verlag, Neuwied, p. 9.

30 W. Heun, *ibidem*, p. 1112.

31 K. H. Friauf, Staatskredit, in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrecht der Bundesrepublik Deutschland, Band IV Finanzverfassung – Bundesstaatliche Ordnung*, C. F. Müller Juristischer Verlag, Heidelberg 1990, p. 331.

32 For the same reasoning, see: F. Arhar 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, p. 991.

33 M. Wiebel, Artikel 115 (April 1978), in: R. Dölzer, *Bonner Kommentar zum Grundgesetz*, C. F. Müller, Heidelberg, p. 24.

with elements of multiple legal acts, or an individual security may combine civil-law and public-law elements. The fundamental difference between loans and guarantees in the sense of Article 149 of the Constitution is that loans create a direct and unconditional liability to repay the funds, whereas guarantees create a conditional liability<sup>34</sup> incumbent upon the state which is realised only in the event of a third party reneging on its liability. This means that guarantees may have financial consequences for future budgets, but not necessarily so. The difference is also reflected in the budget, as loans must be stated or planned in the budget in their entirety, whereas for guarantees only an amount corresponding to the likely due liabilities of the state arising thereunder in the budget period must be determined. However, this amount is only a portion of the entire amount of liabilities arising from the state guarantee. At the same time, this does not entail that a guarantee is not a constituent part of the public debt.

*On the Basis of Law*

24. In its essence, Article 149 of the Constitution is a procedural provision which regulates the legal form and power regarding the adoption of a decision on state borrowings and state guarantees for loans. State borrowings and guarantees require a special decision by the National Assembly in the form of an act. This means that what is required is a special legislative decision under which the financial burden is actually or potentially transferred to the future, while at the same time Article 149 of the Constitution provides for the fundamental power of the National Assembly (the current as well as future terms) to decide on state revenue and expenditure, taking into account the fundamental human rights and freedoms of the present and future generations, as well as the principles of a state governed by the rule of law and a social state. Article 149 of the Constitution furthermore ensures special disclosure of state borrowings and guarantees in accordance with the principles of democracy and the rule of law.<sup>35</sup>
25. It does not follow from the linguistic meaning of Article 149 of the Constitution that it determines substantive (material) conditions or limitations to which state borrowings and guarantees might be bound.<sup>36</sup> However, this does not mean that an act on the basis of which a state guarantee is assumed may be devoid of substance or that the National Assembly may give the Government unlimited power to assume state guarantees or to borrow. The constitutional requirement for the adoption of a law on the basis of which the state may borrow needs to be understood as a requirement that (future) obligations be precise or at least determinable. It is not

<sup>34</sup> *Ibidem*, p. 26.

<sup>35</sup> The same in H. Kube, *ibidem*, p. 13.

<sup>36</sup> This follows from the draft materials of the Constitution. A provision that tied borrowing to a substantive condition ("Loans may be taken out only for extraordinary budget expenditure.") was deleted from the draft Constitution, while such a condition was not foreseen for guarantees in any phase of the framing of the Constitution. M. Cerar and A. Perenič (eds.), *Nastajanje slovenske ustave: izbor gradiv Komisije za ustavna vprašanja* [The Creation of the Slovene Constitution: A Selection of Materials of the Commission for Constitutional Questions] 1990–1991, Volume III, National Assembly of the Republic of Slovenia, Ljubljana 2001, p. 1139.

the implementing instruments (for example, a guarantee agreement) that must make the liability incumbent upon the state clear and predictable, but the act by which the state assumes the guarantee. This also follows from the principle of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the legality of the operation of the state administration (the second paragraph of Article 120 of the Constitution). The demand for precision or determinability ensures that a decision on borrowing is always adopted by the National Assembly itself and that the National Assembly does not transfer this decision with general and unlimited authority to the executive branch. Determinability requires that it is possible to infer from the legal facts of the matter what the future liabilities of the state will be and what purpose is being realised by the borrowing; in any event, liabilities must be specified in terms of amount, either in explicit terms or as a percentage of a specific amount (for example, the total budget). The latter follows from the principle of a social state (Article 2 of the Constitution), which requires that at any moment, including for the future generations which will bear the burden of present borrowing, the state must ensure a social minimum that comprises not only minimum subsistence but a minimum which ensures opportunities for the fostering of human interactions and for participation in social, cultural, and political affairs. At the same time, this is an upper limit that, despite the absence of an explicit constitutional provision on a borrowing ceiling,<sup>37</sup> The legislature may not disregard and may not encumber the state with so much debt that it would jeopardise the social state.

## **B – IV**

### **Review of the AGMFSEA**

26. Article 1 of the AGMFSEA determines that the Act regulates the equity participation of the Republic of Slovenia in the EFSF and the assuming of guarantees for its liabilities. The applicants do not challenge the equity participation in the EFSF; accordingly the Constitutional Court limited the review of conformity with the Constitution to the regulation of guarantees for EFSF liabilities.
27. Substantively, Articles 3, 4, and 5 of the AGMFSEA regulate what was determined by the EFSF Framework Agreement, which the euro area Member States concluded with the EFSF. Pursuant to the first paragraph of Article 3 of the AGMFSEA, the Republic of Slovenia grants an irrevocable and unconditional guarantee for all funding instruments in the framework of the funding programme for the purposes of granting loans to euro area Member States in financial difficulties, for individual funding instruments outside the scope of the funding programme for the purposes of granting loans to euro area Member States in financial difficulties, and for liabilities arising from financing arrangements associated with the funding instruments and the obtaining and maintenance of a high rating thereof (hereinafter: financing

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<sup>37</sup> A particular limit on the amount of borrowing is also determined by the provisions of the TFEU on excessive deficits and Protocol 12 concerning the excessive deficit procedure.

arrangements). The second paragraph of Article 3 of the AGMFSEA determines the framework and the details of the granted guarantee. The guarantee is limited to EUR 2.073 billion and to the funding of obligations under loan agreements entered into on or before 30 June 2013, and can be granted for funding instruments and financing arrangements on or before 30 June 2013. The Act also stipulates that the EFSF may grant funds obtained by means of funding instruments to a euro area member state only with the unanimous approval of participating euro area Member States. The sixth and seventh indents of the second paragraph of Article 3 of the AGMFSEA regulate requests for the repayment of funds from the company that it receives from the borrowers, and the transfer of overdue EFSF claims to borrowers to the Republic of Slovenia (subrogation). The first paragraph of Article 4 of the AGMFSEA regulates the funding programme, which euro area Member States adopt unanimously and which contains the terms of the funding instruments for the acquisition of funds that the EFSF allocates for loans to euro area Member States in financial difficulties. In adopting the funding programme, the Government must cooperate with the National Assembly in accordance with the Act on Cooperation between the National Assembly and the Government in EU Affairs (Official Gazette RS, Nos. 34/04, 43/10, and 107/10; hereinafter referred to as the ACNAGEUA). In Accordance with the second, third, and fourth paragraphs of Article 4 of the AGMFSEA, the guarantee is granted for all funding instruments from each individual funding programme, for individual funding instruments outside the scope of the funding programme, and for financing arrangements. Under the fifth paragraph of Article 4 of the AGMFSEA, the minister in charge of finance is authorised to enter into guarantee agreements and grant deeds of guarantee. The sixth paragraph of the same article of the AGMFSEA regulates the duty of the Government to report, on a quarterly basis, on granted guarantees, approved loans, and individual instalments of loans to a euro area Member State in financial difficulties. Article 5 of the AGMFSEA regulates how to proceed in the event the company cannot honour the obligations for which the guarantee is given under the Act. It stipulates that the Republic of Slovenia transfer its share to the EFSF two days prior to the due date or after the due date based on a written request (i.e. a Noteholder Representative Guarantee Demand) directly to the lender, agent, or creditor, instead of to the EFSE.

28. Considering the constitutional interpretation of Article 149 of the Constitution, and in view of the described starting point of the constitutional review, in the circumstances of this case, with the euro as the single currency requiring cooperation among the euro area Member States, the Constitutional Court deems that the AGMFSEA is not inconsistent with Article 149 of the Constitution. A special decision of the National Assembly in the form of an act was adopted for the guarantee granted for the liabilities of the EFSF. The Constitutional Court deems that the authority granted to the Government [by the AGMFSEA] is not void of substance, to the contrary, it deems that the liability assumed or to be assumed by the Republic of Slovenia is precise. It is precise inasmuch as it determines the following: the purpose for which

the guarantee is being granted – funding instruments by means of which appropriate funds for loans to euro area Member States in financial difficulties are provided; the amount of the guarantee – EUR 2.073 billion; the duration of the guarantee – for loan agreements made on or before 30 June 2013 and funding instruments and financing arrangements entered into on or before 30 June 2013; the debtor – the EFSF; and the types of transactions for which the guarantee is being granted – financing facilities in the framework of the funding programme or individual funding instruments outside the scope of this programme, and financing arrangements. This entails that the challenged arrangement is not inconsistent with the principle of clarity and precision, one of the principles of the state governed by the rule of law under Article 2 of the Constitution, for it is possible to determine both the substance and the purpose of the provision governing the guarantee. Since, as the Constitutional Court has already explained, it is not constitutionally relevant to the review of conformity with Article 149 of the Constitution what the legal nature of the guarantee under the AGMFSEA is – whether or not it is a guarantee within the meaning of the CO – the applicants cannot substantiate the unconstitutionality of the AGMFSEA with allegations referring to the issue of the inexistence of the ancillary nature of the guarantee under the AGMFSEA.

29. The applicants allege that the challenged arrangement is unconstitutional in particular in that, in their opinion, the National Assembly should adopt a special act for each individual guarantee, not just one, general act such as the AGMFSEA. The allegation is unsubstantiated, for the applicants' understanding of the guarantee under the AGMFSEA is clearly wrong. These are not multiple guarantees, which would require a special guarantee for each funding programme or each individual funding instrument or financing arrangement, it is a single guarantee in the amount of up to EUR 2.073 billion that is not drawn at once but in multiple instalments in accordance with the needs and always in proportion to the share of the Republic of Slovenia [in the share capital of the EFSF] (*pro rata pari passu*). By the nature of things, therefore, it is not necessary that a special law be adopted for each call for a portion of the guarantee. The decision on participation in the European Financial Stabilization Mechanism and hence the decision on assuming the guarantee was adopted by the National Assembly by an act that precisely defines what kind of guarantee is being granted, in what amount, to whom, and for what purpose. The range of movement that the Government has in adopting individual funding programmes in accordance with the first paragraph of Article 4 of the AGMFSEA is thus clearly and precisely defined. This paragraph provides for an additional option – which does not follow from Article 149 of the Constitution, but which does not entail that it is therefore unconstitutional, i.e. that the Government cooperate with the National Assembly in accordance with the ACNAGEUA in the adoption of funding programmes. This entails that the National Assembly will participate in forming the positions of the Republic of Slovenia on a proposed funding programme (the first paragraph of Article 4 of the ACNAGEUA) or adopt these positions itself (the first paragraph of Article 11 of the ACNAGEUA).

30. The applicants specifically highlight the third paragraph of Article 4 of the AGMFSEA, which stipulates that the Government may approve the drawing of funds under the Act for individual funding instruments outside the scope of the funding programme, and Article 6 of the AGMFSEA, which stipulates that the funds for the fulfilment of obligations under the Act and any other liabilities determined in accordance with the bylaws of the EFSF be provided in the budget of the Republic of Slovenia. The third paragraph of Article 4 needs to be interpreted in the context of the operation of the EFSF. It follows from the EFSF Framework Agreement that the EFSF may issue funding instruments outside the scope of the funding programme, but they must be closely linked to its core activity of securing the obtaining and maintenance of a high quality rating for the EFSF and its instruments, and facilitate funding by the EFSF. Regarding the guarantee for these instruments, it is vital that the liability of the Republic of Slovenia is limited to the amount determined by the AGMFSEA, which cannot be exceeded except by a new act or by amendments to the AGMFSEA; this follows from Article 3 of the AGMFSEA, which explicitly determines for which funding instruments and financing arrangements the guarantee is being granted. The EUR 2.073 billion ceiling on the liability of the Republic of Slovenia applies to any potential liabilities that may be incurred by the Republic of Slovenia in association with its participation (the status of shareholder) in the EFSF, which includes other liabilities in the sense of Article 6 of the AGMFSEA.<sup>38</sup> The liabilities incurred by the Republic of Slovenia in connection with the operations of the EFSF may not exceed EUR 2.073 billion. In the event that the liabilities exceeded this amount, the National Assembly would have to adopt a new act due to the requirements laid out in Article 149 of the Constitution. Additionally, the sixth paragraph of Article 4 of the AGMFSEA needs to be interpreted as entailing that the Government must report to the National Assembly on all liabilities incurred by the Republic of Slovenia under this law, which includes also the guarantees granted for funding instruments outside the scope of the funding programme and other liabilities within the meaning of Article 6 of the AGMFSEA.

31. The allegation of the applicants that the challenged Act is inconsistent with the first paragraph of Article 148 of the Constitution, which stipulates that all revenues and expenditures of the state and local communities for the financing of public spending must be included in their budgets, is unsubstantiated as well. The Supplementary Budget of the Republic of Slovenia for 2010 (Official Gazette RS, No. 56/10 – Rb2010) includes all expenditures which have direct and financial consequences for the 2010 budget. Expenditure on increases in equity stakes abroad (account 4414) was thus increased by EUR 141,482, which corresponds to the share

38 The EFSF Framework Agreement in the first paragraph of Article 7 also limits the liabilities of the guarantor states, which it defines as costs, losses, expenses, or liabilities, proportionally to their equity stake in the EFSF, which corresponds to the share of their respective central banks in ECB capital, taking into account only euro area Member States.

of the Republic of Slovenia in the subscribed capital of the EFSF in the amount of EUR 146.05 and its share in the approved capital of the EFSF in the amount of EUR 141,335.26. As the Constitutional Court has already explained in this decision, the fundamental difference between a loan and a guarantee is *inter alia* the moment at which a liability is incurred by the state. Since a loan guarantee is conditional (its enforcement is a future, uncertain fact), it does not have immediate direct financial consequences, but such arise at some time in the future. It is for this reason that in every budget, payments for enforced guarantees are budgeted only in the amount corresponding, according to the legislature's estimate, to the expected enforcement of guarantees or securities in the budget period. In this case, it is furthermore necessary to take into account the characteristics of the European mechanism, as the EFSF did not even start in 2010 to carry out the operations for which it had been established and the legislature appears to have assessed that no enforcement of the guarantee under the AGMFSEA was to be expected in 2010. The Constitutional Court cannot venture an opinion on the correctness of this assessment, for this is a question of adequacy, not constitutionality. In the allocation of public funds for individual functions (public expenditure), the National Assembly has a certain scope of discretion with regard to its political judgment when adopting the budget (see Decision of the Constitutional Court No. U-I-40/96, dated 3 April 1997, Official Gazette RS, No. 24/97, and OdlUS VI, 46), which includes an assessment of expected enforcement of guarantees.

32. In the event that statutory regulation interferes with a human right, the Constitutional Court reviews the admissibility of such interference from the viewpoint of a constitutionally admissible aim (the third paragraph of Article 15 of the Constitution) and from the viewpoint point of the principle of proportionality (Article 2 of the Constitution). If the Constitutional Court finds that the interference is constitutionally inadmissible, it establishes its nonconformity with the human right, not with the provisions governing the principles for the protection of human rights (see Decision of the Constitutional Court No. U-I-219/03, dated 1 December 2005, Official Gazette RS, No. 118/05, and OdlUS XIV, 88). In other words, the general principle of proportionality (Article 2 of the Constitution) cannot be an independent criterion for the assessment of conformity with the Constitution, it is connected to an established interference with a specific human right. The Constitutional Court therefore did not need to respond to the alleged nonconformity of the AGMFSEA with Article 2 of the Constitution.
33. In view of the above, and taking into account the starting point of the constitutional review in the case under consideration, the Constitutional Court established that the AGMFSEA is not inconsistent with the Constitution.

## C

34. The Constitutional Court reached this decision on the basis of Article 21 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – CCA), and the third paragraph of Article 46 of the Rules of Procedure of the Consti-

tutional Court (Official Gazette RS, Nos. 86/07 and 54/10), composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, Jože Tratnik, and Jan Zobec. The decision was reached with seven votes against one. Judge Mozetič voted against.

*Dr Ernest Petrič*  
*President*

**DECISION**

At a session held on 28 November 2013, in proceedings to review constitutionality initiated upon two requests of the Administrative Court, after a public hearing was held on 7 November 2013, the Constitutional Court

*decided as follows:*

**Article 12 of the Act on the Additional Taxation of a Part of Managers' Income in the Period of Financial and Economic Crisis (Official Gazette RS, No. 78/09) is abrogated.**

*Reasoning***A**

1. On the basis of Article 156 of the Constitution, the Administrative Court stayed proceedings in two cases regarding the judicial review of administrative acts and by a request initiated proceedings before the Constitutional Court to review the constitutionality of Article 12 of the Act on the Additional Taxation of a Part of Managers' Income in the Period of Financial and Economic Crisis (hereinafter referred to as the AATPMI). The applicant alleges that it would have to apply this statutory provision when carrying out judicial reviews of administrative acts regarding the additional tax assessment prescribed by this Act. It also draws attention to the fact that thirty similar cases are pending before it.
2. In the applicant's opinion, the additional taxation of the income of the members of management and supervisory bodies prescribed by the AATPMI is not constitutionally disputable in itself, i.e. as far as it applies *ex nunc*. However, the applicant finds fault with the manner in which income is subject to tax under the AATPMI, which in the taxable base also includes income that taxable persons received before this Act entered into force. It is convinced that in this part the AATPMI has constitutionally inadmissible retroactive effect. In this regard, it refers to Decision of the Constitutional Court No. U-I-98/07, dated 12 June 2008 (Official Gazette RS, No. 65/08, and OdlUS XVII, 42).

3. The applicant claims that from the principle of trust in the law there follows the expectation that the tax regulation must change in such a manner that changes are known in advance and that tax regulations which create a financial burden do not interfere with the legal situations of taxable persons that are already final. Allegedly, not even the fact that the additional tax under the AATPMI entails an annual tax obligation can change this principle. The applicant draws attention to the fact that the Constitutional Court already adopted such position in Decisions No. U-I-62/95, dated 16 February 1996 (Official Gazette RS, No. 14/96, and OdlUS V, 18), and No. U-I-81/96, dated 12 March 1998 (Official Gazette RS, No. 27/98, and OdlUS VII, 46). In the assessment of the applicant, the aims of the AATPMI, such as are determined in the legislative file, cannot justify its retroactive effect. In its opinion, also in a period of financial and economic crisis the legislature should adopt laws by taking into consideration all constitutional guarantees.
4. The National Assembly did not reply to the request. An opinion was, however, submitted by the Government, which assesses that the taxation of income under the AATPMI is not inconsistent with Article 155 of the Constitution. The retroactive effect of the Act is allegedly required in the public interest and, in addition, the regulation allegedly does not even interfere with acquired rights, as the income that is subject to additional tax in conformity with this Act does not have a legal basis in a decision of a state authority, but only in a contract. The disputed statutory regulation allegedly also passed the test of proportionality.
5. With regard to the aim of the AATPMI, the Government alleges that the Act was adopted in order to alleviate and resolve the financial and economic crisis that also affected the Slovene economy in 2008. In this regard, it is allegedly important that the additional taxation in conformity with the AATPMI only applies to income acquired for the management or supervision over those business entities that on the basis of various regulations benefitted from a surety, guarantee, or financial aid from the state to mitigate the consequences of the financial and economic crisis but in spite of that did not adjust the income of the members of their management and supervisory bodies to their financial situation. The legislature allegedly proceeded from the starting point that if a company needs state aid, it must at the same time reorganise anomalies in the system of corporate management. If, in spite of the fact that it received state aid, a business entity pays to its management personnel income that is disproportionate to business results and that is thus ethically and morally reprehensible, the state allegedly has the right to interfere with the business operations of these entities by tax policy measures. Allegedly, the primary aim of the Act was thus to prevent excessive bonuses being given to members of the management of business entities that need state aid during the economic and financial crisis. If a company is not doing well and is obliged to apply for state aid, then allegedly the rationalisation of spending and the maximising of added value cannot be achieved only by dismissing workers or by cutting their salaries, but also the management personnel must contribute to this end, in the opinion of the Government. From such perspective, the AATPMI

allegedly also pursues the principle of solidarity. The additional taxation in conformity with the AATPMI was allegedly intended to prevent even greater social stratification, which is allegedly in the broader social interest.

6. Also the disputed Article 12 of the AATPMI allegedly serves to achieve the fundamental aim of the Act, i.e. to prevent members of management bodies from receiving excessive bonuses during the financial and economic crisis, and also to attenuate or resolve the financial and economic crisis in such a manner. The Government stresses that the state cannot directly influence the level of income of members of the management or supervisory bodies of companies regardless of the fact whether such companies are directly or indirectly in majority ownership thereof. Contracts regarding the salaries and bonuses of members of management or supervisory bodies allegedly concern enforceable contractual relationships, and information regarding this income is allegedly also not public. Consequently, in the opinion of the Government, the state can only interfere with the payment of income which due to illegitimate imbalances between its level and the financial situation of the business entity is ethically disputable – in addition to non-binding recommendations – by tax policy measures. Allegedly, it is also in the broader social interest that social imbalances are not aggravated in times of crisis; for such reason it is allegedly in the public interest that the retroactive tax burden pursues the systemic coherence of the new regulation. The Government underlines that the payment of high bonuses to the members of the management or supervisory bodies of business entities that have received aid from state funds reduces the resources available for the implementation of state tasks, whereby the crisis requires an even greater role and responsibility of the state, especially from the viewpoint of the requirements of a social state. With regard to Article 146 of the Constitution, which determines that the state raises funds for the performance of its duties by means of taxes and other compulsory charges (as well as from revenues from their own assets), the public interest – i.e. ensuring a social state and social cohesion in the state – allegedly requires that the state finance its tasks also by measures such as envisaged by the AATPMI, especially with regard to the fact that the income taxed by the AATPMI proved to be ethically and morally disputable. In this regard, the Government also draws attention to the social function of property determined by the first paragraph of Article 67 of the Constitution.
7. The measures adopted by the AATPMI are allegedly appropriate and necessary for achieving the described aims of the Act. The legislature allegedly did not have at its disposal other measures that would be effective to the same degree. The contractually agreed rights of members of management and supervisory bodies were allegedly also not excessively affected as compared to the benefits gained by the additional taxation on the basis of Article 12 of the AATPMI. The limit above which the additional taxation applies was namely set relatively high by the legislature, i.e. at an amount 8.6 times the average monthly salary of an employee in the Republic of Slovenia in October 2009.

8. The plaintiff in the proceedings for the judicial review of administrative acts submitted to the Constitutional Court a brief in which he presented his reservations with regard to the consistency of the AATPMI with the Constitution. He alleges that already the first condition for the exceptional admissibility of the retroactive effect of a particular statutory provision, i.e. the existence of a public interest, is not fulfilled. He is namely of the opinion that the challenged Article 12 of the AATPMI does not in itself pursue the aim of ensuring fiscal income or regulating the subject of taxation. It is allegedly possible to achieve such an aim in the same manner without the Act having retroactive effect. Therefore, it is allegedly evident that the purpose of retroactive taxation is only in reducing the bonuses already paid to certain individuals, in particular – according to reports in the media – to the plaintiff in the proceedings for the judicial review of administrative acts. Such an intention of the AATPMI – punitive in the opinion of the plaintiff in the proceedings for the judicial review of administrative acts – allegedly does not entail a constitutionally admissible objective. In his opinion, also the second condition for the exceptional admissibility of the retroactive effect of the AATPMI, i.e. the absence of an interference with acquired rights, is manifestly not fulfilled. The trust in the law of the plaintiff in the proceedings for the judicial review of administrative acts is allegedly inadmissibly weakened, as at the moment when he concluded his employment contract (on 28 January 2004) he justly counted on the fact that the income agreed in the contract would be subject to tax in conformity with the then valid statutory regulation. His claim regarding his payment of a performance bonus – even though it was paid only in 2009 – was allegedly due already after the end of business year 2006 or 2007. The plaintiff also draws attention to the fact that in Decisions No. U-I-62/95, No. U-I-81/96, and No. U-I-181/94, dated 30 March 1995 (Official Gazette RS, No. 21/95, and OdlUS IV, 31) the Constitutional Court already adopted the position that the retroactive taxation of income is inconsistent with Article 155 of the Constitution, because tax obligations imposed in such manner interfere with the acquired right to dispose of one's income.
9. The Constitutional Court sent the application of the plaintiff in the proceedings for the judicial review of administrative acts to the National Assembly and Government for a reply thereto. The National Assembly did not reply to the application. The Government submitted an opinion in which it insisted upon its position in the opinion that it submitted as a reply to the request of the applicant. Also the plaintiff in the proceedings for the judicial review of administrative acts took a position with regard to the opinion of the Government. Its opinion that this case does not concern an interference with acquired rights, as they are not based on the decision of an authority of the state, is allegedly erroneous. From the hitherto constitutional case law it allegedly clearly proceeds that the retroactive determination of a tax obligation entails an interference with the acquired right to dispose of one's income. The Constitutional Court allegedly also adopted the position that an already existing right under the law of obligations can have the status of an acquired right regardless of the fact whether it is based on the decision

of an authority of the state (Decision No. U-I-340/96, dated 12 March 1998, Official Gazette RS, No. 31/98, and OdlUS VII, 48). In the case at issue, allegedly none of the exceptional situations exists in which, in conformity with the position of the legal doctrine, the retroactive effect of a law can exceptionally be admissible: (1) despite the general financial and economic crisis, persons taxable under the AATPMI allegedly could not expect the adoption of such legal regulation with retroactive effect – if the opposite was true, virtually any retroactive interference with the property of individuals could be justified by referring to a crisis; (2) allegedly, also the requirement of the elimination of possible unclarity did not require the adoption of the disputed statutory regulation with retroactive effect; (3) allegedly, it is evident that the case at issue does not concern a case in which the retroactive effect of the Act does not cause (significant) damage to its addressees. The plaintiff in the proceedings for the judicial review of administrative acts thus proposes that the Constitutional Court establish the inconsistency of Article 12 of the AATPMI with Article 155 of the Constitution.

10. On 7 November 2013, the Constitutional Court held a public hearing (Article 35 of the Constitutional Court Act, Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA). It invited thereto the participants in the proceedings, i.e. the applicant, the National Assembly, the plaintiff in the proceedings for the judicial review of administrative acts, and other persons whose participation at the public hearing was considered necessary, i.e. the Government and a legal expert and Member of the Slovene Academy of Sciences and Arts [hereinafter: Acad.] Prof. Dr Marijan Pavčnik, as well as a legal expert Asst. Prof. Dr Aleš Kobal (the first paragraph of Article 36 in relation to the second paragraph of Article 28 of the CCA). All the invitees except the National Assembly attended the public hearing, however the absence of the latter did not prevent the Constitutional Court from conducting the proceedings and deciding on the case (the second paragraph of Article 36 of the CCA).
11. At the public hearing, the applicant objected to the arguments of the Government that there are no other tools available to achieve the aim set by the AATPMI. As far as companies that are in direct or indirect ownership of the state are concerned, the state allegedly had at its disposal measures provided by the Companies Act (Official Gazette RS, No. 65/09 – official consolidated text and following – hereinafter referred to as the CA-1). The applicant underlined that the disputed tax entails a completely new obligation that is charged in addition to the personal income tax. The legislature allegedly did not demonstrate the public interest for the existence of the retroactive effect of the new tax regulation. The aim pursued by the AATPMI, i.e. to prevent excessive compensation of managers in companies that benefitted from state aid, allegedly cannot be achieved by the retroactive effect of the Act. The disputed retroactive taxation is therefore expressed primarily as a punitive measure. The regulation of the AATPMI is otherwise in itself – the tax rate included – not constitutionally disputable. The Administrative Court allegedly already adopted such a position in individual cases.

12. At the public hearing, the plaintiff in the proceedings for the judicial review of administrative acts underlined the problem of the casuistic adoption of laws. The situation in the case at issue was allegedly precisely such, as the AATPMI was allegedly referred to as *lex Kramar*. It is allegedly unacceptable that the AATPMI was adopted despite the warnings of the Government Office of Legislation and the Legislative and Legal Service of the National Assembly that Article 12 of the Act is inconsistent with the Constitution. The plaintiff also drew attention to the article of Dr Rajko Pirnat, *Pravne omejitve ukrepov za izhod iz krize*, published in the magazine *Podjetje in delo*, No. 7 (2010), in which the position that such taxation is prohibited was allegedly expressed. In the opinion of the plaintiff, the disputed retroactive taxation at a rate of 90% effectively entails the confiscation of property. The sole purpose of Article 12 of the AATPMI was allegedly to dispossess a concrete person of a concrete bonus, which is something that allegedly clearly proceeds from the legislative file. Such intention of the legislature is allegedly not legitimate. The two disputed performance bonuses were determined on the basis of two multipliers completely objectivised by a formula included in the employment contract, which allegedly was based on the business results of the company NLB, PLC, Ljubljana, in 2006 and 2007. If the lawfulness of these payments was nonetheless doubtful, in his opinion the state could have made use of civil and criminal law institutes instead of deciding to confiscate them under the guise of a tax regulation. The plaintiff in the proceedings for the judicial review of administrative acts also drew attention to the Judgments of the European Court of Human Rights in *N. K. M. v. Hungary*, dated 14 May 2013, and *Gáll v. Hungary*, dated 26 June 2013. He proposed that the Constitutional Court also carry out an assessment of the consistency of the challenged regulation with the right to private property determined by Article 1 of Protocol No. 1 to 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).
13. At the public hearing, the Government additionally substantiated the adoption of Article 12 of the AATPMI by referring to the prevention of tax avoidance. Due to the relatively lengthy legislative procedure, taxable persons could allegedly have expected that the disputed regulation would be adopted, therefore by their conduct they could have avoided paying this tax. Otherwise, in the opinion of the Government, the purpose of prescribing taxes is not only to pursue financial aims, as they can as well be employed to prevent conduct that the broader social community deems inadmissible or inappropriate. Allegedly, this is exactly what the AATPMI pursued. The data on taxes collected on the basis of the AATPMI allegedly prove as well that the aim of the AATPMI was not to interfere with the rights of a particular taxable person but to regulate at a general level the issue of compensating members of the management or supervisory bodies of companies that benefitted from state aid. The revenue under this fiscal item is allegedly decreasing every year. The Government explained that despite all the measures that had been implemented at the end of 2008 and in 2009 under the so-called anti-crisis

laws<sup>1</sup> (these laws already contained certain limitations or prohibitions with regard to the payment of disputable income in the year when state aid was received)<sup>2</sup>, it was necessary to protect earmarked funds granted in the form of state aid from such being redirected into the income of the management also by an additional tax in force from 1 January 2009 onwards. Despite all the stated measures, the perceived compensation of members of management and supervisory bodies of companies was too high in 2009. These measures in fact entailed complementary solutions, as the so-called anti-crisis laws allegedly referred to business entities, whereas the AATPMI referred to individuals. The Government also insisted upon its position that by applying measures under the CA-1 the state was unable to effectively influence the disputed income of managers. Allegedly, only in companies in which the state was a majority owner did the state have at its disposal certain possibilities to take action: since members of supervisory bodies are allegedly autonomous in their work and independent in the framework of their competences, there allegedly only existed the possibility that their membership [in a management or supervisory body] could be disqualified in the event they did not act in conformity with the owner's interests.

14. The legal expert Acad. Prof. Dr Marijan Pavčnik emphasised that the retroactive effect of a regulation entails an exception to the established rule on the *ex nunc* validity of regulations and is admissible if three criteria are cumulatively fulfilled. The following conditions must be fulfilled: 1) an individual statutory provision is at issue; 2) the retroactive effect must be in the public interest; and 3) the provision must not interfere with acquired rights. In the case at issue, the first criterion is probably fulfilled, however the second and third are allegedly problematic. In the opinion of Acad. Prof. Dr Marijan Pavčnik, the introduction of additional charges in times of an economic crisis can certainly be in the public interest, however only if such charges are in conformity with constitutional principles and rules. Allegedly, in the concrete case it is above all disputable that the additional tax interferes with the acquired rights of taxable persons. There is a constitutional principle that state taxes are determined by law and that tax obligations must be envisaged in advance (Article 147 of the Constitution in relation to the second paragraph of Ar-

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1 I.e. by the Act Amending the Public Finance Act (Official Gazette RS, No. 109/08 – hereinafter referred to as the PFA-D), the Act Amending the Partial Subsidising of Full-time Work Act (Official Gazette RS, No. 40/09 – PSFWA-A), and the Partial Reimbursement of Payment Compensation Act (Official Gazette RS, No. 42/09 – hereinafter referred to as the PRPCA).

2 Cf. the second paragraph of Article 81a and the fifth paragraph of Article 86a of the Public Finance Act (Official Gazette RS, No. 11/11 – official consolidated text and 14/13 – corr. – hereinafter referred to as the PFA), as well as the first paragraph of Article 7 of the Decree on the Criteria and Conditions for Lending Under Article 81a of the Public Finance Act (Official Gazette RS, Nos. 119/08 and 69/10) and the first paragraph of Article 6 of the Decree on the Criteria and Conditions for Issuing Guarantees Under Article 86a of the Public Finance Act (Official Gazette RS, No. 115/08) adopted on its basis, as well as the first paragraph of Article 3 of the Partial Subsidising of Full-time Work Act (Official Gazette RS, Nos. 5/09 etc. – hereinafter referred to as the PSFWA) and the third paragraph of Article 11 of the PRPCA.

ticle 155 of the Constitution). Allegedly, as soon as a tax obligation is determined, an individual acquires the right (the legally protected expectation) that the state will not retroactively escalate tax obligations and make them more difficult. The retroactive escalation of tax obligations allegedly always interferes with the existing rights of taxable persons. Taxable persons allegedly legitimately expect that they are only bound to pay to the state charges that are determined in advance by a law. Acad. Prof. Dr Marijan Pavčnik did not concur with the allegations of the Government that the acquired right must be based on the decision of an authority of the state. An individual allegedly acquires the right to freely dispose of his or her income at the moment when he or she receives it, i.e. when he or she has become the owner of the acquired property. Acad. Prof. Dr Marijan Pavčnik further underlined that the legislative file of the AATPMI does not even state reasons that would substantiate the retroactive effect of Article 12 of the AATPMI. Consequently, the genesis of the statutory text allegedly cannot be an additional argument in favour of the possible retroactive effect of the challenged statutory provision. Acad. Prof. Dr Marijan Pavčnik drew attention to the fact that the case at issue raises a question of principle regarding the role of law in the time and under the circumstances of a social crisis. The old dilemma is allegedly whether the benefit has priority over the law. The answer is allegedly clear: absolutely not! Acad. Prof. Dr Marijan Pavčnik stressed that no matter how severe the crisis is, [such circumstances] do not release us from acting legally and thus introducing legitimate solutions in a legal manner. Gustav Radbruch (Five Minutes of Legal Philosophy (1945), in: *Filozofija prava*, GV Založba, Ljubljana 2007, p. 268) was allegedly relentlessly clear: “Only what law is benefits the people.”

15. The legal expert Asst. Prof. Dr Aleš Kobal held the opinion that Article 12 of the AATPMI is actually not an individual statutory provision in the sense of the second paragraph of Article 155 of the Constitution, with regard to the fact that it extends the validity of the entire AATPMI to a period before its entry into force. He stressed that the AATPMI introduces a completely new tax obligation. Although both the Personal Income Tax Act (Official Gazette RS, No. 13/11 – official consolidated text and following – hereinafter referred to as the PInTA-2) and the AATPMI concern the taxation of income, the AATPMI is namely (in contrast to the PInTA-2) not a systemic law, but an extraordinary tax law. Asst. Prof. Dr Aleš Kobal specifically emphasised the great importance of the predictability of regulations in the field of tax law. The principle of the precision of laws allegedly has an important place in this context. This principle allegedly means that already on 1 January taxable persons must know the taxation of their income in that calendar year, or that taxable persons are able to calculate the amount of their tax obligation or the amount of income they can freely dispose of anytime in a tax year when they receive some particular income. In conformity with the above, also the hitherto case law of the Constitutional Court and other foreign courts with regard to the admissibility of the retroactive effect of laws in the field of taxation is (compared with other fields subject to statutory regulation) more restrictive.

16. During the proceedings, the Constitutional Court received certain explanations from the Government and the Employment Service of Slovenia (the second paragraph of Article 28 of the CCA). It requested that the Government [submit to the Court] orders that it had issued on the basis of Articles 81a and 86a of the PFA, as well as contracts regarding loans or sureties granted on the basis of these orders. It also requested that it [submit] the draft act, whose content was similar to the AATPMI but which was then not submitted to the National Assembly for assessment. The Employment Service of Slovenia requested that examples of contracts concluded on the basis of the PSFWA and the PRPCA be submitted.
17. On 20 November 2013, the Ministry of Finance submitted to the Constitutional Court the data that the representative of the Government was asked to submit during the public hearing, i.e. data on the assessment and payment of tax determined by the AATPMI for 2009, 2010, 2011, and 2012, hypothetical data on the estimated amount of default interest in the event of the refund of taxes already paid due to their being unjustifiably imposed, as well as data on the realisation of public revenue from income taxes, taxes on profits, and the additional tax based on the AATPMI.

#### **B – I**

18. By the Order dated 15 March 2012, the Constitutional Court joined case No. U-I-171/11 to case No. U-I-158/11 for joint consideration and decision-making.
19. The central question of the case at issue is whether Article 12 of the AATPMI is inconsistent with the constitutional prohibition of the retroactive effect of legal acts determined by Article 155 of the Constitution. The Constitutional Court emphasises that the assessment of the concrete acts of individual members of management and supervisory bodies does not fall within the framework of such review of constitutionality. Decision-making on the possible subjective responsibility of an individual which would proceed from the failure to perform due diligence or possibly even from allegations of the abuse of authorisations when exercising the tasks of the management or supervisory body of a company would be the subject of other proceedings conducted against individual persons.
20. The first paragraph of Article 155 of the Constitution prohibits the retroactive effect of legal acts by determining that laws and other regulations and general acts cannot have retroactive effect. The meaning of this constitutional prohibition is to ensure the essential element of a state governed by the rule of law, i.e. legal certainty, and thus to maintain and strengthen trust in the law (Article 2 of the Constitution). However, the prohibition under the first paragraph of Article 155 of the Constitution is not absolute. The second paragraph of Article 155 of the Constitution determines an exception to this prohibition in principle, on the basis of which only a law may establish that certain of its provisions have retroactive effect if this is required in the public interest and provided that no acquired rights are infringed thereby.
21. In conformity with the established case law of the Constitutional Court, a regulation has retroactive effect when the moment of the beginning of its application is the moment before its entry into force and even when the moment of the beginning of its

application is the moment after its entry into force, but some of its provisions have such effect that they retroactively interfere with legal situations or legal facts that were final when the previous legal norm was in force.<sup>3</sup>

22. The AATPMI introduced (the provisional)<sup>4</sup> obligation of the payment of an additional tax on the income of the members of management and supervisory bodies of business entities who benefitted from a surety, guarantee, or financial aid from the state to attenuate the consequences of the financial and economic crisis on the basis of measures adopted by either the National Assembly or the Government (Article 1 and the second paragraph of Article 3 of the AATPMI).<sup>5</sup> The subject of taxation pursuant to this Act are received salaries, other benefits stemming from employment, performance bonuses, severance pay, income received on the basis of profit sharing, certain privileges that business entities grant to taxable persons or to a member of their family, attendance allowances, and other income for conducting business or for carrying out supervision over a business entity (the first through fourth paragraphs of Article 4 of the AATPMI).<sup>6</sup> Pursuant to Article 5 of the AATPMI, the taxable base is the sum of all the mentioned income (reduced by the obligatory social security contributions) that the taxable person received in the past year in the part that exceeds the amounts determined in this Article. The additional tax is calculated and paid at a rate of 49% of the annual taxable base (Article 6 of the AATPMI) on the basis of a decision of the tax authority issued following the declaration of the taxable person in which income from the past year is taken into consideration (Article 7 of the AATPMI). The AATPMI entered into force on 6 October 2009, i.e. the next day after it was published in the Official Gazette of the Republic of Slovenia (the first paragraph of Article 13 of the AATPMI). The challenged Article 12 of the AATPMI determines that this Act applies to income referred to in this Act received from 1 January 2009 onwards. The effect of the mentioned provision is thus such as to encompass in the new taxation also income paid before the Act entered into force, i.e. between 1 January 2009 and 5 October 2009.

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- 3 See, for instance, Decision of the Constitutional Court No. U-I-98/07, Paragraph 23 of the reasoning. In theory, the effect of a law which has such retroactive effect is named true retroactivity, whereas the term quasi-retroactivity in theory describes the effect of a law whose prescribed consequence begins after the regulation is published, but the appearance of this consequence in the law is linked to circumstances (facts) from the time before the law is published (*cf.*, for instance, L. Šturm 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, pp. 57 and 1040).
- 4 The validity of the AATPMI is limited in time; it was in force until 31 December 2010 and will remain in force until the end of the tax year in which the sureties or guarantees and measures for the attenuation of the consequences of the financial and economic crisis expire (the second paragraph of Article 13 of the AATPMI).
- 5 A taxable person liable for the payment of the tax in accordance with this Act shall be a natural person who as a member of a management or supervisory body received income from managing or supervising a business entity (the first paragraph of Article 3 of the AATPMI).
- 6 In conformity with the fourth paragraph of Article 4 of the AATPMI, it is deemed that income is received when it is paid or in any other manner made available to the taxable person regardless of the form in which it is paid or made available.

23. The Constitutional Court has already addressed the issue of the retroactive effect of a tax norm that refers to a periodic tax in Decision No. U-I-62/95. It assessed the regulation determined by the Act Amending the Personal Income Tax Act (Official Gazette RS, No. 7/95 – PInTA-A), which regulated anew the taxation of certain personal income, i.e. severance pay upon retirement, jubilee bonuses, and one-time solidarity aids which previously had not been subject to taxation. The Act entered into force the next day after it was published in the Official Gazette of the Republic of Slovenia, i.e. on 5 February 1995, and was applicable from 1 January 1995 onwards. The Constitutional Court adopted the position that a (new) tax obligation can only emerge after an act has entered into force and that the determination of a retroactive obligation is inconsistent with Article 155 of the Constitution. The Court substantiated such position by stating that [such retroactive] tax obligations entail an interference with an already existing acquired right to freely dispose of one's income (see Paragraph 8 of the reasoning of the mentioned Decision) and that the manner of tax calculation (e.g., annually) does not represent a basis for interpretation in conformity with which the validity of the tax obligation extends also to income paid when such statutory obligation had not yet existed (see Paragraph 9 of the reasoning of the mentioned Decision). Also in Decision No. U-I-81/96<sup>7</sup> the Constitutional Court adopted a similar position (*cf.* the eleventh paragraph of the reasoning of the mentioned Decision). In both cited cases the Constitutional Court clearly expressed that with regard to periodic taxes the constitutionally relevant state of the facts is final at the moment the taxable income arises, regardless of the fact that the final tax obligation is assessed only at the end of the tax year.<sup>8</sup>
24. The AATPMI imposed a new (49%) tax obligation on the specific group of taxable persons. The AATPMI entered into force on 6 October 2009, i.e. the next day after it was published in the Official Gazette of the Republic of Slovenia (the first paragraph of Article 13 of the AATPMI). On the basis of the challenged Article 12 of the AATPMI, the taxable base for the assessment of tax under this Act (also) includes parts of income that the taxable person received before the entry into force of this

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7 The Constitutional Court assessed provisions of the Act Amending the Corporate Profit Tax Act (Official Gazette RS, No. 20/95) which entered into force the next day after the Act was published in the Official Gazette of the Republic of Slovenia, i.e. on 8 April 1995, and were applicable from 1 January 1995 onwards and regulated anew the taxation of general reserves of banks and savings banks already formed.

8 This so-called concept of a taxable event, which instead of the formal formation of a tax debt concretised in the decision of a tax authority takes into consideration the situation of a taxable person who at the moment of receiving income by trusting the existing tax regulation acquires the possibility to freely dispose of the untaxed part of the income, is (*inter alia*) accepted also in Denmark, the Netherlands, Sweden, and Poland. Certain other states (among them also Germany, Belgium, and Italy) accept the so-called concept of a tax period, which deems the moment of the appearance of the tax burden as the legally decisive moment; with regard to periodic taxes, this moment is the last day of the time period for which the tax is being assessed (*cf.* reports of individual states prepared for the conference of the European Association of Tax Law Professors, *Retroactivity of Tax legislation*, EATLP 2010, published on the website <http://www.eatlp.org/index.php/documents/leuven-2010>).

Act, i.e. between 1 January 2009 and 5 October 2009, when they were already subject to tax, namely to the personal income tax on the basis of the PInTA-2. Article 12 of the AATPMI thus determined the beginning of the application of this Act (1 January 2009) before the moment of its entry into force (6 October 2009), therefore it is evident that by this Article the legislature retroactively interfered with the legal situations of the affected taxable persons and imposed an additional burden thereon. Even though the additional tax on income determined by the AATPMI is assessed on an annual basis (as the personal income tax – compare with the first paragraph of Article 15 of the PInTA-2 and Article 6 of the AATPMI), under the (presented) established case law of the Constitutional Court, such new taxation (of income), introduced in the middle of a tax year, which is applicable already from the beginning of the year, has retroactive effect. The AATPMI namely attaches the emergence of a tax obligation to the moment when a particular taxable income is received, whereby it deems that the income is received when it is paid or in any other way made available to a taxable person (compare the first and fourth paragraphs of Article 4 of the AATPMI and the first and fifth paragraphs of the PInTA-2). From this moment (of the so-called taxable event) on, taxable persons legitimately expect that the income received will be subject to precisely such tax as was prescribed by the tax legislation in force at that moment and that they will be able to freely dispose of the remaining income. Therefore, Article 12 of the AATPMI has retroactive effect, which is prohibited by the first paragraph of Article 155 of the Constitution. Nonetheless, the retroactive effect of individual statutory provisions is exceptionally allowed if the conditions determined by the second paragraph of Article 155 of the Constitution are fulfilled.

## B – II

25. In conformity with the second paragraph of Article 155 of the Constitution, the retroactive effect of a particular statutory provision is admissible if this is required in the public interest and provided that no acquired rights are infringed thereby. These two conditions are prescribed cumulatively, whereby the first one is formulated positively and the second one negatively.<sup>9</sup>
26. With regard to the first condition under the second paragraph of Article 155 of the Constitution, the Constitutional Court has already adopted the position that the arguments that substantiate the regulation in the part that applies *ex nunc* cannot be used without reservation for demonstrating a public interest that would exceptionally require that a particular statutory provision be applied retroactively.<sup>10</sup> A different position would dilute the importance of the constitutional prohibition of the retroactive effect of legal acts determined by the first paragraph of Article

9 Cf. Decisions of the Constitutional Court No. U-I-60/99, Paragraph 21 of the reasoning, and No. U-I-98/07, Paragraph 28 of the reasoning.

10 Cf. Decision of the Constitutional Court No. U-I-340/96, dated 12 March 1998 (Official Gazette RS, No. 31/98, and OdlUS VII, 48), Paragraph 8 of the reasoning.

155 of the Constitution. Retroactive effect can thus only be justified by a specific public interest, one which substantiates precisely the retroactive effect of the regulation without which the pursued aim of the particular regulation could not be achieved.<sup>11</sup> With regard to the fact that such a public interest substantiates an exception from the constitutional prohibition of the retroactive effect of a regulation, whereby exceptions must be interpreted restrictively, such public interest must be specifically established in the legislative procedure.<sup>12</sup> The legislature must thus already in the legislative file substantiate the retroactive effect of a legal norm. Possible subsequent substantiations (presented for the first time after the legislative procedure has been completed) of the aims of an act, which are not evident in the legislative file, cannot substitute for such establishment.

27. The legislature must respect the prohibition of the retroactive effect of laws especially in the field of taxation. Not only because of the density and intensity of legal relations between the state (the tax administration) and taxable persons, but also because of the asymmetry of tax law relationships, which entail an interference by the state with the property sphere of taxable persons without directly paying any compensation for such, as well as because of the general sense of justice.<sup>13</sup> The state significantly influences the property sphere of individuals by its tax policy. Therefore, it is understandable that they plan and carry out their actions also with regard to the predicted tax consequences of such actions of theirs. Although taxable persons know or should know that the tax legislation in force that is relevant for their decisions can change and does change,<sup>14</sup> they legitimately expect that it will change in such manner that while taking decisions they will be able to take these changes into consideration, which presupposes that they are informed thereof (the first paragraph of Article 154 of the Constitution).<sup>15</sup> In the event of the adoption of a tax regulation that has retroactive effect, the legislature must demonstrate in the legislative file the existence of a particularly important public interest which particularly justifies such retroactive effect.

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11 Cf. Decision of the Constitutional Court No. U-I-60/98, dated 16 July 1998 (Official Gazette RS, No. 56/98, and OdlUS VII, 150), Paragraph 47 of the reasoning.

12 As stated also by M. Pavčnik, *Teorija prava, Prispevek k razumevanju prava* [Theory of Law, A Contribution to Understanding Law], 3<sup>rd</sup> expanded, amended, and revised edition, GV Založba, Ljubljana 2007, p. 259.

13 Decision of the Constitutional Court No. U-I-81/96, Paragraph 11 of the reasoning. See also C. Waldhoff, *Vertrauensschutz im Steuerrechtsverhältnis*, accessible at: [http://www.jura.uni-bonn.de/fileadmin/Fachbereich\\_Rechtswissenschaft/Einrichtungen/Institute/Kirchenrecht/LehreWS06\\_07/AufsatzVertrauensschutz.pdf](http://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Institute/Kirchenrecht/LehreWS06_07/AufsatzVertrauensschutz.pdf) (19. 4. 2013).

14 Order of the Constitutional Court No. U-I-125/05, dated 8 December 2005, Paragraph 16 of the reasoning. The principle of the adaptation of law to social circumstances is one of the principles of a state governed by the rule of law (see Decisions of the Constitutional Court No. U-I-69/03, dated 20 October 2005, Official Gazette RS, No. 100/05, and OdlUS XIV, 75, Paragraph 7 of the reasoning, and No. U-I-65/08, Paragraph 21 of the reasoning).

15 Such trust of persons subject to income tax is further reinforced by Article 2 of the PInTA-2, which determines that the personal income tax is assessed in conformity with the provisions of the law that is in force on 1 January of the year for which the personal income tax is assessed, if this Act does not determine otherwise.

28. In the legislative file<sup>16</sup> one cannot find particular substantiation of the public interest for the existence of the retroactive effect of the challenged statutory provision. The National Assembly neither replied to the request of the applicant nor attended the public hearing in this case, even despite the fact that in the legislative procedure both the Government and the Legislative and Legal Service of the National Assembly warned [the legislature] of the possibility that Article 12 of the ATPMI might be constitutionally disputable due to its (in the legislative file unexplained) retroactive effect.<sup>17</sup> As far as the allegation in the legislative file “that unsuccessful managers would be left without unjustified bonuses” could be deemed to be the substantiation of the retroactive effect of the Act, it must be established that it does not demonstrate a public interest in the sense of the second paragraph of Article 155 of the Constitution.
29. In addition to fiscal aims, also specific socio-political aims can be pursued by taxes.<sup>18</sup> Among them, not even aims that in the context of general social or economic policy strive to dissuade potential taxable persons from certain conduct are excluded. However, the application of a tax norm with retroactive effect cannot by the nature of the matter serve to dissuade persons from conduct already undertaken,<sup>19</sup> but can only entail the subsequent legal assessment of conduct already undertaken.<sup>20</sup> Consequently, this is not a constitutionally admissible aim of statutory regulation in the field of tax law. If the purpose of a special tax regulation (also) entails dissuading persons from certain conduct, such purpose may only refer to the regulation of future conduct. Only in such a manner do taxable persons have the possibility to plan their decisions in conformity with the principle of trust in the law with regard to changes in tax legislation.
30. The mentioned substantiation of the National Assembly can also be understood as criticism of actions unacceptable in the given circumstances of a financial and economic crisis, which is obviously addressed to a circle of individuals to whom concrete actions already taken are to be attributed. Since in the foreground of the corporate management of companies, which was entrusted to an individual by appointing him or her to the position of a member of the management or control body of a company, there is the responsibility to ensure a reasonable balancing of conflicting interests between particular groups of people – which are affected by the decisions of the bodies of a company and which are important for both the cohesion of the relations between the people in a company and in general for the position of such company – the mentioned substantiation can also be understood as an allegation that such persons acted contrary to the criteria of due diligence in carrying out of tasks required of individuals,

16 Draft of the ATPMI, Gazette of the National Assembly No. 60/09, EPA 317-V.

17 Cf. Report on the Draft of the ATPMI, Gazette of the National Assembly No. 90/09, dated 2 July 2009, EPA 317-V.

18 Cf. Decisions of the Constitutional Court No. U-I-62/95, Paragraph 9 of the reasoning, No. U-I-91/98, Paragraph 25 of the reasoning, and No. U-I-260/04, dated 20 April 2007 (Official Gazette RS, No. 45/07, and OdlUS XVI, 25), Paragraph 28 of the reasoning.

19 Cf. L. Šturm in: L. Šturm (Ed.), *op. cit.*, p. 1039.

20 Cf. M. Pavčnik, *op. cit.*, p. 258.

i.e. the members of management and supervisory bodies. However, as the Constitutional Court has already emphasised, deciding on the possible subjective responsibility of an individual, which would follow from the failure to perform due diligence or possibly even from the allegation of an abuse of authorisations when carrying out the function of a body in a company, and the assessment of the appropriateness of the amount of bonuses paid to the members of management or supervisory bodies do not fall within a review of the constitutionality of the statutory provision at issue.

31. Due to the fact that state funds were granted to business entities in order to attenuate the consequences of the financial and economic crisis,<sup>21</sup> the available budget resources in fact diminished. The fact that state funds were granted to business entities through anti-crisis measures cannot, however, fulfil the requirement of there being a public interest in order for the challenged statutory provision, which is addressed to individuals, to have retroactive effect. Regardless of the fact that taxes can pursue various socio-political aims, the introduction of a retroactive tax obligation cannot substitute for the statutory regulation of the system of compensating the members of the management and supervisory bodies of business entities that benefitted from state aid. In fact, the specific anti-crisis measures adopted that envisaged the expenditure of state funds contained guarantees with regard to such only being used for designated purposes, including limitations on the payment of certain income to the members of management bodies.<sup>22</sup>
32. Therefore, the legislature failed to demonstrate that the public interest requires the retroactive effect of the regulation determined by the AATPMI, even though it should have done so already in the legislative file (Paragraph 27 of the reasoning of this Decision).
33. Even if in its assessment the Constitutional Court had accepted the arguments presented in the proceedings by the Government in favour of the retroactive effect of [the Act in accordance with] Article 12 of the AATPMI, these arguments would not have led [the Court] to make a different decision. With regard to the public interest that allegedly justifies the retroactive effect of [the Act in accordance with] Article 12 of the AATPMI, the Government underlined: 1) that Article 12 of the AATPMI allegedly “prevented excessive compensation of managers in the time of the financial and economic crisis” and in such a manner also the financial and economic crisis was allegedly mitigated or resolved, 2) that illegitimate imbalances between the bonuses of the members of management and supervisory bodies, on one hand, and the business reality, requirements, and limitations imposed by the economic crisis, on the other, which have a negative effect on social cohesion, can only be overcome by having an effect on income already received, 3) that the taxation of income already paid, if such income proves to be ethically and morally disputable, is in the public interest and in conformity with the social function of property as well as with the principle of a

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21 This concerns state funds ensured by the PFA-D, the Republic of Slovenia Guarantee Scheme Act (Official Gazette RS, Nos. 33/09, and 42/09 – the RSGSA), the PSFWA, the PRPCA, etc.

22 See note 2 of the reasoning of this Decision.

social state, 4) that it is in the public interest if a retroactive tax burden pursues the systemic coherence of the new tax regulation, and 5) that the retroactive effect of the AATPMI is intended to prevent the evasion of paying this tax.

34. In itself, the tax burden has no influence on the legal possibility or the claim of a taxable person to the payment of income or a bonus. The opposite is true; the tax burden on the income presupposes that a taxable person receives an income based on a valid legal title. Therefore, it is conceptually excluded that the tax burden (in fact or legally) prevents the taxable person from receiving such income. The position of the Government that the challenged provision serves to prevent the payment of disproportionately high and thus ethically and morally disputable income is thus erroneous. On the contrary, the tax burden, when it significantly decreases the amount of money from a specific taxable income that taxable persons can freely dispose of, as a general rule influences the motivation of taxable persons to acquire such income.<sup>23</sup> However, by the nature of the matter it is not possible to motivate human action or conduct retroactively.<sup>24</sup> Therefore, if the phrase “the prevention of excessive compensation” can be interpreted as meaning that by means of a new, high tax burden one influences the motivation of the specific group of taxable persons such that they do not pay to themselves such income while the Act is in force, by the logic of the matter such an aim cannot be achieved by the retroactive taxation of bonuses and other income already paid. Such an aim is not real and thus cannot substantiate the public interest that could justify the retroactive effect of the additional taxation of income in accordance with the AATPMI.
35. Due to the same reasons that the Constitutional Court rejected the National Assembly’s reference to the aim “that unsuccessful managers would be left without unjustified bonuses”, also the Government’s reference to the following aims must be rejected: 1) that the retroactive effect on income already paid enables the elimination of illegitimate imbalances between the bonuses of members of management and supervisory bodies, on one hand, and the business reality, requirements, and limitations imposed by the financial and economic crisis, on the other hand, and contributes to the elimination of factors that have a negative influence on social cohesion, and 2) in order to ensure of the principle of a social state, the retroactive effect of the tax burden on income already paid, if such income proves to be ethically and morally disputable, is in the public interest (see Paragraphs 29 and 31 of the reasoning of this Decision). Also the uniform regulation of the taxation of income received over the entire tax year is not a sufficient reason for the retroactive effect of the new tax regulation.<sup>25</sup>
36. At the public hearing the Government also alleged that the intention of the retroactive effect of Article 12 of the AATPMI was also to prevent the avoidance of

23 Cf. Decision of the Constitutional Court No. U-I-91/98, dated 16 July 1999 (Official Gazette RS, No. 61/99, and OdlUS VIII, 196), Paragraph 21 of the reasoning.

24 Cf. M. Pavčnik, *op. cit.*, pp. 258–259.

25 Cf. Decision of the Constitutional Court No. U-I-62/95, Paragraph 10. of the reasoning.

the payment of the newly introduced tax obligation. The attempt to prevent the circumvention of a new tax regulation before its entry into force can certainly be an aim in the general public interest which could justify the retroactive effect of the tax regulation.<sup>26</sup> However, in the concrete case the statement of such aim is too general, because the Government did not substantiate what kind of abuses this could concern in the case at issue with regard to the intention when adopting the AATPMI. By referring to the length of the legislative procedure it is indeed not even possible to substantiate the mentioned aim as far as it refers to the time before 21 April 2009, when a draft of the AATPMI was published for the first time in the Gazette of the National Assembly. Taxable persons namely cannot circumvent the new tax regulation if concrete drafts of such regulation are not publicly published.

37. With regard to all of the above, the Constitutional Court assesses that in the case at issue already the first condition prescribed by the second paragraph of Article 155 of the Constitution for the exceptionally admissible retroactive effect of a law is not fulfilled. Consequently, the Constitutional Court (without assessing whether the second, cumulatively determined condition determined by the second paragraph of Article 155 of the Constitution is fulfilled) assessed that Article 12 of the AATPMI is inconsistent with the first paragraph of Article 155 of the Constitution and abrogated it. The abrogation of the challenged provision entails that the regulation in accordance with the AATPMI does not apply to income that taxable persons received in the period before the entry into force of this Act, i.e. between 1 January 2009 and 5 October 2009.
38. Since the challenged Article 12 of the AATPMI had to be abrogated already due to its inconsistency with the first paragraph of Article 155 of the Constitution, the Constitutional Court did not adopt a position with regard to the motion of the plaintiff in the proceedings for the judicial review of administrative acts to also conduct an assessment from the viewpoint of the right to private property (determined by Article 33 of the Constitution and Article 1 of Protocol No. 1 to the ECHR).

### C

39. The Constitutional Court adopted this Decision on the basis of Article 43 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The Decision was adopted by six votes against three. Judges Klampfer, Korpič – Horvat, and Deisinger voted against. Judges Sovdat and Zobec submitted concurring opinions, whereas Judges Klampfer, Korpič – Horvat, and Deisinger submitted dissenting opinions.

*Mag. Miroslav Mozetič*  
*President*

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26 Cf. Decision of the European Commission of Human Rights in *A., B., C., and D. v. United Kingdom*, dated 10 March 1981, and the Judgment of the Court of Justice of the European Union in *Stichting "Goed Wonen" v. Staatssecretaris van Financiën*, C-376/02, dated 26 April 2005.

1. I voted against the Decision because in my opinion there exist arguments in favour of the constitutional consistency of Article 12 of the Act on the Additional Taxation of a Part of Managers' Income in the Period of Financial and Economic Crisis (Official Gazette RS, No. 78/09 – hereinafter referred to as the AATPMI).
2. In the case at issue, the Constitutional Court only had to resolve the issue of the retroactive application of the Act, i.e. the possibility or impossibility of applying the second paragraph of Article 155 of the Constitution. The additional taxation determined by the AATPMI itself therefore has no effect on the decision, neither does the amount of the taxation nor the consequences for taxable persons. The Decision is based on the violation of the first paragraph of Article 155 of the Constitution, whereby the application of the institute of “quasi-retroactivity” has been virtually excluded by such review of constitutionality. In the Decision the fact that the Act regulated the exceptional circumstances of the financial crisis, that it is a temporary Act, and that it is not comparable to cases which the Constitutional Court has thus far decided on was not taken into consideration. In any case, the prohibition of retroactive effect determined by the first paragraph of Article 155 of the Constitution must also apply in the field of taxation, however the extremely exceptional situation where quasi-retroactivity can be applied regarding tax law must also be taken into consideration.
3. In legal theory, the term quasi-retroactivity is explained as the effect of a law whose prescribed consequences begin after the regulation is published, whereby the appearance of such consequence in the law is linked to circumstances (facts) from the time before the law was published.<sup>1</sup> The difference between true and quasi-retroactivity is expressed precisely in relation to the existence of the state of the facts, namely whether the state of the facts is already final (true retroactivity) or whether such is fully finalised only after the law is published.<sup>2</sup> One characteristic of tax obligations is precisely that the relevant state of the facts for taxation is final when an income tax obligation arises, whereby such obligation arises only at the end of the tax year. All income from employment that natural persons receive in a tax year, which is equivalent to a calendar year, is subject to income tax. Consequently, Article 12 of the AATPMI only has quasi-retroactive effects. It would have true retroactive effect if its effects stretched beyond the current tax period, for instance into 2008, [a tax year] for which income has already been subject to taxation in conformity with the [tax] assessment decision of the tax authority issued in 2009.

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1 L. Šturm 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, pp. 57 and 1040.

2 E. Korpič – Horvat, *Aktualna vprašanja novejših ustavnosodnih presojev s področja socialne varnosti (vidik prave in neprave retroaktivnosti)* [Current Issues in the Recent Constitutional Case Law regarding Social Security (Aspects of Retroactivity and Quasi-Retroactivity)], *Delavci in delodajalci*, No. 2–3 (2013), p. 353.

4. The concept of a “tax period” has also been accepted by the German Federal Constitutional Court and the Constitutional Court of Belgium.<sup>3</sup> In the German legal literature, the decisions of the Federal Constitutional Court are indeed subject to critical assessments, however with regard to tax law, quasi-retroactive effect is in principle allowed under certain conditions.<sup>4</sup>
5. A comparative law analysis conducted by the Constitutional Court demonstrates that in the event a regulation enters into force during a tax period and applies from the beginning of such period (for instance, from 1 January), such regulation would have:
  - true retroactive effect in states which accepted the so-called *concept of a taxable event* (Denmark, Finland, Hungary, Netherlands, Poland, and Sweden); however, even though the retroactive effect of regulations is in principle prohibited, the review of the possible unconstitutionality of such regulation varies between the states, such that the retroactive effect of regulations depends on standards, the length of the period of time, exceptional circumstances, the necessity of such to achieve an aim in the public interest, minimal effects for taxpayers, etc.;
  - quasi-retroactive effect in those states that accepted the so-called *concept of a tax period* (Belgium, France, Germany, Italy, Luxembourg, Spain, Turkey, and Portugal) where such retroactive effect is in principle allowed;
  - in Greece, such retroactive effect of tax regulations is allowed already by the constitution;
  - in the U.S. and in the United Kingdom, such adoption and the effects of regulations form a *common legislative practice*.
6. No case such as the one assessed in this Decision by the Constitutional Court was noted in the reviewed case law of foreign constitutional courts. The AATPMI namely refers to an exceptional time of financial and economic crisis and provisionally introduces an additional tax. Also the position of the Court of Justice of the European Union is that a sudden financial crisis or unpredictable budgetary problems can justify the retroactive effect of regulations that create a [tax] burden.<sup>5</sup> I am of the opinion that in other states the question of quasi-retroactivity in cases involving an additional tax on the responsible persons in companies that received a surety or funds from the state for the attenuation of the consequences of the financial and economic crisis would not have been raised. Such income had its origin in the management or supervision of the mentioned business entities receiving [state] aid and consequently their income stemmed from taxpayers’ money as well.

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3 German Federal Constitutional Court (*Bundesverfassungsgericht*): Decisions of the second senate No. 2 BvL 14/02, 2 BvL 2/04, 2 BvL 13/05 and No. BvR 784/05, 2 BvR 1738/05, both dated 7 July 2010, and Decision of the first senate No. 1 BvL 6/07, dated 10 October 2012, accessible at <http://www.bundesverfassungsgericht.de/>. The Constitutional Court of Belgium (*Arbitragehof*) has also stated such: Decision No. 109/2004, dated 23 June 2004, accessible at: <http://www.const-court.be/>.

4 K. Tipke; *Die Steuerrechtsordnung*, Volume 1, Otto Schmidt, Köln 1993, pp. 177–202.

5 Judgments of the Court of Justice of the European Union in *Rache*, 98/78, dated 25 January 1979, para. 20, in *Decker*, 99/78, dated 25 January 1979, para. 8, and in the joined cases *Zuckerfabrik*, C-143/88 and C-92/89, para. 49.

7. In the current Decision, the lack of a substantiated public interest for the existence of the retroactive effect of the challenged statutory provision is deemed to be decisive. The allegation in the legislative file (*“that unsuccessful managers would be left without unjustified bonuses”*) is evaluated as insufficient in the Decision. The Constitutional Court namely established that the public interest in the sense of the second paragraph of Article 155 of the Constitution is not demonstrated by this allegation. I believe that with its short, ambiguously expressed substantiation the legislature nonetheless stated what it could have stated by means of a longer substantiation. The legislature’s allegation in the legislative file must be connected with the law itself, i.e. with the clearly expressed intention of the law. Such entails that funds from the budget of the state cannot be spent on bonuses, because such bonuses are “unjustified”. By the additional tax that income has not been seized, but has only been subject to an additional tax. The public interest [required] by the second paragraph of Article 155 of the Constitution was thereby demonstrated, because it was clearly evident from the [stated] purpose of the Act. In this event, also the second condition was fulfilled, namely that there was no severe interference with the acquired rights of responsible persons, and also their social rights have not been jeopardised.<sup>6</sup> The universal principle of justice is connected with this question as well. In life a regulation that rewards an individual with money that he or she receives from people – taxpayers – as aid in difficult times is unimaginable and legally unfair.
8. Epilogue: Due to the decision to abrogate Article 12 of the AATPMI, the refund of the additional tax together with default interest calculated until 30 November 2013 will amount to EUR 2,130,585.61.<sup>7</sup> Such amount will be refunded from the budget of the state from taxpayers’ funds.

*Dr Mitja Deisinger*

6 B. Bugarič, *Pravno mnenje o ustavnosti zakona o dodatnem davku* [Legal Opinion Regarding the Constitutionality of the Value Added Tax Act], Ljubljana, 22 September 2009, (delivered to the Constitutional Court together with a letter from the President of the political party Zares, dated 27 November 2013), on page 2: “[...] that we cannot speak of acquired rights is probably clear: how can the money or some other aid that management pays to itself as a bonus from the funds that were intended to help companies and other business entities during the severe economic crisis be an “acquired” right? This is no acquired right but completely unjustified enrichment on the account of the public money of taxpayers; for such reason it is completely right that the state has the possibility to try to reacquire this money through taxes.”

7 The Ministry of Finance transmitted this information to the Constitutional Court by letter No. 050-4/2012, dated 20 November 2013.

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**CONCURRING OPINION OF JUDGE DR JADRANKA SOVDAT,  
JOINED BY JUDGE MAG. MIROSLAV MOZETIČ**

*“No, this tenet does not mean: Everything that  
benefits the people is law. Rather, it is the other way  
around: Only what law is benefits the people.”<sup>1</sup>*

1. In the case at issue, the Constitutional Court did not decide on whether the plaintiff in the proceedings for the judicial review of administrative acts has the right, with regard to his success and responsibilities when performing the tasks of the former president of the management board of a bank, to keep his bonus inasmuch as it exceeded the social security contributions paid and taxation on the basis of the personal income tax (in conformity with the Personal Income Tax Act (Official Gazette RS, No. 13/11 – official consolidated text, 24/12, 30/12, 75/12, 94/12, and 96/13 – the PInTA-2)), as can be read and heard in the media. The Constitutional Court decided on whether the legislature admissibly retroactively introduced a tax obligation – i.e. with *ex tunc* effect. On the basis of the decision of the Constitutional Court, the Administrative Court, which initiated these proceedings for the review of constitutionality, will decide on the (constitutionality and) legality of the [tax] assessment decision by which a tax obligation was imposed retroactively on individuals. The subject of this review of constitutionality is underlined in Paragraph 19 of the reasoning of the Decision, which stresses that a decision on the possible subjective responsibility of an individual which would proceed from the failure to perform due diligence or possibly even from allegations of the abuse of authorisations when exercising the tasks of the management or supervisory body of a company can only be a subject of concrete proceedings. I agree with that and I add that this can only be subject to concrete proceedings in which all constitutional procedural guarantees are also ensured to such individuals. However, what was mentioned cannot be subject to decision-making in proceedings to review the constitutionality of a law, in the case at issue namely whether the legislature constitutionally admissibly introduced the retroactive effect of a tax law.
2. The essential finding of the Decision is that the legislature did not demonstrate a public interest that would justify the retroactive effect of the challenged statutory provision. When this was established, the Constitutional Court halted its assessment at this point and did not assess the existence of other conditions for the constitutional admissibility of retroactivity determined by the second paragraph of Article 155 of the Constitution. In fact, it was not necessary to do so because the conditions are determined cumulatively. I concur with the Decision in this respect and for such reason I also voted for it. However, in this context, my view of the content of the second paragraph of Article 155 of the Constitution is somewhat different. In addition,

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1 At the public hearing in this case, Acad. Prof. Dr Marijan Pavčnik cited (not coincidentally!) the final thought from Radbruch's Second Minute of Legal Philosophy. See G. Radbruch, *Pet minut filozofije prava* [Five Minutes of Legal Philosophy], *Filozofija prava, Cankarjeva založba, Ljubljana* 2001, p. 268.

I wish to concur with the positions expressed in certain parts of the reasoning by also stating my own reasons. I also wish to emphasise that in my opinion, under all the conditions determined by the second paragraph of Article 155 of the Constitution, including the admissibility of the interference with “acquired rights”, the assessment of the constitutional admissibility of retroactivity would lead to the same final decision, i.e. to the abrogation of Article 12 of the Act on the Additional Taxation of a Part of Managers’ Income in the Period of Financial and Economic Crisis (Official Gazette RS, No. 78/09 – hereinafter referred to as the AATPMI). The final decision would in my opinion also be the same if the Constitutional Court modified its position regarding the starting point of the review of constitutionality with regard to the retroactive effect of tax regulations and instead of the so-called concept of a taxable event, accepted the so-called concept of a tax period on which the German Federal Constitutional Court insists, despite critics in legal theory, when assessing the constitutional admissibility of changes to tax legislation during a tax year.

3. With regard to the above, I first present my view of the content of the second paragraph of Article 155 of the Constitution, then I state my arguments for the assessment of all the elements of the mentioned constitutional provision, and finally I also demonstrate why in my opinion the operative provisions of the Decision would have to be the same even if the view of the starting point of the assessment with regard to the retroactivity of tax laws was different. However, I concur with the fact that the Constitutional Court did not change its position in the case at issue.

## I

4. The Decision proceeds from the fact that the meaning of the prohibition of the retroactive effect of statutory provisions determined by the first paragraph of Article 155 of the Constitution, which was expressly written by the Constitution-framer, lies in ensuring one essential element of a state governed by the rule of law, i.e. legal certainty, and thereby in maintaining and reinforcing trust in the law, which are two of the principles of a state governed by the rule of law. I, of course, concur with that. In a state governed by the rule of law, a human has, on one hand, the right to request freedom and opportunities to plan his or her life with a reasonable degree of certainty, and on the other, he or she must be protected by law and order which enable him or her to follow his or her path without interference.<sup>2</sup> On this path, in order to ensure harmony with others and due to the public interest, individuals must adapt their behaviour to regulations that limit their freedom in a constitutionally admissible manner. They can only do this by becoming acquainted with such regulations beforehand, for such reason the constitutional requirement that regulations must be published before they enter into force (the first paragraph of Article 154 of the Constitution), i.e. before an individual is required to abide by them,<sup>3</sup> is

2 J. Harvey, L. Bather, *The British Constitution*, 3<sup>rd</sup> Edition, McMillan St Martin’s Press, London 1972, p. 11.

3 “Abstract legal norms contained in the laws are by their nature [...] rules of conduct which apply *ex nunc* and encompass those legal relations that exist or arise after the norms entered into force. Logically, certain

even more important. Of course, I also agree that a prohibition of retroactivity extending to all laws regardless of the field of regulation is not absolute,<sup>4</sup> because the Constitution-framers envisaged an exception under the second paragraph of Article 155 of the Constitution. The prohibition under the first paragraph of Article 155 of the Constitution can be seen as a legal rule that concretises the legal principles determined by Article 2 of the Constitution<sup>5</sup> and as a constitutional principle at the same time.<sup>6</sup> On the contrary, such does not apply to the second paragraph of Article 155 of the Constitution, which undoubtedly is a constitutional rule, which is something that is not negligible with regard to the possibilities of its interpretation. Legal rules that introduce exceptions must already in principle be interpreted restrictively. The legislature, which must respect the Constitution when adopting laws, must take this into consideration. The second paragraph of Article 155 of the Constitution imposes on the legislature [the duty] to assess whether the constitutional conditions that allow it to implement statutory provisions with retroactive effect are fulfilled. This assessment must also have a recognisable and outwardly visible manifestation from which it is evident that the legislature takes its obligation to respect the Constitution seriously. For such reason, it must be evident already in the legislative file (i.e. all legislative material from the legislative procedure) why these conditions are fulfilled (Paragraph 27 of the reasoning of the Decision).

5. In accordance with the position adopted by the Decision, two conditions are prescribed in order for the exception determined by the second paragraph of Article 155 of the Constitution to be admissible: 1) if this is required in the public interest and 2) provided that no acquired rights are infringed thereby (Paragraph 25 of the reasoning of the Decision). At the public hearing, Acad. Prof. Dr Marijan Pavčnik identified three conditions for the admissibility of retroactivity in this provision: 1) only certain of its provisions can have retroactive effect, 2) if this is required in the public interest, and 3) provided that no acquired rights are infringed thereby. In this regard he specifically underlined the cumulative nature of certain conditions. Even before assessing whether the mentioned three conditions [are fulfilled], it is in my opinion necessary to assess whether what is actually at issue is the retroactive effect of a statutory provision. If we establish that what is at issue is retroactivity, I agree that we are also dealing with three conditions, of which two are positive and one is negative. In this respect, the first condition in fact twice emphasises the statutory level of legal norms – only

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conduct can only be required from people *ex nunc*. From this it logically follows that legal norms should not have retroactive power.” Statement of the former president of the Constitutional Court in the “Commentary on the Constitution” of 2002. L. Šturm 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, p. 1039.

4 *Ibidem*, p. 1040.

5 M. Pavčnik, *Teorija prava: prispevek k razumevanju prava* [Theory of Law, A Contribution to Understanding Law], 4<sup>th</sup> revised edition, Cankarjeva založba, Ljubljana 2011, p. 125.

6 *Ibidem*, p. 127. With regard to the prohibition of retroactivity as a constitutional principle see L. Šturm in: L. Šturm (Ed.), *op. cit.*, p. 54.

a law can determine that certain of its (i.e. statutory) provisions can have retroactive effect. And of course, I agree that all conditions must be fulfilled cumulatively, which entails that already the absence (or the presence of the negative condition – an interference with an acquired right) of one of them results in an unconstitutionality.

6. Firstly then, [I will assess] whether in the case at issue we are actually dealing with the retroactive effect of statutory provisions, and afterwards also other conditions. If what is at issue is not retroactivity, Article 155 of the Constitution is not at all applicable, but the matter at issue could possibly only be a question of an interference with the principle of trust in the law, which the Constitutional Court assesses in conformity with Article 2 of the Constitution. As is stated by Paragraph 21 of the reasoning of the Decision, in conformity with the established case law, a law has retroactive effect 1) as a general rule when the moment it becomes applicable is before it enters into force and 2) when the moment it becomes applicable is after it enters into force, but some of its individual provisions have such an effect that they retroactively interfere with legal situations or legal facts that had become final when the previous legal norm was in force. The challenged provision entered into force on 6 October 2009; it determines that the Act “applies to income referred to in this Act received<sup>7</sup> from 1 January 2009 onwards.” So far, in such cases the Constitutional Court deemed that what is at issue is the first mentioned situation, i.e. that the moment when the Act became applicable is before the moment of its entry into force. In this regard, both in Decision No. U-I-62/95, dated 16 February 1996 (Official Gazette RS, No. 14/96, and OdlUS V, 18) and in Decision No. U-I-81/96, dated 12 March 1998 (Official Gazette RS, No. 27/98, and OdlUS VII, 46) the Constitutional Court expressly stated that the manner of the calculation of tax (e.g. by an annual calculation) does not represent a basis for an interpretation under which the validity of a tax obligation is extended to income paid when such statutory obligation did not yet exist. Respect for this position brings us to the conclusion that the challenged statutory provision introduced a retroactive effect of the provisions of the AATPMI.
7. In order to depart from the mentioned explicitly expressed starting point that proceeds from the so-called concept of a taxable event (Paragraph 23 of the reasoning of the Decision), the Constitutional Court would need serious constitutional reasons. At this time, I do not see them myself. I do see, however, those which oppose a change in this position. If a free individual and his or her dignity are the source of the constitutional order – and they are, if the public authority must act in such a manner so as to respect this freedom – then this must also apply in the field of the freedom of property (Article 33 of the Constitution). The state has constitutional authorisation to limit the freedom of property by (*inter alia*) prescribing tax obligations (Article 147 of the Constitution),<sup>8</sup> but in such a manner that individuals at any moment know what

7 In conformity with the fourth paragraph of Article 4 of the AATPMI, an income is deemed to be received when it is paid or in any other manner made available to the taxable person.

8 The Constitutional Court does not deem these tax obligations to constitute an interference with the private property determined by Article 33 of the Constitution, as long as the amount of the prescribed tax is not such as to jeopardise the essence of property, whereby it becomes such when it exceeds one half of the income; see

their obligations are (by a law that is published so that anyone can become acquainted therewith; the first paragraph of Article 154 of the Constitution), because only in such a manner will they also be able to adapt their behaviour and remain free at the same time. Such freedom would be substantially limited if virtually until the end of the year they did not know whether the state would impose additional tax obligations on them either by increasing tax rates or by imposing new taxes, by means of which they would create a burden on the income that they received during the year and which undoubtedly became their private property, and they thus acquired the freedom to dispose of such. Individuals can act freely if they know at any moment what obligations are imposed thereon by the state, therefore [any] obligations must be clearly and specifically determined by law. A tax law on the basis of which individuals cannot understand what their tax obligation is would not fulfil the requirements regarding clarity and precision. Therefore, such a law would be inconsistent already with the principle of the clarity and precision of regulations, which is one of the principles of a state governed by the rule of law determined by Article 2 of the Constitution. Only if individuals know their obligations (in this regard, also legal predictability as one of the elements of legal certainty is at issue), they will be able to fulfil them and exercise their freedom of conduct at the same time. Or, in the context of the field of a tax law and the substantiation presented by Asst. Prof. Dr Aleš Kobal at the public hearing: A tax obligation arises in the month when an individual receives an income; at the end of the year there arises the state's claim for the payment of the tax. What the principle of the precision of tax regulations ensures to individuals is precisely that at any moment in a tax year when they receive an income they can calculate the amount of their tax obligation, and the remainder is what they can allocate for their further personal spending, for investments, for anything. For such reason, already the first day of the tax year and at any moment in the tax year they must know (be able to calculate) how much tax they will pay at the end of the tax year.

8. A modification of the position regarding the so-called concept of a tax period would entail that the taxable obligation in fact does arise at the moment when an income is paid, however the tax is calculated with finality only annually, wherefore an individual could not count on the fact that the state will not modify the tax obligation (i.e. increase it or introduce additional taxation) during the tax year; the competent administrative authority will issue an assessment decision only in the first months of the following year and thus the law, although, for instance, it entered into force only in December of the tax year, will apply with finality only after it has entered into force (when the assessment decision is issued); the state of the facts of the tax assessment will be final only when the tax period comes to an end. If in the case at issue the Constitutional Court had changed its position and followed this path, this

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Decision No. U-I-91/98, dated 16 July 1999 (Official Gazette RS, No. 61/99, and OdlUS VIII, 196). See also the criticisms of this Decision, namely E. Kerševan, *Ustavne omejitve davčnega poseganja v lastninsko pravico, Javna uprava*, Nos. 1-2 (2013), pp. 5–18. Prof. Kerševan is opposed to the position that an interference with private property arises only above the 50% tax rate.

would entail that due to respect for the principle of equality (the second paragraph of Article 14 of the Constitution) such position would also have to apply in future cases. This would open the door to the legislature being able to increase tax obligations during a tax year, whereby new or increased obligations would in any event apply to all income in the tax year regardless of when the amendment would enter into force, and the legislature would not have to respect the second paragraph of Article 155 of the Constitution, because this would not be retroactivity at all. The legislature would only have to respect the principle of trust in the law determined by Article 2 of the Constitution – meaning that individuals could only be certain that the state will not deteriorate their position during a tax year arbitrarily, i.e. without a real substantiated reason predominantly in the public interest.<sup>9</sup> I do not find such modification of the position acceptable precisely due to an individual's freedom to act and legal predictability. In addition to the constitutional reasons already mentioned, two additional reasons strengthen my conviction that the hitherto constitutional case law is correct. On one hand, there is the warning of Asst. Prof. Dr Kobal that due to the criticisms in legal theory, the Federal Finance Court of Germany (which is one of the specialised supreme courts) is already leaning towards the full prohibition of retroactivity in the field of periodic taxes. With regard to the above, I can easily imagine the arguments for such a change. On the other hand, although the German Federal Constitutional Court maintains its current position, what is essential is the assessment test that was introduced for instances referred to as the quasi-retroactivity of a tax law. This test is not the same as the test in the established case law of our Court with regard to interferences with the principle of trust in the law determined by Article 2 of the Constitution. [I will address] this issue later (in Section III).

9. I therefore agree that we are dealing with the retroactive effect of statutory provisions. Consequently, firstly the question of whether the first condition is fulfilled is raised: only a law can determine that certain of its provisions have retroactive effect. In Decision No. U-I-181/94, dated 30 March 1995 (Official Gazette RS, No. 21/95, and OdlUS IV, 31), to which the plaintiff in the proceedings for the judicial review of administrative acts also refers, the Constitutional Court abrogated the retroactive effect of an executive regulation of a ministry, by which the obligation to make payments into the budget was introduced, due to two inconsistencies, namely with Articles 147 and 155 of the Constitution. Article 147 of the Constitution prohibits the *ex nunc* introduction of tax burdens by implementing regulations, while Article 155 prohibits their *ex tunc* introduction. By Decision No. U-I-185/10, Up-1409/10, dated 2 February 2012 (Official Gazette RS, No. 23/12, and OdlUS XIX, 33), by which the Constitutional Court abrogated a statutory provision that ordered the retroactive application of an executive regulation, the Constitutional Court specifically emphasised that only a law can determine that statutory provisions have retroactive effect. However, the emphasis that only individual statutory provisions can have retroactive effect, not an

<sup>9</sup> The Constitutional Court adopted such position already in Decision No. U-I-123/92, dated 22 March 1993 (Official Gazette RS, No. 67/93) and in numerous later decisions.

entire law, is not yet present in the hitherto case law. The fact that also this emphasis could be relevant in the case at issue was stressed by Asst. Prof. Dr Kobal at the public hearing. Namely, the challenged provision does not introduce the retroactive effect of “individual” provisions of the Act, but the retroactive effect of the entire Act – the Act which “introduces the obligation of the payment of an additional tax on income received for the management or supervision of business entities determined by this Act” (Article 1 of the AATPMI). In my opinion, this warning must be taken seriously. The case at issue does not only concern a correction of individual legal norms in a system of taxation and their *ex tunc* application,<sup>10</sup> but the introduction of a completely new tax obligation that the legislature introduced by an entirely new law<sup>11</sup>, which is in its entirety also applicable retroactively, as is formulated in the wording of the challenged statutory provision. In fact, second thoughts regarding a [possibly] too narrow interpretation of the Constitution would be possible in this part, especially from the viewpoint [of preventing] that the choice of the legislative technique would in itself influence the adoption of the position whether what is at issue are individual statutory provisions or the entire Act. However, the position that an interpretation which disregards this perspective widens the application of a legal rule which is to be an exception and which explicitly refers to individual provisions of a law is also pertinent (and even more so when what is at issue is a law that introduces a new tax).

10. The Decision does not elaborate upon the first condition, but argues the absence of the public interest, the existence of which is the second condition for the retroactive effect of individual statutory provisions. In this context, it must be underlined that in conformity with the second paragraph of Article 155 of the Constitution, there must exist a public interest for any retroactive effect of statutory provisions, even if they do not interfere with acquired rights. What is at issue is a public interest which can only be attained by the retroactive effect of statutory provisions or as is formulated in the Decision: “[a] public interest, one which substantiates [...] the retroactive effect of the regulation” (Paragraph 26 of the reasoning of the Decision). The Decision introduces a measure of strictness as regards the legislature in the sense that already in the legislative procedure it must be clearly evident what the public interest is due to which the retroactive effect of individual statutory provisions must be introduced. However, such strictness is logical and based on the fact that the second paragraph of Article 155 of the Constitution entails an exception to an important constitutional rule (the principle of the prohibition of retroactivity determined by the first paragraph of this Article), which falls within an elementary

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10 As was stated, for instance, by the European Court of Human Rights in *N. K. M. v. Hungary*, dated 14 May 2013, namely that retroactive taxation can be applicable “essentially to remedy technical deficiencies of the law” (paragraph 51), whereby the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – ECHR) does not contain a provision which would be substantially equal to Article 155 of the Constitution.

11 At the public hearing, Asst. Prof. Dr Kobal economically and legally qualified the tax determined by the AATPMI as double taxation – i.e. as a new tax that creates a burden on income that has already been subject to tax (the personal income tax).

part of [the nature of] a state governed by the rule of law. Such conduct also requires the responsible exercise of the legislative power. Consequently, I concur with the argumentation in Paragraphs 28 and 29 of the reasoning of the Decision.

## II

11. Even if we recognised – by citing what has been presented in the legislative procedure and by which the Government subsequently substantiated the public interest for the existence of the retroactive effect of statutory provisions – a public interest that would retroactively impose a tax on indeed very high income, the third condition determined by the second paragraph of Article 155 of the Constitution would even then not be fulfilled. From Decisions No. U-I-62/95 and No. U-I-81/96 it clearly proceeds that the Constitutional Court deemed the right to dispose of income paid when a tax was not yet in force an acquired right. This is in a way understandable. If a law regulating taxation is clear and precise, an individual can calculate, when [he or she receives] each paid income, what is the amount of his or her tax obligation and what remains in the sphere of his or her freedom of property.<sup>12</sup> We can take a look at this also from an alternative viewpoint. Laws regulating taxation impose obligations. If an obligation is known at the time of receiving the income, what is at issue is the legitimate expectation of the taxable person to know, by consulting the statutory regulation, how much tax he or she must pay, even if the state is to calculate this officially and with finality only after the end of the tax year. Consequently, the taxable person can freely dispose of the remainder of his or her income, because on the basis of the determined tax obligations he or she can legitimately expect that this part of the income will remain his or hers also after the tax assessment, and this is also protected by the right to private property (Article 33 of the Constitution).<sup>13</sup> Therefore, in the case at issue, taxable persons had a legitimate expectation that they could freely dispose of the income paid on the basis of contractual relations<sup>14</sup> insomuch as they exceed the taxable obligation which was in force when they received them.<sup>15</sup> Together with the prohibition of ret-

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- 12 Also Prof. Pirnat deems that the right to dispose of income [remaining] after taxation as in force at the time of acquiring the income entails an integral part of private property determined by Article 33 of the Constitution. See R. Pirnat, *Pravne omejitve ukrepov za izhod iz krize* [Legal Limitations of Austerity Measures], Podjetje in delo, Nos. 6-7 (2010), p. 1285.
  - 13 Or, as was stated by the European Court of Human Rights: “[A] ‘legitimate expectation’ of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1.” Judgment in *N. K. M. v. Hungary*, paragraph 35.
  - 14 Whether they were also entitled to receive this income was neither the subject of the tax procedure nor is the subject of this review of constitutionality.
  - 15 The allegation of the Government that with regard to rights proceeding from contracts one should not even speak of acquired rights, because they are allegedly only at issue when a right is recognised by a decision of an authority of the state, is so obviously erroneous that it is not even necessary to specifically discuss it. After all, by Decision No. U-I-340/96, dated 12 March 1998 (Official Gazette RS, No. 31/98, and OdlUS VII, 48), to which the plaintiff in the proceedings for the judicial review of administrative act brought attention, the Constitutional Court specifically underlined that the second paragraph of Article 155 of the Constitution also protects acquired obligations law rights.

roactivity, also at issue, above all, is the legitimate expectation of individuals that the state will not retroactively impose new obligations on them, because their freedom of property would be substantially limited if until the end of the tax period they did not know whether the state would impose an additional tax burden on them or not. Namely, if a prohibition on the retroactive interference with acquired rights is in force, there must *a fortiori* exist a prohibition on imposing retroactive tax burdens – when what is at issue is actually the fact that in reality the content of this “right” is, from such perspective, “the right not to have obligations”.

12. In Decisions No. U-I-62/95 and U-I-81/96 the Constitutional Court interpreted the second paragraph of Article 155 of the Constitution as a legal rule that does not allow further exceptions. If the conditions determined therein are fulfilled, retroactivity is allowed, if they are not, it is not allowed. As soon as the Constitutional Court established that there was an interference with acquired rights, it deemed such retroactivity to be inadmissible. However, already in Decision No. U-I-340/96 (which was adopted at the same session as Decision No. U-I-81/96!) the Constitutional Court indicated that in conformity with the third paragraph of Article 15 of the Constitution it might also allow a retroactive law that would interfere with acquired rights if this were necessary due to the protection of an even more weighty right or due to the elimination of even more severe interferences with others’ rights. This is what in fact it has done two times thus far: the first time by Decision No. U-I-60/98, dated 16 July 1998 (Official Gazette RS, No. 56/98, and OdlUS VII, 150), when what was at issue was an interference with legitimate expectations<sup>16</sup> regarding the payment of lost profit when confiscated property was returned, and the second time by Decision No. U-I-60/99, dated 4 October 2001 (Official Gazette RS, No. 91/01, and OdlUS X, 168; Paragraph 24 of the reasoning this Decision expressly refers also to Decision No. U-I-340/96), when what was at issue was an interference with the right of authorised investment companies to select state property. Thereby, the Constitutional Court interpreted the third condition “provided that no acquired rights are infringed thereby” as if in fact it stated “provided that no acquired rights are inadmissibly infringed thereby”. The reasoning of such admissibility is in its entirety evident in Decision No. U-I-60/99. The Constitutional Court deemed an interference with acquired rights to be admissible if in addition to the fact that a public interest is demonstrated (which must anyway exist in conformity with the second paragraph of Article 155 of the Constitution – therefore in addition to the fact that a public interest which justifies the retroactive effect of statutory provisions is demonstrated) the interference with acquired rights passes the so-called strict test of proportionality, i.e. that the interference with acquired rights is appropriate and necessary for attaining a public interest

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16 At this point one must agree with Prof. Pirnat that what was at issue was not an interference with acquired rights, but an interference with expected rights; see R. Pirnat, *Instrumentalnost javnega prava in načelo zaupanja v pravo* [The Instrumental Nature of Public Law and the Principle of Trust in the Law], (the example of provisions regarding the pay for annual leave in the Fiscal Balance Act), *Podjetje in delo* Nos. 6-7 (2012), p. 1048. However, also expected rights that are protected by Article 33 of the Constitution must be protected by the second paragraph of Article 155 of the Constitution.

and is also proportionate in comparison with the interest that is being protected. An interference with acquired rights can thus be admissible under the conditions determined for interferences with human rights and fundamental freedoms.

13. In such context, we can first of all raise the question of whether it is possible to assess retroactive interferences with acquired rights and the retroactive imposition of obligations in accordance with the same criteria. Such question particularly arises when the Constitutional Court at the same session in one case interprets the second paragraph of Article 155 of the Constitution strictly regarding an *ex tunc* imposition of obligations and in the other case regarding an *ex tunc* interference with acquired rights, allowing a relaxation of this strictness, however on the basis of the strict test of proportionality when different rights oppose each other. One could also possibly conclude from the above that by Decision No. U-I-81/96 the Constitutional Court established a stricter assessment regarding the interpretation of the second paragraph of Article 155 of the Constitution in the part “no acquired rights are infringed thereby” when additional obligations are imposed *ex tunc*, because what is at issue in this context is not that different rights can collide but the relationship *state – individual*, whereby the state imposes obligations on individuals.
14. Even if we ignore the mentioned question and even if the test referred to in Decision No. U-I-60/99 was relevant to the retroactive imposition of tax obligations, it is clearly evident that the mentioned test in fact includes both tests of the admissibility of interferences with human rights, i.e. the test of legitimacy (the third paragraph of Article 15 of the Constitution; in conformity with the established constitutional case law, also the public interest is a constitutionally admissible aim for the limitation of human rights) and the strict test of proportionality (Article 2 of the Constitution; appropriateness, necessity, and proportionality in the narrower sense). However, the test of legitimacy is the first condition, therefore at this point again first of all the question is raised whether there exists a public interest that justifies the retroactive effect. Just as it was not demonstrated with regard to the second condition determined by the second paragraph of Article 155 of the Constitution, it would neither be demonstrated in the first step of the assessment of the third condition – with regard to the interference with an acquired right – if we followed this path.
15. If, for instance, we deemed the need to protect public funds granted to business entities in the form of sureties or guarantees, or funds for the attenuation of the consequences of the financial and economic crisis on the basis of measures adopted by the National Assembly and the Government (the second paragraph of Article 3 of the AATPMI) to be a demonstrated public interest, we would come to the conclusion that the retroactive interference was not necessary for the protection of the mentioned funds. All the measures that were adopted and that envisaged the involvement of public funds are namely statutorily expressly regulated and contain – to which also the Decision draws attention (Paragraph 13 of the reasoning) – express limitations to ensure that these public funds are used for eligible purposes. The measures were only possible if expressly determined limitations with regard to the income of the members of the management and supervisory bodies in these business entities [were re-

spected] during the time when public funds were being received. Supervision by competent authorities was also envisaged, together with the sanction of either the return of the funds or the nullity of contracts, and minor offence sanctions were envisaged as well. The state thus established aid from public funds in the time of crisis, but at the same time determined the conditions under which this aid was allocated, including the condition of the limitation of payments to management and supervisory bodies. Therefore, in order to protect public funds the state did not need the measure of the retroactive effect of a tax law as well; consequently the measure was not necessary.

16. With regard to the companies of which the state was the majority owner and could as such influence the conduct of the management and supervisory boards by exercising its rights, another reason joins the mentioned one that speaks against the necessity. At the public hearing, Higher Court Judge Counsellor Marjanca Faganel drew attention thereto in the name of the applicant of this review of constitutionality. She warned that in these instances the state had at its disposal absolutely all the measures in conformity with the law regulating companies in order to achieve that its influence be enforced. One can agree with that as well. If a state acts *iure gestionis*, then it must act, as other entities, in conformity with existing regulations in order to enforce its interests. Corporate law gives it sufficient mechanisms to this end. If the state does not exploit these mechanisms as one would expect in the interest of efficient management, then it cannot use (abuse?) its position in power – *iure imperii* – and thereby *ex tunc* repair what it did not do right *iure gestionis*. Such conduct would also create an inequality (without a real reason proceeding from the nature of the matter) between business entities with respect to the question of who their owner is.
17. If we assessed the interference with “acquired rights” from the viewpoint of the strict test of proportionality, then at least also the question of proportionality in the narrower sense would arise. The part of income which remained to individuals after taxation under the personal income tax became subject to the additional tax. With regard to the rate of 49%, calculations indicate that, for instance, the total tax rate of the plaintiff in the proceedings for the judicial review of administrative acts would exceed 80% if the personal income tax is [taken into consideration] as well. By taking into consideration Decision of the Constitutional Court No. U-I-91/98, we would thus as well be faced with a tax burden which substantially exceeds 50% taxation on income, therefore the question of proportionality in the narrower sense and thus of the admissibility of an interference with private property protected by Article 33 of the Constitution would become pertinent.<sup>17</sup>
18. If the Constitutional Court continued its assessment and also addressed the question of how to interpret the concept of the infringement of acquired rights from the second paragraph of Article 155 of the Constitution with regard to Decision No. U-I-81/96, on one hand, and Decisions No. U-I-340/96 and No. U-I-60/99, on the other, then already in this Decision it would first have to adopt a clear position with regard to the question that I highlighted in paragraph 13 of this separate opinion. What is in my opinion especially important for the case at issue is that regardless of which path

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17 See note 8.

the Constitutional Court were to follow, i.e. either the path of Decision No. U-I-81/96 or the path of Decision No. U-I-60/99, it would have arrived at the same conclusion.

### III

19. Why would we come to the same conclusion even if we changed the standpoint from the hitherto constitutional case law and followed the example of German constitutional case law? It is true that despite the criticisms in legal theory, the German Federal Constitutional Court persists in its starting point as regards the so-called tax period, according to which the emergence of tax debt is deemed to be the legally decisive moment, which with regard to periodic taxes arises on the last day of the tax period for which the tax is being assessed and is assessed by an assessment decision issued by the competent authority. The German constitution does not contain a provision such as the provision in Article 155 of the Constitution [of the Republic of Slovenia], therefore the entire assessment proceeds from the viewpoint of an interference with the principle of trust in the law, namely both “true retroactivity” and “quasi-retroactivity”, whereby the first one is absolutely prohibited and the second one can be admissible. Different provisions of constitutions can of course already entail the first essential reason due to which different positions of different constitutional courts can (and must) emerge. However, what in this context is even more essential in my opinion is the fact that also the German Federal Constitutional Court is very much aware that in instances of tax obligations it is dealing with special situations in which mere supervision over the arbitrariness of the legislature’s behaviour as regards changing tax obligations during a tax period does not suffice. For such reason, it stresses that the retroactive effect of tax regulations is only compatible with the principle of trust in the law if the interference is substantiated by a special public interest, one which substantiates precisely the retroactive effect of a regulation, and if the principle of proportionality thereby remains protected – therefore if an interference is appropriate and necessary for the attainment of the statutory aim and if with regard to the overall assessment of the weight of the affected trust and the weight and necessity of the reasons for retroactive effect the limit of attributability remains protected (BVerfG, BvL 6/07, dated 10 October 2012). The German Federal Constitutional Court thus assesses the admissibility of quasi-retroactivity by a test, which is the same as our test of the admissibility of interferences with human rights, therefore by the test of legitimacy (a public interest which justifies precisely the retroactive effect of statutory provisions) and the strict test of proportionality – it is an interference that is appropriate, necessary, and proportionate in the narrower sense.
20. Therefore, even if the Constitutional Court did have constitutionally admissible reasons for modifying the position and assessed the constitutionality of the challenged statutory provision in accordance with the mentioned criteria, the assessment would bring us, due to the reasons I have presented (in Section II), to the same result, i.e. to the establishment of unconstitutionality, whereby the Constitutional Court could have equally halted [its assessment] already at the first step of the assessment – because a public interest which specifically justifies retroactive effect is not demonstrated.

21. Due to the presented reasons, by following any possible parameters from the constitutional case law, I myself come to the same decision in the case at issue. All this further strengthens my conviction that the [decision from the] operative provisions of the Decision, which I have supported with my vote, is correct. The decision brings long-term respect for individuals' freedom (and the freedom of property as well) by simultaneously fulfilling the obligations towards the state, which is called upon to ensure the common welfare, but in such a manner that also thereby respects the law.

*Dr Jadranka Sovdat*

*Mag. Miroslav Mozetič*

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**DISSENTING OPINION OF JUDGE DR ETELKA KORPIČ – HORVAT**

1. I voted against the abrogation of Article 12 of the of the Act on the Additional Taxation of a Part of Managers' Income in the Period of Financial and Economic Crisis (Official Gazette RS, No. 78/09 – hereinafter referred to as the AATPMI), because I do not concur with the assessment that the public interest for the existence of the retroactive effect of Article 12 of the AATPMI is not demonstrated.
2. In Paragraph 28 of the reasoning the Constitutional Court states that in the legislative file (Gazette of the National Assembly, No. 60/09, EPA 317-V, dated 8 May 2009) one cannot find a special substantiation of the public interest for the existence of the retroactive effect of the Act. With regard to [the question of] whether the public interest was demonstrated in the legislative file, it indeed follows from the Decision that the allegation in the legislative file “that unsuccessful managers would be left without unjustified bonuses” could be deemed as the substantiation of the retroactive effect of the Act<sup>1</sup>, but in this respect the Decision concludes that this allegation does not demonstrate public interest in the sense of the second paragraph of Article 155 of the Constitution. I am of the opinion that the Constitutional Court here failed to substantiate its assessment. It is true that the excerpt from the sentence contains too many value-based judgments as to what successful and unsuccessful managers are, which is something that does not belong within the legislature's assessment, and that this can be the reason for not taking [the passage] into consideration, however I think that the Constitutional Court should have taken into

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1 The whole sentence from the legislative file to which the Constitutional Court refers and which refers to the reasons for the adoption of the Act reads as follows: “[...] It is precisely the unethical conduct of certain managers or ethical relativism in relation to the principle of the supremacy of the market over ethics that encouraged us to prepare a new regulation that would contribute to achieving a system that would enable unsuccessful managers to be left without unjustified bonuses or the prevention of excessive compensation of managers in times of the financial and economic crisis.” See Gazette of the National Assembly, No. 60/09, EPA 317-V, p. 3.

consideration the legislative file in its entirety and connect it with the reasons and aims regarding the adoption of the AATPMI stated therein.

3. In Paragraph 31 of the reasoning the Constitutional Court states that the available budget resources were reduced due to the fact that state funds were granted to business entities, however this fact cannot fulfil the requirement of there being a public interest in order for the challenged statutory provision, which is addressed to individuals, to have a retroactive effect, and that the introduction of a retroactive tax obligation cannot substitute for the statutory regulation of the system of rewarding the members of management and supervisory bodies. I am of the opinion that the aim of the AATPMI was not to regulate the system of payments of the mentioned bodies, but to protect public funds by higher taxation, namely by higher taxation of that income that was very (excessively) high<sup>2</sup> in order for the funds to be returned into the budget in such a manner. In my opinion, this fulfils the requirement of there being a public interest.
4. Furthermore, the reasons stated by the Government with regard to the public interest were rejected by the Constitutional Court with considerable ease. The Constitutional Court established that the Government failed to sufficiently demonstrate the existence of a public interest for the *ex tunc* [effect of the Act] (Paragraphs 33 through 36 of the reasoning). This also applies to the allegation of the Government stated at the public hearing that one of the aims of the AATPMI was to prevent avoidance from paying this tax, which is something that even the Court of Justice of the European Union admits (the Judgment in *Stichting "Goed Wonen" v. Staatssecretaris van Financiën*, C-376/02, 26 April 2005) with regard to the retroactive effect of a law.
5. From the legislative file<sup>3</sup> – if we correctly understand it as a whole and if we do not dissect individual, more or less awkwardly formulated sentences – it clearly proceeds that the Act at issue falls within a package of anti-crisis measures in the field of the salaries of members of the management of business entities that are in majority ownership of the state (hereinafter referred to as state companies) and which on the basis of measures for the attenuation of the consequences of the financial and economic crisis received sureties, guarantees, or funds from the state (hereinafter referred to as state aid). From the [legislative] file it clearly proceeds that it is extremely difficult for the Government to maintain control over the income of members of management, *inter alia* also because their salaries are determined on the basis of contracts and because the data regarding their income are not public. Consequently, people are justifiably asking themselves how it could happen that some managers have high income although their companies are not doing well, they have to dismiss workers, apply for state aid, etc. It further proceeds from the legislative file that the aim of the Act is to prevent excessive compensation of managers in times of financial and economic crisis and that the Act thereby

2 See Article 5 of the AATPMI.

3 See Gazette of the National Assembly, No. 60/09, EPA 317-V.

pursues the aim of solidarity in conformity with which also the managers should contribute their share to resolving the financial and economic crisis by paying higher taxes, not only workers by decreasing salaries. All of the above and more is clearly stated in the legislative file.

6. With regard to the above, in my opinion the legislature's intention when adopting the AATPMI was clear and commonly known as well. The AATPMI was adopted due to the redirection of public funds into private funds through high payments to the members of managements and supervisory bodies of only those state companies that had received state aid. The taxpayers expected such measure, for such reason it also entailed a fair distribution of the burden that taxpayers carry [in order to enable] the recovery of state banks and state companies.<sup>4</sup> It must be taken into consideration that the legislature has wide discretion when adopting tax regulations, including such with retroactive effect, and that this is a very delicate field. On one hand, taxes represent the most important source of income for the budget of the state, while on the other hand tax obligations interfere with the property sphere of taxable persons. Therefore, the field of the legislature's discretion when adopting laws is not unlimited. It is undisputable, as the Constitutional Court states, that only "a special public interest, one which substantiates precisely the retroactive effect of the regulation without which the pursued aim of the particular regulation could not be achieved" can justify retroactive effect (Paragraph 26 of the reasoning). In the case at issue, a major part of the financial aid was paid to state companies in 2009 before the AATPMI entered into force. If income from the entire tax year had not been subject to taxation, the legislature would not have been able to attain, in an equally effective manner, the fundamental aim of the AATPMI, i.e. to return a certain part of public funds into the budget by an additional taxation on the payment of a high level of personal income to the members of management.
7. In conformity with the second paragraph of Article 155 of the Constitution, the Constitutional Court cannot allow a law to have retroactive effect:
  - if it is not demonstrated that the retroactive application of a law is required in the public interest;
  - if the retroactivity of the law interferes with acquired rights.
8. As stated above, with regard to the first condition, I am of the opinion that the Constitutional Court established with unacceptable ease that the public interest for the existence of the retroactive application of the AATPMI was not demonstrated. If it had established that it was, it would have to assess whether the retroactive effect of the AATPMI interferes with the acquired rights of the affected taxable persons.
9. In its hitherto case law, the Constitutional Court distinguished the retroactivity of a

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4 With regard to the fact that the aim "to protect the social sense of justice and to distribute the public burden" is legitimate, see also the Judgment of the European Court of Human Rights in *N. K. M. v. Hungary*, dated 14 May 2013.

law as true<sup>5</sup> or quasi-retroactivity.<sup>6,7</sup> True retroactivity interferes with acquired rights. Quasi-retroactivity only interferes with expected rights. Quasi-retroactive effect can thus only be disputable due to the protection of the principle of trust in the law in conformity with Article 2 of the Constitution and not in conformity with Article 155 of the Constitution.

10. In theory, it is not disputable when what is at issue is true retroactivity and when quasi-retroactivity, as well as when what is at issue is acquired rights and when expected rights. Acquired rights are at issue when rights are individualised (they concern a determined person) and concretised (they determine the scope of rights). They are determined by an individual act (i.e. a decision, a contract).<sup>8</sup>
11. The case at issue concerns the payment of personal income tax.<sup>9</sup> The state of the facts to which the AATPMI applies is the tax on the income from employment which taxable persons receive in the entire tax year, which is the same as a calendar year and ends on 31 December of the current year. The prepayment of tax does

- 5 In conformity with the doctrine of the Constitutional Court, true retroactive effect is at issue when a time before the entry into force of a regulation is determined as the moment of the beginning of its application and when a time after its entry into force is determined as the moment of the beginning of its application, but some of its provisions have such an effect that they retroactively interfere with legal situations or legal facts that were final before its entry into force. See, for instance, Decision No. U-I-98/07, dated 12 June 2008, Paragraph 23 of the reasoning (true retroactivity).
- 6 The position of the Constitutional Court is that quasi-retroactive effect is at issue when a regulation has effects for a concrete state of the facts that indeed arose before a law is published, but when the law entered into force the state of the facts was not yet entirely final. In such instances, an individual provision of the Act only has quasi-retroactive effect, which can be disputable due to the protection of the principle of trust in the law determined by Article 2 of the Constitution and not by Article 155 of the Constitution. See, for instance, Decision No. U-I-141/01, dated 20 May 2004 (quasi-retroactivity).
- 7 When defining true and quasi-retroactivity, the Constitutional Court modelled its standpoint on the doctrine developed by the German Federal Constitutional Court (Decision dated 31 May 1960, collection of decisions of the German Federal Constitutional Court BVerfGE 11, 139 [146], Decision dated 19 July 1967, BVerfGE 22, 241 [248], Decision dated 20 June 1976, BVerfGE 48, 403 [415]).
- 8 M. Pavčnik, *Teorija prava* [Theory of Law], 3<sup>rd</sup> extended and revised edition, GV Založba, Ljubljana 2007, p. 260. Also other authors differentiate between acquired rights and legitimate legal expectations: see R. Pirnat, *Instrumentalnost javnega prava in načelo zaupanja v pravo* [The Instrumental Nature of Public Law and the Principle of Trust in the Law], Podjetje in delo, Nos. 6–7 (2012), pp. 1044–1054, and R. Pirnat, *Pravne omejitve ukrepov za izhod iz krize* [Legal Limitations of Austerity Measures], Podjetje in delo, Nos. 6–7 (2010), pp. 1282–1288; K. Töpke, *Die Steuerrechtsordnung*, Verlag Dr Otto Schmidt, Cologne 1993, pp. 177–201; P. Craig, *EU Administrative Law*, Oxford University Press, Oxford 2006, pp. 607–621; M. Krivic, *Še drugič o načelu zaupanja v pravo* [A Second Time on the Principle of Trust in the Law], Pravna praksa, No. 33 (2000), pp. 12–13; J. Šinkovec, *Načelo varstva zaupanja v pravo* [Principle of Trust in the Law], Podjetje in delo, No. 1 (1993), pp. 3–14.
- 9 All income from employment which natural persons acquired or achieved in a tax year, which is the same as a calendar year, is subject to personal income tax (the first paragraph of Article 15 of the Personal Income Tax Act, Official Gazette RS, No. 13/11 – official consolidated text, 24/12, 30/12, 75/12, 94/12, and 96/13 – hereinafter referred to as the PInTA-2). In this regard, it is deemed that income is acquired or achieved in the tax year in which it is received, and it is received when it is paid to a natural person or in any other manner made available for his or her disposal (the fifth paragraph of Article 15 of the PInTA-2).

not entail a tax assessment (compare the second paragraph of Article 125 of the PInTA-2). Only on the basis of a final decision of the tax authority on the assessment of personal income tax for the entire tax year does the personal income tax become a final tax. The obligation [to pay] the personal income tax therefore arises since the first prepayment is received in a tax year and finishes when the tax year ends, when the entire income from the employment of taxable persons is known.<sup>10</sup> The person liable for payment of the personal income tax must fulfil the tax obligation only after the tax year ends, on the basis of a final decision of a tax authority on the assessment of the personal income tax (the first paragraph of Article 123 of the PInTA-2).<sup>11</sup> The right of taxable persons to freely dispose of the non-taxed part of their income is concretised in an acquired right only by a final administrative decision, in the case at issue thus only at the end of the 2009 tax year. Therefore, the challenged Article 12 of the AATPMI does not interfere with acquired rights, but only with expected rights; it only has quasi-retroactive effect. It would have true retroactive effect if it was applicable for the tax year 2008, because then it would interfere in a modifying manner with legal situations already final (i.e. with already received final decisions on the assessment of the personal income tax for 2008) and thus with acquired rights.<sup>12</sup> Acquired rights are thus not violated if with regard to a periodic tax the tax obligation changes during the year. In the case at issue, this entails that both conditions for the exceptional admissibility of the retroactive application of the Act are fulfilled. Such retroactivity is required in the public interest and it does not interfere with acquired rights. In fact, this in itself does not entail that the AATPMI is in conformity with the Constitution, but I am of the opinion that such legal situations should be assessed in relation to Article 2 and not to Article 155 of the Constitution.

12. In Paragraph 23 of the reasoning the Constitutional Court states that in Decision No. U-I-62/95 (and in Decision No. U-I-81/96 as well) it has already addressed the issue of the retroactive effect of a tax norm that refers to a periodic tax, but I am of the opinion that cases No. U-I-62/95 and No. U-I-81/96 are not comparable with the case at issue. In case No. U-I-62/95 the Constitutional Court expressly established that the new personal income tax burden interferes with the existing acquired right to dispose of income. As stated above, in the case at issue the Constitutional Court did not even address the assessment of whether the AATPMI interferes with acquired rights. In fact, in note 8 the Constitutional Court concludes that in the

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10 See the third paragraph of Article 44 of the Tax Procedure Act (Official Gazette RS, No. 13/11 – official consolidated text, 32/12, and 94/12 – TPA-2) [which was] in force at the disputed period of time.

11 Prepayments of tax already paid during a tax year are subtracted from a taxable person's personal income tax as a final tax (the third paragraph of Article 125 of the PInTA-2).

12 A similar position was also adopted by the German Federal Constitutional Court: compare Decisions of the second senate 2 BvL 14/02, 2 BvL 2/04, 2 BvL 13/05, and 2 BvR 748/05, 2 BvR 753/05, 2 BvR 1738/05, both dated 7 July 2010, and Decision of the first senate No. 1 BvL 6/07, dated 10. October 2012, accessible at <http://www.bundesverfassungsgericht.de>. As stated also by the Constitutional Court of Belgium: *cf.* Decision No. 109/2004, dated 23 June 2004, accessible at <http://www.const-court.be>.

mentioned cases, i.e. No. U-I-62/95 and No. U-I-81/96, it accepted the so-called concept of the taxable event and not the concept of the so-called tax period, although the Constitutional Court did not state this in any of the mentioned Decisions. It would also be difficult to come to such a conclusion on the basis of definitions of true and quasi-retroactivity that the Constitutional Court developed in its constitutional case law, because the cases are in fact different. In conformity with the Personal Income Tax Act (Official Gazette RS, No. 71/93 – hereinafter referred to as the PInTA), severance pay upon retirement was not included in the personal income tax base. Consequently, a zero final tax then applied to this severance pay, from which it follows that on the day of retirement the person acquired the right to dispose of the entire amount of the severance pay. In February 1995 (more precisely on 5 February 1995) the Act Amending the Personal Income Tax Act (Official Gazette RS, No. 7/95 – hereinafter referred to as the PInTA-A) was published, which was applicable from 1 January 1995 onwards. One of the changes that it introduced referred to severance pay upon retirement: in accordance with the new regulation, it had to be included in the personal income tax base. Due to the fact that before the entry into force of the PInTA-A a zero final tax was applicable to the severance pay, the retroactive application of the PInTA-A had true retroactive effect. The Constitutional Court adopted the same position also in Decision No. U-I-81/96, by which it assessed the provisions of the Act Amending the Corporate Profit Tax Act (Official Gazette RS, No. 20/95 - hereinafter referred to as the CPTA-A), which made general reserves of banks and savings banks that exceeded by more than 20% the prescribed capital suitability subject to taxation, which beforehand had also not been subject to taxation. In that case, the Act entered into force on 8 April 1995 and was applicable from 1 January 1995 onwards. In both cases what was at issue was the introduction of a new tax, i.e. an interference with states of the facts that had already been final as non-taxed.<sup>13</sup> Consequently, in both cases the new taxation interfered with the right to freely dispose of the non-taxed part of the income. This is precisely the point in which both mentioned cases significantly differ from the case at issue.

13. Since in my opinion the case at issue does not concern an acquired right, but an expected right, Article 12 of the AATPMI cannot be abrogated by referring to Article 155 of the Constitution, but possibly only due to the interference with the principle of trust in the law protected by Article 2 of the Constitution. Therefore, in the case at issue, what is of fundamental importance is not the constitutional question of whether there exists a public interest, but weighing what has to be given priority – the public interest or the trust in the law of the affected taxable persons.

<sup>13</sup> In this regard, attention should be drawn to the fact that the PInTA, which was relevant for the decision-making of the Constitutional Court in case No. U-I-62/95, treated the prepayment of tax during a year as the payment of a special tax which it deemed to be a subtype of the personal income tax (see the first paragraph of Article 3 of the PInTA). Only the Personal Income Tax Act (Official Gazette RS, No. 54/04 – hereinafter referred to as the PInTA-1) introduced the prepayment of tax such as those determined by the PInTA-2 (cf. Personal Income Tax Draft Act – PInTA-2, Gazette of the National Assembly, No. 2/04, EPA 1088-III, p. 19).

14. The Constitutional Court should have therefore weighed between two constitutionally protected assets, i.e. between the public interest and the trust of the affected taxpayers in legal certainty and a state governed by the rule of law. It should have taken into consideration all the circumstances of the case and carry out a constitutional assessment with regard to the importance of the public interest, on one hand, and the trust of the affected individuals in a state governed by the rule of law, on the other. It should have answered the question of whether due to a real substantiated public interest it is urgently necessary that the regulation determined by Article 12 of the AATPMI also applies to income that taxable persons received before the entry into force of the AATPMI, however during the same tax year, i.e. in the period from 1 January 2009 until 5 October 2009.<sup>14</sup> In such framework, it should have taken a position with regard to the questions of whether the disputed changes had been relatively predictable, whether the affected individuals could have counted on the change in advance, what the weight of the change and the importance of the existing legal situation for the addressees of the AATPMI was, and what the weight and the importance of the public interest was, including the consideration of whether an interference with trust in the law satisfies the principle of justice.<sup>15</sup> Briefly, the Constitutional Court should have explained whether the effects of the AATPMI interfere so severely with expected rights and thereby with trust in the law that the interference is not *proportional* to the public interest. The Constitutional Court did not carry out such weighing.
15. When weighing whether in this very specific case the public interest or trust in the law should be given priority, the Constitutional Court should not have overlooked the warning *Summum ius, summa iniuria* (*Supreme justice, supreme injustice*; Cicero).
16. With regard to the above, I am of the opinion that the AATPMI interfered with the expectations of the affected taxable persons that their personal income tax obligations in 2009 would not increase. The Constitutional Court should have therefore assessed whether by the additional taxation of members of management and supervisory bodies from 1 January 2009 until 5 October 2009, [as] determined by the AATPMI, the legislature disproportionately interfered with the principle of trust in the law. Since the Constitutional Court did not conduct such assessment, I could not vote in favour of this Decision.

*Dr Etelka Korpič – Horvat*

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14 Cf. Decision No. U-I-79/12, dated 7 February 2013, Paragraph 12 of the reasoning.

15 See Decisions of the Constitutional Court No. U-I-11/07, dated 13 December 2007 (Official Gazette RS, No. 122/07, and OdlUS, XVI 86), Paragraph 13 of the reasoning, No. U-I-66/08, Paragraph 58 of the reasoning, and No. U-I-79/12, Paragraph 12 of the reasoning.

1. By the mentioned Decision the Constitutional Court abrogated Article 12 of the Act on the Additional Taxation of a Part of Managers' Income in the Period of Financial and Economic Crisis (Official Gazette RS, No. 78/09 – hereinafter referred to as the AATPMI), because it established that in the case at issue already the first condition prescribed by the second paragraph of Article 155 of the Constitution for the exceptional admissibility of the retroactive effect of an individual statutory provision was not fulfilled. Consequently, without considering whether the second, cumulatively determined condition determined by the second paragraph of Article 155 of the Constitution is fulfilled, it established that the challenged statutory provision is inconsistent with the first paragraph of Article 155 of the Constitution. The abrogation of this provision entails that the regulation determined by the AATPMI does not apply to income that taxable persons received before the entry into force of this Act, i.e. between 1 January 2009 and 5 October 2009.

Therefore, the majoritarian position of the judges is that the legislature failed to demonstrate even the first condition for the admissibility of the retroactive effect of a regulation, i.e. the public interest.

2. I voted against such decision, because I do not concur with the position that the challenged Act should be assessed by means of the second paragraph of Article 155 of the Constitution and especially not with the conclusion that in the case at issue the legislature failed to demonstrate the public interest. In my opinion, the question raised in the case at issue is not whether Article 12 of the AATPMI is in conformity with Article 155 of the Constitution, because the Act does not extend to the past tax year, but whether the principle of trust in the law, which is one of the principles of a state governed by the rule of law determined by Article 2 of the Constitution, is violated. It is precisely this principle that guarantees to an individual that the state will not worsen his or her legal situation arbitrarily, i.e. without a reason based on the predominant public interest. Below in this dissenting opinion, I will present the arguments for not concurring with the majority. The basic thought that led me to a different decision – whether what is at issue is assessment under Article 155 or under Article 2 of the Constitution – is the existence of the public interest, because I am of the opinion that the aim of the legislature was to prevent, in an efficient manner by adopting the Act, the excessive compensation of managers in those business entities that received state aid, which is something that is in the interest of all taxpayers. In my opinion, the public interest is clearly expressed and is as such an appropriate constitutional basis for such act.
3. The challenged Act was adopted in October 2009 and entered into force on 6 October 2009, i.e. the next day after it was published in the Official Gazette of the Republic of Slovenia. On the basis of the challenged Article 12 of the AATPMI, this Act also applied to income received from 1 January 2009 onwards. Thus, income that taxable persons received before the entry into force of this Act, i.e. between 1 January 2009 and 5 October 2009, is included in the taxable base for tax assessment in conformity with this Act (the

so-called managers' tax). What is at issue is an increase in the tax on income that has been received from managing a business and supervision carried out by management bodies **who benefitted from a surety, guarantee, or financial aid from the state to mitigate the consequences of the financial and economic crisis on the basis of measures adopted by either the National Assembly or the Government.** These are salaries, other benefits stemming from employment, or any other compensation for managing these business entities, performance bonuses, severance pay, income received on the basis of profit sharing, and other privileges received by managers of companies that received state aid in a tax year, which is the same as a calendar year.

4. The central and decisive question that had to be answered by the Constitutional Court in the case at issue was whether Article 12 of the challenged Act is in conformity with the constitutional rules regarding the temporal validity of regulations.

This concerns the question of whether by such statutory provision the legislature retroactively interfered with the acquired rights of the affected taxable persons, wherefore the latter is inconsistent with Article 155 of the Constitution. Also the assessment of the allegation regarding the unlawfulness of the disputed legal norm and consequently the resolution itself of this concrete constitutional dispute depend on the answer to this question. Since I proceed from the position that in the case at issue the state of the facts to which the Act referred to has not yet become entirely final, whereby also acquired rights have not yet arisen, what is at issue is not the true retroactivity of the Act determined by Article 155 of the Constitution, but it may only be a question of the protection of expected rights, which are protected through the constitutional principle of trust in the law determined by Article 2 of the Constitution. Indeed, in my assessment the challenged Act is not unconstitutional regardless of the path I choose to carry out the assessment, be it by means of Article 155 or Article 2 [of the Constitution].

5. In conformity with the first paragraph of Article 155 of the Constitution, which determines that laws and other regulations and general acts cannot have retroactive effect, there is a prohibition of the retroactive effect of legal acts. An exception to this rule is determined in the second paragraph of the cited provision of the Constitution. The retroactive effect of an individual statutory provision is namely admissible if this is required in the public interest and provided that no acquired rights are infringed thereby. If the Constitutional Court assesses that the condition of there being a public interest is not fulfilled, it establishes that the retroactive effect of the regulation is inadmissible without assessing the acquired rights. If, however, it establishes that a certain measure has been adopted in order to protect the public interest, then it must also assess whether by such measure it interfered with [any] acquired right. Therefore, the Constitution protects rights acquired on the basis of a law in such manner that there can be no interferences therewith with *ex tunc* effect. In conformity with the doctrine of the Constitutional Court, acquired rights enjoy the same protection as human rights and fundamental freedoms (Decision No. U-I-137/93, dated 2 June 1994). Consequently, an interference with an acquired right is assessed on the basis of the third paragraph of Article 15 of the Constitution by a test of proportionality, i.e. from the viewpoint of the necessity, appropriateness, and proportionality of the interference.

6. In my opinion, in the event of an assessment in conformity with Article 155 of the Constitution, the challenged regulation is not inconsistent with the Constitution, since both conditions for the exceptionally allowed retroactive effect are fulfilled, i.e. the public interest is demonstrated, and I am also of the opinion that [the measure] does not entail an interference with acquired rights. Already in Decision No. U-I-81/96, dated 12 March 1998 (Official Gazette RS, No. 227/98), the Constitutional Court stated that tax regulations must not have retroactive effect, except under the conditions determined by the second paragraph of Article 155 of the Constitution. Such position entails that in the field of taxation retroactivity is not absolutely prohibited. The Constitutional Court must thus in every individual case assess whether what is at issue is a regulation in public interest, as well as whether the regulation entails an interference with acquired rights. With regard to the challenged Act, both conditions determined by the second paragraph of Article 155 of the Constitution are fulfilled, therefore there is no violation of the principle of the prohibition of retroactivity.
7. The challenged regulation was adopted due to the protection of the public interest; what is at issue is a law adopted in the special circumstances of the financial and economic crisis. The liquidity crisis, which followed the financial crisis, also severely affected the real economy. Therefore, in 2009 the state adopted, in an urgent procedure, several measures to revitalise it. By introducing state guarantees granted to banks to support borrowing by business entities, the state attempted to increase the credit activity of banks and thus enable the economy to acquire liquid funds more easily (the Republic of Slovenia Guarantee Scheme Act, Official Gazette RS, Nos. 33/09 and 52/09 – hereinafter referred to as the RSGSA). With the intention of preventing the dismissal of workers, the state introduced new measures in the field of the active employment policy, such as subsidies to ensure full-time work hours by the Partial Subsidising of Full-time Work Act (Official Gazette RS, No. 5/09 – hereinafter referred to as the PS-FWA) and the institute of the temporary layoff by the Partial Reimbursement of Payment Compensation Act (Official Gazette RS, No. 42/09 – hereinafter referred to as the PRPCA). It also adopted measures for co-financing development investment projects already started, co-financing the outplacement of workers, and co-financing the self-employment of employees. All funds for the implementation of these measures were provided for in the budget of the Republic of Slovenia. As a result of this recovery of financial institutions and companies by means of state funds, i.e. on the shoulders of taxpayers, the problem of banks' losses and losses in the economy became a problem for the entire society. Even though the state allocated a part of taxpayers' funds to recovering business entities that had sustained losses, even in years when state aid was received, members of management and supervisory bodies were paid bonuses and other income that evidently were not proportionate to the financial situations in these business entities. Despite very weak financial situations in the business entities that they managed or supervised, these management or supervisory personnel were paid very high income from employment in these subjects, which was something that was evidently not appropriately proportional to the financial situations in these companies. The fact is that we do not have an efficient system of corporate management

of companies in the state, despite relatively precise regulation in the Companies Act (Official Gazette RS, No. 65/09 – official consolidated text, 33/11, 91/11, 32/12, 57/12, and 82/13 – hereinafter referred to as the CA-1). One should not overlook the fact that Article 270 of the CA-1, which was in force at the time of the implementation of the anti-crisis measures, already determined that when determining the totality of the income of an individual member of management, supervisory boards must ensure that this income is appropriately proportional to the tasks of the members of the management and to the financial situation in the company, and that in the event that, after the income is determined, the business operations of the company deteriorate and could jeopardise its economic state or cause damage to the company, supervisory boards can also decrease such income. Precisely due to the inappropriate payment policy and the inefficiency of supervision over such, this statutory provision was amended on 20 June 2009 by the Act Amending the Companies Act (Official Gazette RS, No. 42/09 – hereinafter referred to as the CA-1C), whereby companies were required to harmonise these changes with statutes by 1 September 2010. The legislature introduced important novelties with regard to the policy regarding the income of members of management and supervisory bodies and transferred certain competences there regarding to the general meetings of companies. However, not even this ensured the payment of bonuses that would be proportional to the financial situations of the respective business entities. Also ineffective was the prohibition determined in the PSFWA and PRPCA that prohibited business subjects from calculating and paying bonuses to management and supervisory bodies in the business year in which they received a state aid.

8. Since the income of members of management for which the challenged Act determined a higher tax had been determined in employment contracts, in the opinion of such members of management it was paid completely lawfully. Managers of business entities that received state aid were most often in an employment relationship, because they had concluded an employment contract. The contractual nature of an employment relationship is reflected both in the conclusion as well as in the amendment or conclusion of a new employment contract due to changed circumstances. In conformity with Article 49 of the Employment Relationship Act (Official Gazette RS, No. 21/13 and 78/13 – corr. – hereinafter referred to as the ERA-1), a modification of any of the components of an employment contract – which also applies to payment for work – can only be achieved on the proposal of an employee or an employer by an annex to the employment contract. The employment contract is changed and the payment for work is thereby decreased if the opposing party agrees thereto, otherwise the previous employment contract remains in force. Since the refusal to sign an annex to an employment contract is not penalised by labour law legislation, an employer has no possibility to decrease the payment for work. It is also not possible to allege that the bonuses were paid to members of management on the basis of valid obligations law transactions, since with regard to employed managers what is at issue is not a civil law relationship, therefore the unlawfulness of a payment cannot be assessed on the basis of the obligations act and civil law. An employment contract with a manager is a labour law contract, by which the executive director in a public limited company

or the company manager of a limited company regulates his or her relationship with the company that he or she manages as an employment relationship with all the elements of such relationship determined by Article 4 of the ERA-1. Bonuses were paid in such amounts as had been determined in the respective employment contracts.

9. In addition to all the mentioned inefficient measures (in practice, it became evident that by the mentioned measures the state could not successfully prevent payments in companies in state ownership that received state aid) the state had to [attempt to] seize the excessive part of the income of the members of management and supervisory bodies by the challenged Act. There was no other way to efficiently protect the financial resources granted in the form of state aid from inappropriate use. Since what was at issue with regard to state aid were budgetary resources, so that through the payment of general taxes all taxpayers contributed to the preservation of the business opportunities of these business entities, there was a public interest that demanded urgent action by the state in a manner that would efficiently interfere with the conduct of individual business entities that on one hand were receiving state aid and on the other were paying disproportionately high bonuses or other income to members of their management and supervisory boards. It is fair that in crisis circumstances one tries to redistribute [a part of] the burden also to the managers who are responsible for the weak financial situation of the business entities that they manage, and not only to [leave the burden to] workers and taxpayers. Therefore, there exists a public interest.
10. In my opinion, also the second condition for the retroactive effect of a regulation is fulfilled because the Act did not interfere with acquired rights. Since [at the moment] when a taxable person receives, during a tax year, a particular income from employment, he or she does not yet acquire the right to dispose of its non-taxed part, in my opinion what is at issue is not an acquired right. When an individual receives a salary or any other income from which the personal income tax is paid, he or she can, in accordance with the tax regulation in force, until the end of the tax year only estimate the expected income and determine what part of the income he or she will have to allocate for the payment of personal income tax after the end of the calendar year, i.e. what part of the income he or she can dispose of. Until the tax year – which is the same as the calendar year – ends, what is at issue in this case is not yet an amount of tax debt determined with finality and thus also not an amount of the available, i.e. non-taxable part of the income. Consequently, with regard to periodic taxes, which is what the personal income tax is, it is not possible to speak of an acquired right until the tax year ends. Such entails that during a tax year it is not possible to attribute true retroactive effect to a newly introduced statutory regulation that introduces higher or additional tax rates for income from employment already taxed beforehand by means of prepayments. For such reason, I am of the opinion that the case at issue, in which the effect of a change in a legal norm refers to the current taxable period – which applies to the personal income tax as a periodic tax – concerns quasi-retroactivity, because with regard to such tax the taxable obligation arises only when the tax year ends. What is essential for quasi-retroactivity is that it is not arbitrary, i.e. a change can be substantiated by factual reasons that stem from social activity.

11. The challenged provision of the AATPMI would therefore have true retroactive effect if its effects extended over the current tax period, i.e. if the change referred to the period before that [tax year] (for instance to 2008) or if the Act was adopted in 2010 and would interfere with income from employment paid in 2009. However, if the Act interfered with legal situations already final and thus with the acquired right to the free disposal of income that has already been subject to taxation on the basis of an assessment decision of a tax authority, that would be true retroactivity, which in conformity with the Constitution is only admissible under the condition of public interest and if what is at issue is not an interference with acquired rights. This is not, however, the case in the case at issue, because Article 12 of the challenged Act only entails that the Act connects the future legal consequences of the new tax law regulation to certain facts which arose in the past, while the concrete state of the facts – an integral part of which are those facts – was not yet final when the Act entered into force. Consequently, in my judgment, the challenged legal norm (only) has quasi-retroactive effect.
12. The German Federal Constitutional Court also differentiates between true retroactivity (*echte Rückwirkung, Rückbewirkung von Rechtsfolgen*) and quasi-retroactivity (*unechte Rückwirkung, tatbestandliche Rückanknüpfung*). According to the German constitutional case law, a law has true retroactive effect if it applies to events that have become final before it was published in an official gazette – they are, as a general rule, prohibited. On the contrary, quasi-retroactivity is at issue if the new law applies to economic activities that had been initiated in the past but were not yet completed when the law entered into force; such effects of the law are, as a general rule, admissible (Decision dated 31 May 1960, BVerfGE 11, 139 [146], Decision dated 19 July 1967, BVerfGE 22, 241 [248], Decision dated 20 June 1976, BVerfGE 48, 403 [415]).
13. It is precisely in the field of taxation where the German Federal Constitutional Court differentiates between true retroactivity and quasi-retroactivity by means of the principle of a tax period. In the opinion of the German Federal Constitutional Court, with regard to taxes regarding which a tax obligation arises only at the end of the year, a tax case is not final until the end of that year. Therefore, if a new law (for instance, a personal income tax law) is promulgated before 31 December but is applicable already from 1 January of the same year, in the opinion of the German constitutional case law, such regulation only has quasi-retroactive effect. Only if the new law is supposed to apply also to previous years is it deemed to be retroactive in this part (Decision BVerfG No. 2 BvL 2/83, dated 14 May 1986, BVerfGE 72, 200). Also the position adopted in Decision No. 2 BvL 6/59, dated 19 December 1961 (BVerfGE 13, 261), is interesting; also the plaintiff in the proceedings for the judicial review of administrative acts refers thereto, although that Decision is not applicable in its case, because Article 12 of the AATPMI does not determine that income from the previous year is subject to taxation as well.
14. In fact, German fiscal theorists are opposed to the presented differentiation between true and quasi-retroactivity, because in their opinion the emergence of a tax obligation at the end of the year is allegedly only of a technical character and it allegedly does not indicate whether a relevant event subject to taxation has become final beforehand or

not. Taxable persons are allegedly entitled to legal certainty with regard to taxable consequences at the moment of the execution of a transaction. However, the German Federal Constitutional Court did not abandon such differentiation, i.e. the position that in the event of a change in a regulation during a tax year the effects are only quasi-retroactive.

15. As proceeds from Decision BVerfG No. 2 BvL 14/02, 2 BvL 2/04, 2 BvL 13/05, dated 7 July 2010, the German Federal Constitutional Court only chose the stricter approach with regard to the assessment of the admissibility of quasi-retroactivity. It underlined that quasi-retroactivity is also compatible with the principle of trust in the law, but only if it is appropriate and necessary for the realisation of the purpose of a law and if the principle of proportionality is not violated when weighing between the affected trust and the necessity of the reasons for the change. In this regard, it proceeded from the starting point that with regard to tax norms it is the emergence of tax debt that is decisive. Therefore, in the field of tax law true retroactivity allegedly only exists in the case when the legislature subsequently changes a tax debt that has already arisen. In the field of personal income tax law, such entails that a change in legal norms with an effect on the current taxable period [represents] quasi-retroactivity, because the tax obligation arises only when the tax year ends. [The German Federal Constitutional Court] also stressed that in the diverse field of quasi-retroactivity, in which, as a general rule, the prohibition of retroactivity does not apply, the troubling effects of disappointment [in relation to] the legally protected trust [in the law] require sufficient substantiation from the viewpoint of their proportionality. Such allegedly also applies in the event when the legislature changes personal income tax legislation during a tax year and the change extends to the beginning of that year. In such event, the addressee of the norm must only accept the disappointment [in relation to] his or her trust [in the law] if this is justified by a special public interest, such that substantiates precisely the retroactive effect of a regulation, and by taking into consideration the principle of proportionality regarding such.
16. The Constitutional Court has also already dealt with the issue of the retroactivity of regulations in the field of taxation. In Decision No. U-I-81/96, dated 12 March 1998 (Official Gazette RS, No. 27/98), by which the Constitutional Court assessed the provisions of the Act Amending the Corporate Profit Tax Act (Official Gazette RS, No. 20/95), it stated that a tax obligation entails an interference by the state in the property sphere of legal entities, therefore “it [...] applies even more to tax regulations that they must not have retroactive effect, except under the conditions determined by the second paragraph of Article 155 of the Constitution, i.e. if such is required in the public interest and provided that no acquired rights are infringed thereby”. Such entails that also in the field of taxation retroactivity is not absolutely prohibited. The Constitutional Court dealt with the question of the retroactive effect of a tax norm that referred to a periodic tax, i.e. personal income tax, also in Decision No. U-I-62/95, dated 16 February 1996. It assessed the regulation determined by the Act Amending the Personal Income Tax Act (Official Gazette RS, No. 7/95), which introduced the taxation of certain personal income – severance pay upon retirement, jubilee bonuses, and one-time solidarity aid – which beforehand were not subject to taxation. The

Act entered into force the next day after it was published in the Official Gazette of the Republic of Slovenia, i.e. on 5 February 1995, and was applicable from 1 January 1995 onwards. In the mentioned decision, the Constitutional Court in fact adopted the position that such *ex tunc* determination of a tax obligation is inconsistent with Article 155 of the Constitution, because [such retroactive] tax obligations interfere with an existing acquired right to freely dispose of income (see Paragraph 8 of the reasoning of the mentioned Decision). It was of the opinion that the manner of tax calculation (for instance, yearly) does not represent a basis for interpretation in conformity with which the validity of a tax obligation extends also to income paid when such statutory obligation had not yet existed (see Paragraph 9 of the reasoning of the mentioned Decision). However, what was at issue in that case was a new taxation of categories that had previously been entirely exempt from taxation. Therefore, at the moment of the payment or the formation of the mentioned property categories they were exempt from taxation, which entails that already at that moment individuals acquired the right to freely dispose thereof. This is precisely the aspect from which, in my opinion, [that] case significantly differs from the case at issue. In this regard, attention should be drawn to the fact that the Personal Income Tax Act (Official Gazette RS, No. 71/93, 2/94 – corr. and 7/95 – hereinafter referred to as the PInTA), which was relevant for the decision-making of the Constitutional Court in case No. U-I-62/95, treated the prepayment of tax during a year as the payment of a special tax which it deemed to be a subtype of the personal income tax (see the first paragraph of Article 3 of the PInTA). Only the new Personal Income Tax Act (Official Gazette RS, No. 54/04 – hereinafter referred to as the PInTA-1) introduced the prepayment of tax such as determined by the PInTA-2 (compare with the Personal Income Tax Draft Act – PInTA-2, Gazette of the National Assembly, No. 2/04, EPA 1088-III, p. 19). In fact, at the moment when taxable persons receive an income subject to taxation they can legitimately expect that the income received will not be subject to a higher tax rate than was determined by the legislation in force at that moment, but at that moment they have not yet acquired an individualised and concretised right to freely dispose of such income.

17. In order to overcome the financial and economic crisis more easily, the state provided state aid to business entities, which is certainly in the public interest. Therefore, it is also in the public interest that by means of tax measures it tried to ensure that state aid achieve its purpose by [ensuring] that the business entities that received state aid (as a general rule, precisely due to their weak financial situation) are not exhausted by excessive payments to members of management. The Act at issue encompassed the members of the management of those business entities in which the crisis conditions began to be reflected more severely in operations. For such reason, it was more than reasonable to expect from such personnel that they would ensure the economical behaviour of business entities and in such framework also adjust their income to the given circumstances.
18. The taxation determined by the challenged Act entails the taxation of income from the employment of individuals that is among the highest in the state and that was paid in companies which in the period of the financial and economic crisis received state aid in the form of subsidies and sureties. For such taxation, the legislature dem-

onstrated, (also) insofar as it extends to income received before the entry into force of this Act, the existence of a particularly substantiated public interest that could only be achieved by Article 12 of the AATPMI having quasi-retroactive effect. It is namely in the public interest that, in such exceptional circumstances of the global financial and economic crisis, the policy regarding the income of management and supervisory personnel of companies, which precisely due to this crisis benefitted from state aid, is regulated in such a manner that their income is not excessive but that they are in accord with the real financial situation in those business entities. Namely, the realisation of the purpose of such state aid is thereby indirectly ensured. I am convinced that when pursuing such an important public interest for the society as a whole this public interest outbalances the interference with the trust of taxable persons in the stability of the existing legal regulation of the personal income tax.

19. With regard to the above I am of the opinion that by the challenged statutory regulation the legislature in fact did interfere with the principle of the protection of trust in the law, which is one of the principles of a state governed by the rule of law, because it thereby interfered with the legitimate expectations of taxable persons under the AATPMI that they would be able to dispose of their received income above the taxation limit determined by the personal income tax legislation in force already at the moment when they receive such income (see Paragraphs 10 and 11). However, the legislature had real reasons substantiated in the predominant and legitimate public interest for the interference in these expectations. Consequently, in my judgment, the challenged legal norm is not inconsistent with Article 2 of the Constitution.

*Mag. Marta Klampfer*

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#### CONCURRING OPINION OF JUDGE JAN ZOBEC

1. In this concurring opinion I only express two minor reservations with regard to the substantiation of the Decision. The first refers to the findings and positions from Paragraph 28 and its continuation in Paragraphs 29 and partly 30, while the second refers to the assessment of the arguments stated by the Government in favour of the retroactive effect of the challenged Article of the AATPMI.
2. Paragraph 28 states that “in the legislative file one cannot find particular substantiation of the public interest for the existence of the retroactive effect of the challenged statutory provision.” This is followed by: “As far as the allegation in the legislative file ‘that unsuccessful managers would be left without unjustified bonuses’ could be deemed to be the substantiation of the retroactive effect of the Act, it must be established that it does not demonstrate a public interest in the sense of the second paragraph of Article 155 of the Constitution.” In my opinion, such allegation entails a clear substantiation of the retroactive effect of the Act. It states that the bonuses that unsuccessful managers unjustifiably received will be seized to the benefit of the state. To be left without a bonus presupposes its acquisition – one cannot be left without

something that one does not even have. Therefore, only someone who has already received a bonus (or at least received the right to a bonus or the right to request a bonus) can be left without the bonus. A phrasing that would refer to future conduct, i.e. to the prevention of the payment of unjustified bonuses, would only read as follows: “that (unsuccessful) managers will not be paid (unjustified) bonuses” or “that (unsuccessful) managers will not receive (unjustified) bonuses”.

3. The legislature’s aim as regards the retroactive effect of the disputed statutory provision was therefore (not to dissuade [members of management] from being paid unjustified bonuses, but) that unsuccessful managers to whom unjustified bonuses have been paid would be left without such unjustified bonuses, i.e. the seizure thereof. This could in fact entail a public interest in the sense of the second paragraph of Article 155 of the Constitution. But only if such benefit were also legitimate (constitutionally consistent). However, in my opinion (although at first sight nothing is wrong with the aim that something is seized from someone who received it unjustifiably), it lacks such quality.
4. Firstly, already because such aim is internally contradictory. If, namely, someone has received something unjustifiably, there is no need to adopt regulations that would by means of retroactive effect enable the seizure of that which was unjustifiably received. Whatever has been unjustifiably paid already had such attribute (i.e. unjustifiability) already when it happened, i.e. upon the payment itself. If this occurs subsequently, after the payment has already been effectuated, i.e. proclaimed to be unjustified *ex tunc*, we are dealing with retroactivity. The action (in this case the payment of a bonus) is then *ex tunc* legally qualified as unjustified.
5. When, however, a legislature decides to [start] such adventure (the game with the constitutional prohibition of retroactivity), by which it interferes with acquired rights (acquired at the latest when [a bonus or salary] is paid), it must, of course, firstly clearly define the criteria of unjustifiability – in the case at issue, also who the unsuccessful managers are from whom what has already been paid must be seized. Only after it does that could these criteria, which are an integral part of the aim (as the legislature explained, it namely did not aim, by means of such retroactivity, at all bonuses, but only at those that were unjustified – and even not at the seizure of such from everyone, but only from unsuccessful managers), be subject to an assessment of legitimacy (i.e. consistency with the Constitution). If the aim – of which these criteria were an integral part – passed such test, also the retroactive interference with acquired rights itself would then have to be subject to the strict test of proportionality – where again everything would be centred on the aim in the framework of which the criteria of the unjustifiability of bonuses would play an important role. However, in the Act there is no sign of any such criteria and of how which managers are unsuccessful should be assessed. Moreover, the Act does not even mention any unjustified bonuses or unsuccessful managers. The tax hits everyone – both unsuccessful and successful [managers] and applies to both justified (for instance, those that have been paid to successful managers during the crisis) and unjustified bonuses (paid to managers who caused deficits and losses amounting to millions).

6. The aim defined in the legislative file is thus illegitimate.<sup>1</sup> Illegitimate, because it is contrary to the concept of law. The law, although it stems from a purpose, becomes independent the moment it is created and then lives its own life, which is separated from who created the law. Or, as Radbruch says, although the law “emerged from the purpose, it wants to be in force, from the same moment on, regardless of its fulfilling this purpose, already on the basis of its mere existence; it wants to live in accordance with its own laws as if it was an end in itself”<sup>2</sup> The life of the law is thus autonomous and “outside and above the influential field of state purposes.”<sup>3</sup> As an ordinary citizen, I can certainly be disposed, like the vast majority of others, to the [aim] that “unsuccessful managers would be left without unjustified bonuses”. However, as a lawyer, and especially as a judge of the Constitutional Court, I can never be [disposed thereto] if the price [of such aim] entails a breakdown of the concept of law which requires the generality and equality of a norm in relation to those whom the norm concerns, and if that entails a deviation from that aspect of legal certainty that requires the validity of positive law, even if this is unreasonable for the state.
7. In the case at issue, only the seizure of “unjustified bonuses from unsuccessful managers” could be reasonable for the state (and not also the seizure of earned bonuses). However, such reasonableness (the legislature’s intent) is not expressed in the Act and thus also does not exist therein. As stated above, the tax hits everyone – unsuccessful and successful [managers] and unjustified and justified bonuses. If it could still be possible from the state administration (the tax authorities) to expect that it will adapt to (and try to comply with) the state’s will, this cannot in any way be expected from the judiciary, which has the final word with regard to the interpretation and application of the challenged statutory provision. Quite the contrary. The essence of judicial independence is namely in that it entails the outer and practical manifestation of the all-encompassing independence, autonomy, and freedom of law – including freedom from he who created it.<sup>4</sup>
8. This is where the whole sense of the rule of law is hidden. It namely entails that no one is above the law, not even the legislature. Therefore, *non sub homine sed sub Deo*

1 In this regard, I leave aside the question of whether it is legitimate to use tax legislation in order to seize from a taxable person property which in the opinion of the legislature has been acquired unjustifiably. Or in other terms, I am not hereby adopting a position with regard to whether taxes can be a means to expropriate (nationalise) [property] and also not with regard to the question of whether such can entail a means for penalisation. In this respect, let me only mention that in Article 1, Section 9, Clause 3 the U.S. constitution explicitly determines the prohibition of the adoption of “Bills of Attainder”.

2 G. Radbruch, *Filozofija prava*, translation A. Maček, GV Založba, Ljubljana 2007, p. 217.

3 *Ibidem*. Or very clearly and succinctly in the Second Minute of the Five Minutes of Legal Philosophy: “No, this tenet does not mean: Everything that benefits the people is law. Rather, it is the other way around: Only what law benefits the people.” (*Ibidem*, p. 268).

4 According to Ihering, the judiciary has the exclusive task of realising the law. Therefore, the motto of the judiciary is: the law and nothing but the law. The judiciary has its sight throughout directed exclusively at the law. And a judge is the person in whom the law is revived and channelled, through his words, into reality. See R. von Ihering, *Law as a Means to an End*, translation I. Husik, The Boston Book Company, Boston 1913, pp. 289, 290.

*et lege* applies also with regard to the legislature and its will. Not even the almighty legislative power is above the law. Or, if I may evoke Ihering once again: The law has (and must have) the power to develop, instead of fear, worries, and anxiety, a firm and unwavering feeling of security and reliability, which in the opinion of the mentioned legal scholar is an appropriate expression of the state of mind that law and faith allow to a human: the law provides him the feeling of security and peace in his relations to other persons, and faith in his relation to God.<sup>5</sup> Therefore, it can never be the legislature's will that rules, but rather it is the law that rules. The legislature has in this respect only the privilege to create a law, whereby it is (only) given the indirect possibility to weave its will into the law and thus achieve its aim through the law. But no more than that – therefore only through the law, which entails that it only has an indirect possibility (and not a direct authorisation) to implement its intention. In a state governed by the rule of law based on the separation of powers it is the judiciary that will state whether it has succeeded in doing so, whether it has taken advantage of the constitutional possibility. It will state that after it has interpreted the law – sovereignly, independently, and freely, i.e. such as is also the law that it is interpreting (and also creating through its case law), and not [after the law has been interpreted] by anyone else. Not even by the legislature (by interpretations of one kind or another, which are more or less “obligatory”).

9. Since the legislature thus did not demonstrate a legitimate substantiation of the retroactive effect of the disputed statutory provision, in my opinion the reasoning of the Decision should have ended at this point. But it did not. In the following sections (from paragraph 33 onwards) it also dealt with the arguments presented by the Government in order to justify such retroactive effect. The Constitutional Court admittedly rejected them. But even if it had not, they should not have influenced the decision – if they had, such decision would be inconsistent with the principle of the separation of powers. Because if the legislature has decided that individual statutory provisions have retroactive effect, then it is only the legislature who can explain the first condition that must be fulfilled for the exceptional admissibility of retroactive effect. It is only its intention that counts – not the intention of the Government or anyone else. For such reason, treating the arguments of the Government only weakens (and in this respect even nullifies) the principle of the separation of powers. The executive power is not called upon to explain, in place of the legislature, which aim the other (the legislative) branch of power pursued by a certain measure and whether such aims entail a public interest. Only the legislature itself can do that, i.e. the one who adopted the law and who must (precisely for such reason) well know why it acted in such manner. Since only it is only its intention that is relevant, it is only the legislature that can tell the Constitutional Court what it had pursued by such retroactivity.

*Jan Zobec*

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<sup>5</sup> *Ibidem*, p. 288.

**OPINION**

At a session held on 18 March 2010 in proceedings to review the constitutionality of a treaty, initiated upon the proposal of the Government of the Republic of Slovenia, the Constitutional Court The Arbitration Agreement

*issued the following opinion:*

- I. The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia is an applicable constitutional act and as such a permanent and inexhaustible constitutional source of the statehood of the Republic of Slovenia.
- II. Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia protects the state borders of the Republic of Slovenia and in conjunction with Article 4 of the Constitution entails the applicable and relevant constitutional determination of the territory of the Republic of Slovenia.
- III. In the part in which Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia protects the state borders between the Republic of Slovenia and the Republic of Croatia it must be interpreted within the meaning of the international law principles of *uti possidetis iuris* (on land) and *uti possidetis de facto* (at sea).
- IV. In accordance with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, the land border between the Republic of Slovenia and the Republic of Croatia is constitutionally protected where the border between the republics of the former Socialist Federative Republic of Yugoslavia was drawn, whereas the maritime border is protected along the line up to the High Sea to where the Republic of Slovenia *de facto* exercised its authority before its independence.
- V. The Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia does not determine the course of the state borders between the Parties to the Agreement, but it establishes a mechanism for the peaceful settlement of the border dispute.
- VI. Article 3 (1) (a), Article 4 (a), and Article 7 (2) and (3) of the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, which must be interpreted and reviewed as a whole in

terms of content, are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia.

### *Reasoning*

#### **A**

1. The Government of the Republic of Slovenia filed a proposal with the Constitutional Court that the Constitutional Court issue an opinion on the conformity of Article 3 (1) (a) of the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia (hereinafter referred to as the Agreement) with Article 4 of the Constitution in conjunction with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (*Temeljna ustavna listina o samostojnosti in neodvisnosti Republike Slovenije* – hereinafter referred to as the BCC). The Government is of the opinion that the Agreement is entirely in conformity with the BCC and the Constitution; it filed the proposal with the Constitutional Court that it issue an opinion due to the fact that a part of the expert public has allegedly expressed reservations and concerns regarding the constitutional conformity of the individual parts of the Agreement. In the opinion of the Government, the second paragraph of Article 160 of the Constitution enables the Government to file a proposal for the review of the constitutionality of the Agreement although it is of the opinion that the Agreement is not inconsistent with the Constitution. With reference to such, the Government refers to the position of the Constitutional Court in Opinions No. Rm-1/97 of 5 June 1997 (Official Gazette RS, No. 40/97, and OdlUS VI, 86) and No. Rm-1/02 of 19 November 2003 (Official Gazette RS, No. 118/03, and OdlUS XII, 89).
2. The position of the Government is that Section II of the BCC established the land border between the Republic of Slovenia and the Republic of Croatia, and the border so-established only needs to be demarcated in nature. Therefore, the power of the Arbitral Tribunal to determine the course of the land border is allegedly not inconsistent with Section II of the BCC and Article 4 of the Constitution, but allegedly only entails the precise determination of the land border. With reference to the maritime border, the Government proceeds from the regulation in the Socialist Federative Republic of Yugoslavia (hereinafter referred to as the SFRY) whereby the regime regulating the sea and the maritime zones was determined uniformly, therefore the maritime border between the Republic of Slovenia and Croatia was not determined. Consequently, also the power of the Arbitral Tribunal to determine the course of the maritime border is allegedly not inconsistent with Section II of the BCC and Article 4 of the Constitution. The possible doubts regarding the unconstitutionality of Article 3 (1) (a) of the Agreement are allegedly resolved also by Article 3 (1) (b) and (c), which require the Arbitral Tribunal to determine Slovenia's junction to the High

Sea and the regime for the use of the relevant maritime areas. These two provisions of the Agreement allegedly ensure the preservation of the right of Slovenia, which it already had in the former SFRY, to territorial junction to the High Sea.

3. In order to support its position that the Agreement is not inconsistent with the Constitution, the Government refers to Opinion of the Constitutional Court No. Rm-1/00 of 19 April 2001 (Official Gazette RS, No. 43/01, and OdlUS X, 78), in which the Constitutional Court adopted the standpoint that “the BCC and the Constitution do not prohibit the conclusion of treaties that would regulate border issues [...] provided that such a treaty remains within the framework of Article 4 of the Constitution”. When reviewing whether the Agreement is in conformity with the Constitution, also the position of the Constitutional Court from the above-cited Opinion that the border between Slovenia and Croatia is “presumably known, however, not yet concretised in a border treaty and demarcated in nature” must be, in the opinion of the Government, taken into account.
4. The Government furthermore states that the Agreement is not a treaty on the common state land and maritime border, but is a foundation for submitting the settlement of the border dispute to an independent international judicial body, which is allegedly also in conformity with general principles and rules of international law, which on the basis of Article 8 of the Constitution are binding on Slovenia and are a part of its legal order.
5. In the supplementation to its application, the Government supplemented its proposal with certain specific reservations and concerns voiced by the expert public regarding the constitutionality of Article 3 (1) (a) of the Agreement. These concerns of the expert public, as stated by the Government, in their substance primarily refer to the question of whether the decision of the Arbitral Tribunal would entail merely a precise determination of the border, which is presumably already known, or whether such would concern a new determination or alteration of the border, which would allegedly require a prior amendment to the BCC. In the above-mentioned concerns, the expert public furthermore states that the Agreement entails a special manner of establishing the border between Slovenia and Croatia, whereby the Agreement nowhere refers to the existing border as determined by the BCC. The BCC namely determines that the border with Croatia is where the border between the republics within the former Yugoslavia was. Differently than the BCC, the Agreement determines the rules and principles of international law as the criteria for determining the course of the border.

#### B – I

6. The second paragraph of Article 160 of the Constitution reads as follows: “In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court.” In addition to the powers stated in the first paragraph of Article 160 of the Constitution, such regulation vests in the Constitutional Court special competence for the *a priori* constitutional review of treaties.

7. A proposal for the *a priori* review of the constitutionality of a treaty may be filed by three applicants, as determined by the Constitution, i.e. the President of the Republic, the Government, or a third of the deputies of the National Assembly. In the case at issue, the proposal was filed by the Government, which is of the opinion that the Agreement is not inconsistent with the Constitution or the BCC.
8. In accordance with the first paragraph of Article 162 of the Constitution, proceedings before the Constitutional Court are regulated by law. Article 70<sup>1</sup> of the Constitutional Court Act (*Zakon o Ustavnem sodišču* – Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) reiterates the powers of the Constitutional Court from the second paragraph of Article 160 of the Constitution, whereas it does not contain other explicit procedural provisions with reference to expressing an opinion when reviewing treaties. Therefore, in accordance with the first paragraph of Article 49 of the CCA, the provisions of Chapter IV of this Act, which provides for the review of the constitutionality and legality of regulations, are to be applied, *mutatis mutandis*, for procedures for the review of a treaty (see Constitutional Court Opinion No. Rm-1/97).
9. In proceedings for the review of the constitutionality of a regulation, the Constitutional Court reviews the constitutionality of the provisions of the regulation which an applicant, as provided for in Articles 23 or 23a, or a petitioner, as provided for in Article 24 of the CCA, alleges are inconsistent with the Constitution. The Constitutional Court may not extend *ex officio* its review of the constitutionality to provisions which are not challenged, except in cases in which such is allowed by the principle of connectivity provided for in Article 30 of the CCA.<sup>2</sup> In addition to the challenged provisions, a request or petition must also contain the provisions of the Constitution or law with which the challenged provisions are allegedly inconsistent. Moreover, an applicant or a petitioner must also state the reasons why the challenged provision is allegedly unconstitutional or unlawful.<sup>3</sup> A matter that should be decided by the Constitutional Court should be formulated as a dispute on the constitutionality or legality of the challenged provisions. If an applicant initiating proceedings does not have any doubts regarding the constitutionality or legality of the challenged provisions, there is no need for legal protection provided by a Constitutional Court decision.
10. Reasons for a different position do not exist with reference to the procedure for the *a priori* review of treaties. When expressing an opinion on the constitutionality of a

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1 Article 70 of the CCA reads as follows: "In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The Constitutional Court adopts such opinion at a closed session."

2 The principle of connectivity allows the Constitutional Court to also review the constitutionality and legality of other provisions of the same or other regulation or general act issued for the exercise of public authority for which a review of the constitutionality or legality has not been proposed, if such provisions are (a) mutually related or (b) if such is necessary to resolve the case.

3 The content of applications is provided for in Article 24b of the CCA and Annexes to the Rules of Procedure of the Constitutional Court (*Poslovnik Ustavnega sodišča* – Official Gazette RS, No. 86/07).

treaty, the Constitutional Court also reviews only the provisions of the treaty whose review is requested by the entitled applicant; it reviews other provisions only under conditions which apply for the principle of connectivity. As a general rule, the Constitutional Court reviews the matter only from the viewpoint of the provisions of the Constitution which were referenced by the applicant. In instances in which an applicant is the Government, it cannot be required from the Government that it alleges the unconstitutionality of a treaty – the Government is namely, as a general rule, a signatory to treaties, whereas at the same time the second paragraph of Article 160 of the Constitution gives the Government the right and power to propose the [constitutional] review of every treaty. However, the fact that it cannot be required from the Government that it be subjectively convinced that a treaty is unconstitutional does not entail that the Government does not need to provide a statement of reasons for its proposal. Regardless of its standpoint on the conformity of the relevant treaty with the Constitution, the Government must state which provisions of the treaty the Constitutional Court should review as well as which provisions of the Constitution it must take into consideration when doing so. The Government also has to state reasons why individual provisions of a treaty could be disputable from the constitutional point of view. Although the Government does not have reservations regarding the conformity of the treaty with the Constitution, it must nevertheless state in the proposal which reservations regarding the constitutionality of the treaty otherwise exist (e.g. those of the parliamentary opposition or expert public).

11. The power of the Constitutional Court in the procedure provided for by the second paragraph of Article 160 of the Constitution is limited to the review of treaties which are in the ratification procedure. A condition for such a procedure to be initiated before the Constitutional Court is that the procedure for the ratification of the treaty has been initiated in the National Assembly. It proceeds from the second paragraph of Article 160 of the Constitution, which determines that in the process of ratifying a treaty the Constitutional Court issues an opinion “on the conformity of such treaty with the Constitution”, that the subject of the review is the content of the treaty, i.e. its individual provisions. The subject of the review cannot be the ratification procedure. Possible deficiencies in the ratification procedure<sup>4</sup> may concern the act on the ratification, however such deficiencies cannot be alleged in the procedure for the *a priori* review of a treaty.<sup>5</sup> As is the case for the review of the constitutionality and legality of regulations, also in cases calling for the *a priori* review of the constitutionality of a treaty, the Constitutional Court does not assess whether the treaty is appropriate.

4 The procedure for the ratification is regulated in the Constitution by Articles 86 and 3a. Article 86 as a general rule determines that the National Assembly ratifies treaties by a majority of votes cast by those deputies present, whereas Article 3a as a special provision determines that treaties by which Slovenia may transfer the exercise of part of its sovereign rights to international organisations and may enter into a defensive alliance with states, must be ratified by a two-thirds majority vote of all deputies. In both procedures only a treaty whose substance is in conformity with the Constitution may be ratified.

5 The procedure for ratification can only be reviewed if it were regulated in a treaty, thus if the treaty regulated such procedure in its provisions.

Therefore, the Constitutional Court does not provide a value judgment or an assessment of the implementation of the public interest which is pursued by a treaty.

## B – II

12. The Agreement, which in the original English version is entitled *Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia*, was signed by the President of the Government of the Republic of Slovenia and the President of the Government of the Republic of Croatia on 4 November 2009 in Stockholm, Kingdom of Sweden. At a session held on 17 November 2009, the Government determined the text of the draft Act on the Ratification of the Agreement and submitted it for adoption to the National Assembly. During the procedure for the ratification of the Agreement, the Government submitted the proposal that the Constitutional Court review whether Article 3 (1) (a) of the Agreement is in conformity with Article 4 of the Constitution in conjunction with Section II of the BCC.

13. The proposed criteria for the constitutional review are Article 4 of the Constitution and Section II of the BCC. Article 4 of the Constitution reads as follows:

“Slovenia is a territorially unified and indivisible state.”

Section II of the BCC reads as follows:

“The state borders of the Republic of Slovenia are the internationally recognised state borders between the hitherto SFRY and the Republic of Austria, the Republic of Italy and the Republic of Hungary in the part where these states border the Republic of Slovenia, and the border between the Republic of Slovenia and the Republic of Croatia within the hitherto SFRY.”

14. The proposed subject of the review is Article 3 (1) (a) of the Agreement, which in the original English version reads as follows:

“The Arbitral Tribunal shall determine the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia.”

In the draft Act on the Ratification of the Agreement, the above-cited provision in the Slovene translation reads as follows:

“*Arbitražno sodišče določi potek meje med Republiko Slovenijo in Republiko Hrvaško na kopnem in morju.*”<sup>6</sup>

15. Article 3 (1) (a) of the Agreement specifies the power of the Arbitral Tribunal to determine the course of the border between the Parties to the Agreement. It does not in and of itself proceed from this provision where the Arbitral Tribunal will determine the course of the border or which criteria it will apply in this regard. Article 3 (1) (a) is therefore inseparably connected with Article 4 (a) of the Agreement,

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6 Article 3 (1) of the Agreement, which determines the task of the Arbitral Tribunal, in the original English version reads as follows: “(1) The Arbitral Tribunal shall determine: (a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia; (b) Slovenia’s junction to the High Sea; (c) the regime for the use of the relevant maritime areas.” In the translation, as proposed in the draft Act on the Ratification of the Agreement, Article 3 (1) of the Agreement reads as follows: “(1) *Arbitražno sodišče določi: (a) potek meje med Republiko Slovenijo in Republiko Hrvaško na kopnem in morju; (b) stik Slovenije z odprtim morjem; (c) režim za uporabo ustreznih morskih območij.*”

which determines what the Arbitral Tribunal will have to apply when determining the course of the border. Article 4 (a) of the Agreement in the original English version reads as follows:

“The Arbitral Tribunal shall apply the rules and principles of international law for the determinations referred to in Article 3 (1) (a).”

In the draft Act on the Ratification of the Agreement, the above-cited provision in the Slovene translation reads as follows:

*“Arbitražno sodišče uporablja pravila in načela mednarodnega prava za odločanje po točki (a) prvega odstavka 3. člena.”<sup>7</sup>*

16. For the effects of the decision of the Arbitral Tribunal also Article 7 (2) and (3) of the Agreement are essential. It follows from these provisions that the decision of the Arbitral Tribunal will not merely be an opinion or a recommendation, but a decision that will be definitive and legally binding for the Parties to the Agreement and will thus have the nature of a judicial decision. Article 7 (2) and (3) of the Agreement in the original English version read as follows:

“(2) The award of the Arbitral Tribunal shall be binding on the Parties and shall constitute a definitive settlement of the dispute.

(3) The Parties shall take all necessary steps to implement the award, including by revising national legislation, within six months after the adoption of the award.”

In the draft Act on the Ratification of the Agreement, the above-cited provisions in the Slovene translation read as follows:

*“(2) Razsodba arbitražnega sodišča je za pogodbenici zavezujoča in pomeni dokončno rešitev spora.*

*(3) Pogodbenici v šestih mesecih po sprejetju razsodbe storita vse potrebno za njeno izvršitev, vključno s spremembo notranje zakonodaje, če je to potrebno.”*

17. Article 3 (1) (a), Article 4 (a), and Article 7 (2) and (3) of the Agreement are mutually inseparably connected, as only their joint legal effect entails that the Arbitral Tribunal, applying the rules and principles of international law, will definitively and with legally binding effect determine the course of the state border between the Parties to the Agreement – the Republic of Slovenia and the Republic of Croatia – on land and at sea. As the above-mentioned provisions of the Agreement are mutually connected, the Constitutional Court, on the basis of Article 30 of the CCA, decided to extend the procedure for the review of the constitutionality of Article 3 (1) (a) also to Article 4

7 Article 4 of the Agreement, which determines applicable law and other criteria which the Arbitral Tribunal is to apply when deciding, in the original English version reads as follows: “The Arbitral Tribunal shall apply (a) the rules and principles of international law for the determinations referred to in Article 3 (1) (a); (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3 (1) (b) and (c).” In the translation, as proposed in the draft Act on the Ratification of the Agreement, Article 4 of the Agreement reads as follows: *“Arbitražno sodišče uporablja: (a) pravila in načela mednarodnega prava za odločanje po točki (a) prvega odstavka 3. člena; (b) mednarodno pravo, pravičnost in načelo dobrososedskih odnosov za doseglo poštene in pravične odločitve, upoštevajoč vse relevantne okoliščine, za odločanje po točkah (b) in (c) prvega odstavka 3. člena.”*

(a) and Article 7 (2) and (3) of the Agreement. The Constitutional Court interpreted and reviewed the above-mentioned provisions of the Agreement as a whole.

### B – III

18. The formation and cessation of states and the questions of the state territory and state borders are questions which are primarily in the domain of international law. It is in the nature of the matter that state borders concern two or more states and are in general a result of their mutual agreement. State borders exist as *de facto* effective demarcation lines between sovereign states, when determined at the level of international law, either by a treaty, by a decision of an international body, or by exercising *de facto* authority which a neighbouring state does not oppose. In the Republic of Slovenia, the state borders are also regulated in national law, namely in Section II of the BCC; also Article 4 of the Constitution refers to the state territory. State borders, as established in national law, do not bind other states and do not have international law effects in and of themselves. Thus, regarding the state borders of the Republic of Slovenia one must distinguish between international law and national law positions. These concern two separate legal systems, however when interpreting national law one must proceed from international law, as state borders are by nature a question of international law. The formation of a new state is in international law to a great extent a question of fact,<sup>8</sup> however, its recognition and acceptance by the international community also depend on the fact whether the state respected the rules and principles of international law upon its formation. Especially the rules and principles of international law which refer to the formation of new states following the dissolution of a common state, as was the case of the former SFRY, are relevant. Such concern the rules and principles of international law which regulate fundamental relations between newly established and already existing neighbouring states or between newly established states themselves, especially concerning their territory and state borders.
19. In order for a state border to be justified under international law, it is of key importance that a state demonstrates legal title (*iustus titulus*). International law titles (French *titre*) on which the course of the state borders is based have two functions. Firstly, legal title is a basis for exercising state sovereignty<sup>9</sup> and indicates from where a

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8 From the perspective of international law, the formation of a new state as a subject of international law is to a great extent *questio facti*. In order to speak of the state, four conditions must be met: there must exist (1) a population, i.e. a group of individuals that permanently reside in a certain (2) territory; in this territory (3) a government must be established which (4) is not legally subordinate to any other government. Article I of the Montevideo Convention on Rights and Duties of States of 1933 provides that the state should possess the following qualifications: (1) a permanent population; (b) a defined territory; (3) government; and (4) capacity to enter into relations with the other states. See I. Brownlie, *Principles of Public International Law*, Seventh Edition, Oxford University Press, Oxford 2008, pp. 70–72.

9 Arbitrator Max Huber in his arbitration decision on the Island of Palmas in 1928 explained that “sovereignty [...] in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.” Cited from D. Türk, *Temelji mednarodnega prava* [Foundations of International Law], GV Založba, Ljubljana 2007, p. 407.

state draws legal entitlement to its territory and sovereignty. Secondly, legal title demonstrates and protects also the specific course of the border demarcated in nature.<sup>10</sup>

20. Within the former SFRY the Republic of Slovenia had external state borders with the Republic of Austria, the Republic of Italy, and the Republic of Hungary. In the former SFRY the state borders with these three states were determined by treaties.<sup>11</sup> After the dissolution of the common state, these external Yugoslav borders became the state borders of the Republic of Slovenia. Under international law, the Republic of Slovenia succeeded to these borders on the basis of the rules and principles of international law which determine the inviolability of state territory and the continuity of state borders. These rules and principles are provided for in certain most important universal and regional documents. The Charter of the United Nations of 1945 (hereinafter referred to as the UN Charter), among the principles of how its Members should act, determines the principle of the sovereign equality of all its Members and the prohibition of the threat or use of force against the territorial inviolability or political independence of any state. Respect for territorial inviolability is furthermore emphasised by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of

10 The most common legal titles are border treaties. A special aspect of the transfer of sovereignty in a certain territory by a treaty is cession, which entails the peaceful transfer of territory from one sovereign state to another. The cession has often taken place within the framework of peace treaties following a war. Other legal titles are, for instance, peaceful occupation (connected to *terra nullis*), accretion, and prescription. In the last decades the principle of *uti possidetis* is increasingly more important for newly emerging states. More D. Türk, *ibidem*, pp. 407–421, and M. N. Shaw, *International Law*, Fifth Edition, Cambridge University Press, Cambridge 2003, pp. 414–451.

11 Within the former SFRY the internationally recognised borders were determined by treaties. The Slovene-Austrian state border was determined by the Treaty of Peace of Saint-Germain of 1919 (also taking into account the results of the plebiscite held in 1920). This was again affirmed by the Austrian State Treaty (hereinafter referred to as the AST) of 1955. The precursor of the SFRY – the Federative Peoples' Republic of Yugoslavia (FPRY) – was not an original signatory to the AST, however, on 14 November 1955 it acceded to the AST. With its accession to the AST Yugoslavia became party to the AST. With its accession to the AST, Yugoslavia recognised the old border as determined by the Treaty of Peace of Saint-Germain and declared that it would respect the inviolability of the territorial integrity and independence of Austria (for more on the AST, see B. Bohte, M. Škrk, *Pomen avstrijske državne pogodbe za Slovenijo in mednarodnopravni vidiki njenega nasledstva* [The Significance of the Austrian State Treaty for Slovenia and International Law Aspects of its Succession], *Pravnik*, Vol. 52, No. 11–12 (1997), pp. 601–630). The state border with Italy was determined by the Paris Peace Treaty of 1947, with the exception of the part of the border that divided Yugoslavia and the Free Territory of Trieste (hereinafter referred to as the FTT). Following the implementation of the Memorandum of Understanding (i.e. the London Memorandum) of 1954, the demarcation line between Zones A and B of the FTT became the demarcation line between Italy and Yugoslavia. The border with Italy came into effect under international law in 1975 following small modifications on land and the determination of the maritime border by signing the so-called Osimo agreements (for more, see B. Bohte, M. Škrk, *Predgovor, Pariška mirovna pogodba* [Foreword, Paris Peace Treaty], Ministrstvo za zunanje zadeve RS, Ljubljana 1997, pp. v–xii). The state border with Hungary was determined by the Peace Treaty of Trianon of 1920, which in 1947 was affirmed by the Paris Peace Treaty.

1970 (hereinafter referred to as the Declaration of Seven Principles).<sup>12</sup> The Helsinki Final Act on Security and Cooperation in Europe of 1975 (hereinafter referred to as the Helsinki Act) is especially important for peaceful coexistence between the states of Europe, which among the principles guiding relations between European states also determines the inviolability of frontiers and the territorial integrity of states. Considering the fact that in the territory of the former SFRY the new states were established as a result of its dissolution, both Vienna Conventions, which refer to the law of treaties, must especially be taken into account. Treaties governing state borders are namely concluded for an indefinite period of time; such concern so-called permanent treaty regimes. This entails that in accordance with Article 62 (2) (a) of the Vienna Convention on the Law of Treaties of 1969,<sup>13</sup> a fundamental change of circumstances may not be invoked in cases of such treaties (i.e. the *rebus sic stantibus* clause) as grounds for terminating or withdrawing from a treaty. Article 11 of the Vienna Convention on Succession of States in respect of Treaties of 1978<sup>14</sup> moreover determines the generally applicable principle of international law that a succession of states does not as such affect a boundary established by a treaty.

21. The duty to respect the territorial integrity of the neighbouring states and the inviolability of state borders, and especially the duty to respect treaties which determine the state borders, thus follow from the rules and principles of international law which applied during the time Slovenia was gaining independence and which were binding on Slovenia as a newly emerging state. The dissolution of the state and the establishment of the new states do not influence the applicability of the treaties which, before the establishment of the new states, determined the borders between the hitherto existing states (i.e. the principle of the continuity of the state borders) or which referred to other territorial issues (i.e. territorial provisions). The tendency towards legal safety in international relations is reflected in the rules on the continuity of state borders.
22. From the viewpoint of international law, the establishment of new states following the dissolution of a common state, as was the case of the SFRY, is a special situation which concerns the state borders between newly established states. Before independence these states did not have borders determined in accordance with international law; there existed only certain internal demarcations which merely served the purpose of administrative division between the individual parts of the territory. For instances of the dissolution of states in which administrative borders between the individual constitutive parts of the federal territory were determined, international law determines that legal title for the course of the borders between newly established states is the principle of *uti possidetis iuris*. This principle entails that until a possible different agreement is reached, the internationally recognised border between the new states lies where the administrative border within the former common state had

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12 Resolution of the General Assembly of the United Nations 2625 (XXV).

13 Official Gazette SFRY, MP, 30/72, The Act on Notification of Succession (*Akt o notifikaciji nasledstva*), Official Gazette RS, No. 35/92, MP, No. 9/92.

14 Official Gazette SFRY, MP, 1/80, The Act on Notification of Succession (*Akt o notifikaciji nasledstva*), Official Gazette RS, No. 35/92, MP, No. 9/92.

been. The principle of *uti possidetis iuris* was applied when the states of Latin America and Africa, after the former colonial powers had withdrawn, were gaining independence, and the International Court of Justice recognised this principle as a general principle of international law, as it is logically connected with the act of achieving independence.<sup>15</sup> The purpose of the principle is to protect the integrity of the borders which the newly established states succeeded to from the former common state and to prevent the threat to the independence and stability of the new states. The principle of *uti possidetis iuris* secures the territorial *status quo* which existed when independence was achieved; the International Court of Justice namely underlined that this principle “stops the clock” or “freezes the territorial title”.<sup>16</sup> Its primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved.<sup>17</sup>

23. From the legal point of view, the principle of *uti possidetis iuris* secures and protects legal title to territory. If or until the states reach an agreement on the common border, the principle of *uti possidetis iuris* is an international law foundation of the states' sovereignty. The principle presupposes that between the former federal units of the federal state there existed a legally determined delimitation, thus that these units did not merely exercise a “bare” *de facto* authority but they had the right or legal basis to exercise authority in their territory. The International Court of Justice has underlined numerous times that in the name of this principle the word *iuris* does not refer to international law but to the constitutional or administrative law of the pre-independence sovereign state.<sup>18</sup> The principle of *uti possidetis iuris* thus entails that the border between newly established states is where the legal delimitation of authority between individual administrative units within the common state had existed. If a different agreement is not reached, a newly established state succeeds to the territory which was under its authority as a constituent part of the common state.
24. In order to understand the effects of the international law principle of *uti possidetis iuris* in the case of the dissolution of the SFRY, it is necessary to proceed from the constitutional position of Slovenia in the former common state. What is particularly relevant are the introductory provisions and basic principles of the Constitution of the

15 Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (Paragraph 20 of the reasoning). In recent years the International Court of Justice again underlined this in Case concerning the Frontier Dispute (Nicaragua/Honduras), Judgment of 8 October 2007 (paragraph 151 of the reasoning).

16 Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (Paragraph 30 of the reasoning).

17 Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (Paragraph 22 of the reasoning). See also Case concerning the Frontier Dispute (Nicaragua/Honduras), Judgment of 8 October 2007 (paragraph 153 of the reasoning).

18 See also Case concerning the Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 1992 (paragraph 333 of the reasoning) and Case concerning the Frontier Dispute (Nicaragua/Honduras), Judgment of 8 October 2007 (paragraph 158 of the reasoning).

former SFRY of 1974.<sup>19</sup> In Article 1 of the federal Constitution, the SFRY was defined as “a state community of voluntarily united nations and their [...] Republics”, whereas in Article 2 the republics and autonomous provinces which comprised Yugoslavia were listed. Of key importance was Article 5 of the Constitution, which determined that the territory of the SFRY “consists of the territories of the [...] Republics” and that “the territory of a Republic may not be altered without the consent of that Republic”. Already before the normative part, in the preamble and basic principles, the Constitution of 1974 underlined that the relations in the federation were based on the consolidation of the rights and responsibilities of the republics and autonomous provinces. With reference to such, it proceeded from the right of every nation to self-determination, including the right to secession, on the basis of which nations were united in a federative republic. The SFRY was thus not divided into republics only after it was established, but the republics constituted the federal state by joining it.<sup>20</sup> It is especially important that the federal constitution proceeded from the principle that the sovereignty rested primarily in the republics, whereas the sovereignty rested in the federal state only inasmuch as the republics transferred the exercise of the sovereignty by the unanimous and voluntary decision to join the federal state. In the basic principles of the Constitution (Section I) it was namely determined that the nations and nationalities exercised their sovereign rights in the republics, whereas they exercised these rights in the federation when in their common interests it was so specified by the federal Constitution. The Constitution of the SFRY of 1974 thus strongly emphasised the role of the republics at the expense of the federation. The federation and its powers were established “on the basis of the right of every nation to self-determination and original state authority and powers of the republics as primary bearers of the state authority.”<sup>21</sup> The presumption of the state power was to the benefit of the republics and also the constitutions of the republics followed such. The SFRY was established as a federal state on the basis of the decisions of the republics and provinces to join the common state. The fact “that the Republic of Slovenia has been a state under the constitutional order [...] [of the SFRY] and has exercised only a part of its sovereign rights within the [SFRY]” was also declared in the preamble to the BCC at the constitutional level.

25. The emphasised state sovereignty of Slovenia (and the other republics) within the SFRY entailed that the republics also had a certain territory where such sovereignty was exercised. It clearly proceeds from the constitutional regulation of the SFRY that the territory of the republics and the determination of the delimitations between the republics did not fall within the competence of the SFRY but was left to agreement

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19 Official Gazette SFRY, No. 9/74.

20 Cf., T. Jerovšek, *Temeljna ustavna listina o samostojnosti in neodvisnosti Republike Slovenije kot temeljni akt nastanka slovenske države* [Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia as the Fundamental Act Creating the Slovene State], *Studia Historica Slovenica: Časopis za humanistične in družboslovne znanosti*, Vol. 7, No. 1–2 (2007), p. 239.

21 C. Ribičič, *Ustavno-pravni vidiki osamosvajanja Slovenije* [Constitutional Law Aspects of Slovenia's Path to Independence], *Uradni list RS, Ljubljana* 1992, p. 10.

between the republics. As the Constitution of the SFRY determined that the republic borders could be altered only with the consent of the republics concerned, it is clear that the borders between the republics, at least the land borders, had to be known. This entails that on 25 June 1991, when the Republic of Slovenia declared its sovereignty and independence, the Slovene-Croatian state border on land was known, and namely its course ran along the borders of the frontier municipalities or cadastral municipalities.<sup>22</sup> This border was naturally not an interstate border, but only an administrative delimitation which, notwithstanding its weaker legal status, indicated to where the republic sovereignty of Slovenia as a federal unit extended.

26. Upon independence, the land border between Slovenia and Croatia, as it existed within the former SFRY, became an internationally recognised state border, substantiated by the international law principle of *uti possidetis iuris*. Therefore, the rules and principles of international law apply for such – especially the principle of the inviolability of state borders, according to which borders can only be altered unanimously, by a treaty between the states. The key characteristic of the principle of *uti possidetis iuris* is that it does not have the character of a peremptory norm of international law (*ius cogens*), but the states involved may always determine the course of the state border by a treaty, either to confirm a border as it proceeds from the principle of *uti possidetis iuris*, or to determine its course differently, taking into account different circumstances. Until a different agreement between the Republic of Slovenia and the Republic of Croatia is reached, their state border on land is where the border between the republics within the former SFRY had been, i.e. along the borders of municipalities or cadastral municipalities, as they existed on the day of the establishment of the new states. Upon independence the internal land border between the republics became the external state border, which, in accordance with the rule of the preservation of the territorial *status quo*, may only be altered with their consent.
27. Also the Arbitration Committee of the Conference on Yugoslavia (i.e. the Badinter Committee) after the dissolution of Yugoslavia in its Opinion No. 3 based the establishment of the new states on the principle of *uti possidetis iuris*.<sup>23</sup> In its starting point this Opinion was based on the standpoint of the International Court of Justice that the principle of *uti possidetis iuris* is a general principle of international law, which is connected with achieving independence, whenever such occurs. The Committee adopted a standpoint supporting the inviolability of the existing external state borders of the former SFRY, whereby it underlined that such follows from the UN Charter, the Declaration of Seven Principles, the Helsinki Act, and the Vienna Convention on Succession of States in respect of Treaties. Regarding the internal republic borders, it furthermore adopted the standpoint that “except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the

22 Municipal territories in the former [Yugoslav] Republic of Slovenia were provided for by the Act Regulating the Procedure for the Establishment, Unification, and Alteration of a Municipal Boundary and Municipal Boundaries (*Zakon o postopku za ustanovitev, združitve oziroma spremembo območja občine ter o območjih občin* – Official Gazette SRS, No. 28/80 etc.).

23 The Opinion is published in the *European Journal of International Law*, Vol. 3 (1992), pp. 184–185.

principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*.” The Badinter Committee considered that the principle of *uti possidetis* applies all the more readily, as the Constitution of the SFRY of 1974 stipulated that the republics’ territories and boundaries could not be altered without their consent.<sup>24</sup>

28. Thus there are various international law titles concerning the course of the state borders of the Republic of Slovenia. Regarding the borders with Austria, Italy, and Hungary, the legal titles are the treaties which the SFRY had concluded with these states and which Slovenia succeeded to in accordance with international law. Regarding the land border with Croatia, the legal title is the principle of *uti possidetis iuris*. This principle presupposes the territorial delimitation within the former common state and protects the territorial *status quo* after independence. In the definite nature of the legal title in the sense of *lex certa* there is an important difference between treaties and the principle of *uti possidetis*. In instances of treaties, state borders are determined in the manner which is usual at the level of international law; namely, in order to say that a state border is determined, its course must be described with words, determined by geographic coordinates, and thereafter the border must be drawn on a reference map. Parties to the agreement must consent to all these elements, which they demonstrate by concluding a treaty whose essential elements are these elements that define a state border. Permanent or *ad hoc* international tribunals determine the course of the state borders in the same manner in instances in which the states cannot themselves reach an agreement thereon and unilaterally transfer the power to determine the borders to such tribunals. The last act of determining the borders is always their demarcation in nature and by boundary stones.
29. Differently than in instances of treaties (and the judgments of international tribunals), the definite nature of the principle of *uti possidetis iuris* depends on the fact of how clearly and precisely the border was determined before the new states were established. In the case of the dissolution of the SFRY, the principle of *uti possidetis iuris* presupposes the existence of the delimitation between Slovenia and Croatia within the former SFRY, however, in certain parts, regardless of the commitment of both states to this principle, it does not provide a clear answer on the course of the otherwise internationally recognised state border. The land border before independence was known (its course ran along the borders of the municipalities or cadastral municipalities), however, the republics never determined its course in a manner in which the borders were determined at the international level, namely by an agreement in which the borders would be clearly described, demarcated, and drawn on a map. The deficiency of the principle of *uti possidetis iuris* is evident with regard to those sections of the border where the borders of the municipalities or cadastral municipalities in the former republics overlapped or were not completely clear for some other reason already at that time. In cases of such disputable sections of the land border, the states can agree that the principle of *uti possidetis iuris* is a relevant criteria and that it is necessary to

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24 See also A. Pellet, The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples, *European Journal of International Law*, Vol. 3 (1992), pp. 178–181.

proceed from the territorial *status quo* on the day when the states became independent, however, this does not lead to a solution if they do not agree on what the specific course of the border demarcated in nature between the municipalities was or have different ideas regarding the territorial situation that the principle of *uti possidetis iuris* should protect. The situation could be even more complicated, as due to the unclear legal delimitation *de facto* authority (police, courts, etc.) may have overlapped in certain areas.<sup>25</sup> If the states interpret the application of the principle of *uti possidetis iuris* differently, it is clear that this principle can only be a temporary legal title concerning the course of the state borders. Especially with regard to the disputable sections, the states should agree on the definitive precise course of the border demarcated in nature, either directly by a treaty or by transferring this decision to an international judicial body. In comparison with the principle of *uti possidetis iuris*, clarity, which for determining the course of the border is entailed by a treaty or judicial decision, is an important element of the stability of the state borders.

30. From the viewpoint of international law, the separate question of the maritime border between the Republic of Slovenia and the Republic of Croatia arises. Differently than the land border, the maritime border between the republics within the former SFRY was not determined. Quite on the contrary, it proceeds from the former federal legislation that the SFRY had sovereignty at sea.<sup>26</sup> The sea was a unified federal territory on which the republics did not have their own, independent of the federation, legal title to exercise authority. This naturally does not entail that the republics did not exercise any *de facto* authority at sea or that the exercise of authority was not divided between them.<sup>27</sup> Upon gaining independence, the Republic of Slovenia

25 Also the specific history of the FTT from the perspective of international law and delimitation between the republics following the cessation of Zone B of the FTT, which *de facto* became a part of Yugoslavia with the Memorandum of Understanding of 1954, contributed to an unclear legal delimitation between Slovenia and Croatia at certain sections of the border.

26 The Act Concerning the Coastal Sea and the Continental Shelf of the SFRY (*Zakon o obalnem morju in epikontinentalnem pasu Socialistične federativne republike Jugoslavije* – Official Gazette SFRY, No. 49/87) in the first paragraph of Article 1 reads as follows: “The sovereignty of the Socialist Federal Republic of Yugoslavia (hereinafter referred to as the SFRY) shall extend to the coastal sea of the SFRY, to the airspace above it, and to the seabed and subsoil of that sea.”

27 Slovenia exercised *de facto* authority in the Bay of Piran before 25 June 1991, which in the former SFRY had the status of internal waters, which is evident from numerous documents published in the White Book on the Border between the Republic of Slovenia and the Republic of Croatia (*Bela knjiga o meji med Republiko Slovenijo in Republiko Hrvaško*), Ministrstvo za zunanje zadeve, Ljubljana 2006. In addition to a number of judicial and minor offence decisions of the Slovene authorities, the fact that in the former SFRY the Bay of Piran was considered a sea under Slovene authority is demonstrated also, for instance, by the Marine Fisheries Ordinance of 11 December 1987 (*Odlok o morskem ribištvu* – Official Publications of the Municipalities of Ilirska Bistrica, Izola, Koper, Piran, Postojna, and Sežana, No. 42/87; the Ordinance was adopted on the basis of the Marine Fisheries Act [*Zakon o morskem ribištvu*], Official Gazette SRS, Nos. 25/76 and 29/86), in accordance with which Slovene fishing waters extended from Cape Savudrija to Cape Debeli Rtič, and by the Long-Term Plan of the Socialist Republic of Slovenia for the 1986-2000 period (*Dolgoročni plan SR Slovenije za obdobje od leta 1986 do leta 2000* – consolidated cartographic part – Official Gazette SRS, No. 36/90) in which

became a coastal state. In view of the fact that a coastal state cannot exist without an appropriate area of sea, this entails that a part of the Adriatic Sea and the territory under this sea are a part of its state territory. What part of the sea with the pertinent maritime zones is Slovene state territory is in the first place a question which should be resolved applying the rules and principles of international law. However, they are effective only inasmuch as the states observe them when concluding border treaties or inasmuch as they are a basis for the decisions of international tribunals.

31. In the event of the dissolution of a state such as the SFRY, the question of succession at sea is open until a final agreement on the border is concluded. Also with reference to succession at sea, international law determines as a starting-point principle that the territorial *status quo* is protected by the principle of *uti possidetis*. In view of the fact that the border between Slovenia and Croatia within the former SFRY was legally not determined, the territorial situation at sea on the day of gaining independence is not protected by the principle of *uti possidetis iuris*, but is protected by the principle of *uti possidetis de facto*. This principle is applied in instances in which delimitation within the former common state was not determined, but *de facto* existed.<sup>28</sup> A *de facto* existing border is even more relevant under international law if it is based on express or tacit agreement between the states.<sup>29</sup> Given that before 25 June 1991 the Republic of Slovenia exercised *de facto* authority in the Bay of Piran, and especially given that from the conduct of the Republic of Croatia before independence it can be concluded that it expressly agreed therewith or tacitly consented to such, thus the international law principle of *uti possidetis de facto* protects the factual situation on the day of achieving independence. However, from the viewpoint of precision and the stability of the state borders, also this principle does not ensure permanently satisfactory results, especially not in the event of a dispute when each state has its own idea regarding the facts before independence. A definitive settlement of the border issue is therefore possible only by a treaty regulating borders or a treaty on transferring a decision to an international judicial body.

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the Bay of Piran is drawn in thirteen cartographic maps as a part of the Republic of Slovenia. The fact that also the federal government deemed the Bay of Piran to be Slovene sea follows, for instance, from the survey of lighthouses of the Hydrographic Institute of the Yugoslav Navy in Split of 1978, in which the Savudrija lighthouse (listed under number 178, E2642) was placed among the lighthouses of Slovene Primorje. Before 25 June 1991 the Republic of Slovenia also exercised its authority outside the Bay of Piran, as the Koper border police supervised the maritime border with Italy up to Point T 5. See the White Book on the Border between the Republic of Slovenia and the Republic of Croatia, *ibidem*, pp. 10–13, and Ž. Štefan, *Od zaščitnikov do pomorskih policistov: zgodovina in razvoj slovenske pomorske policije*, Ministrstvo za notranje zadeve Republike Slovenije, Ljubljana 1997, pp. 77 and 109.

28 Cf., D. Türk, *ibidem*, p. 414.

29 Such was also the position of the International Court of Justice in Case concerning the Frontier Dispute (Nicaragua/Honduras), Judgment of 8 October 2007. The Court observed that the principle of *uti possidetis iuris* might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation. In cases in which the court establishes that the border, in the sense of the principle of *uti possidetis iuris*, was not determined before independence, it may justify the maritime border if it establishes certain circumstances (in the case at issue, the question whether there was a tacit agreement between the states has been raised) also on the principle of *de facto* delimitation (see especially paragraphs 232 and 253 of the reasoning).

## B – IV

32. From the viewpoint of national law, with the adoption of the BCC the Republic of Slovenia became a sovereign and independent state. The BCC was adopted on 25 June 1991 as the fundamental constituting state act of the Republic of Slovenia. With its adoption the Republic of Slovenia definitively broke its ties with the SFRY and established itself as a sovereign state.<sup>30</sup> Section I of the BCC declared that the Republic of Slovenia is a sovereign and independent state and determined that the Constitution of the SFRY ceased to be in force for the Republic of Slovenia and that the new state assumed all rights and duties which under the republic or federal constitution were transferred to the authorities of the SFRY. An essential element of statehood is also a territory in which the state is the highest legal and *de facto* authority. The territory of the Republic of Slovenia was defined by Section II of the BCC, and namely so that it defined its state borders. As an internal act, the BCC did not have direct effects at the level of international law, even though its influence at the international level cannot be denied. With its adoption, the state declared to the world that it had met the international law criteria for the existence of a state, which was important for recognition by other states. The aim of the BCC was thus to constitute at the constitutional level and to declare at the international level a new sovereign state, which would be an equal subject in the international community.
33. From the formal perspective of the hierarchy of legal acts, the BCC was adopted as a legal act at the constitutional level.<sup>31</sup> The constitutional power of the BCC, however, was not limited only to the moment of its adoption, but it is permanently applicable law. This is additionally confirmed by the fact that also the Constitution in its preamble refers to the BCC, where the BCC is explicitly defined as one of the starting points of the Constitution.<sup>32</sup> The Constitution, which by its authority as the highest legal act determines the organisation of the state power and by its determined human rights and fundamental freedoms, also its limits,<sup>33</sup> draws its power also from the BCC. The

30 With reference to state sovereignty, we can be distinguished between internal and external sovereignty. Internal sovereignty entails that the state is the highest legal authority in its territory, whereas external sovereignty entails that it is not dependant on any other state. See R. Jennings, A. Watts (Editor), *Oppenheim's International Law*, Ninth Edition, Longman, London in New York 1996, pp. 120–123. On the concept of the state, see also J. Crawford, *The Creation of States in International Law*, Second Edition, Oxford University Press, Oxford 2006, pp. 3–254. On the concept of the state and sovereignty, see also L. Pitamic, *Država* [The State], Cankarjeva založba, Ljubljana 1997, pp. 1–44.

31 This is also affirmed in Sections IV and V of the BCC, in which the charter calls itself “a constitutional act”.

32 The preamble to the Constitution reads as follows: “Proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and from fundamental human rights and freedoms, and the fundamental and permanent right of the Slovene nation to self-determination; and from the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood, the Assembly of the Republic of Slovenia hereby adopts the Constitution of the Republic of Slovenia.”

33 It is precisely because of the importance of human rights and fundamental freedoms that there should be no confusion between the state and the sovereignty of the people. State sovereignty is connected to the existence of the state as a sovereign and independent subject, which is only a subject of international law, whereas

BCC is a formally applicable constitutional act and as such a permanent and inexhaustible constitutional foundation of the statehood of the Republic of Slovenia.

34. From the viewpoint of its substance, upon its adoption the BCC did not only have declaratory international law effects, but as a constitutional act it mainly had internal constitutive legal effects. The constitutional effect of Section II of the BCC was that it defined the state borders and thereby determined the territory on which the Republic of Slovenia became a sovereign and independent state. It is immediately clear that Section II of the BCC did not determine the borders in a manner that is usual in treaties, as it did not describe their course or determine them by geographic coordinates. However, as the provision refers to the internationally recognised external state borders of the former SFRY and to the border with Croatia, as it existed within the former SFRY, the borders were determined also in national constitutional law. Section II of the BCC thus constitutionalised the state borders of the Republic of Slovenia.
35. The constitutionalisation of the state borders in Section II does not merely entail a definition of the initial territorial state of affairs, thus the determination of the territory on which the Republic of Slovenia became a sovereign state on 25 June 1991. Namely, when interpreting Section II of the BCC also the provisions of the Constitution must be taken into account, which in relation to the BCC is *lex posterior*. Only by a joint consideration of the provisions of the Constitution and the BCC can the substantive law effects of Section II of the BCC be definitively determined. Thereby, it is immediately clear that the Constitution did not explicitly abrogate in any way any provision of the BCC. Quite on the contrary, the Constitution in its preamble explicitly refers to the BCC and defines it as one of its starting points, whereby the formal applicability of the BCC was undoubtedly also extended into the present and the future. Furthermore, for the question of the substantive application of Section II of the BCC, particularly Article 4 of the Constitution is relevant.
36. Article 4 of the Constitution, which determines that Slovenia is a territorially unified and indivisible state, has in and of itself two meanings. On one hand, territorial unity refers to the type of organisation of the state. This entails that Slovenia is a unitary state and may not be organised as a federal state; in the state the establishment of territorial units that would have the status of federal units is not allowed. On the other hand, the indivisibility of the state refers to the sovereignty of the state in its territory. The state authorities exercise their authority in the entire state territory, therefore, it is not allowed to renounce to the benefit of another state a part of the state territory

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the sovereignty of the people refers to the quality of such state power. With reference to the concept of the sovereignty of the people, what is determined in the second paragraph of Article 3 of the Constitution comes to the foreground, namely that in Slovenia power is vested in the people and that this power is exercised by citizens directly and through elections, consistent with the principle of the separation of legislative, executive, and judicial powers. Human rights and fundamental freedoms are especially important for a correct understanding of the concept of the sovereignty of the people, and these are also stated as a starting point in the preamble to the Constitution; even before that, upon its establishment, Slovenia bound itself in Section III of the BCC to guarantee the protection of human rights and fundamental freedoms.

or the exercise of the functions of the sovereign authority in this territory.<sup>34</sup> In another meaning, Article 4 of the Constitution presupposes that the territory of the Republic of Slovenia is known and defined by the state borders and it is precisely this that was the aim of Section II of the BCC. The Constitution was adopted on 23 December 1991, thus six months following the BCC, and the territory whose unity and independence are ensured by Article 4 of the Constitution was undoubtedly the territory determined by the state borders defined in Section II of the BCC. If Article 4 of the Constitution is to be an effective constitutional provision also today, then also Section II must be considered applicable law which has a legally relevant substance still today.

37. Upon its adoption, the BCC undoubtedly mainly had a legal-historical task to constitute the state of the Republic of Slovenia and in this sense it is a formally applicable constitutional basis of the state sovereignty still today. However, Section II of the BCC is not only a formally applicable provision, but because of Article 4 of the Constitution it is still today a substantively effective constitutional provision which must be taken into account when the borders with neighbouring states are altered at the level of international law. Article 4 of the Constitution and Section II of the BCC are mutually connected, namely that the content of Article 4 of the Constitution depends on Section II of the BCC, which draws its current applicability from Article 4 of the Constitution. The preamble to the Constitution underlines the continuous legal applicability of the BCC, whereas it proceeds from Article 4 of the Constitution that Section II of the BCC is living law in terms of its substance. Section II of the BCC is not exhausted in terms of substance, but together with Article 4 of the Constitution it entails an applicable and relevant constitutional definition of the territory of the Republic of Slovenia.
38. In the above-mentioned sense, these constitutional provisions entail a constitutional obstacle to altering the state borders. In a territorially fairly small state, as is the Republic of Slovenia, such provisions also have a guarantee function; by these provisions the constitution framers established the state territory and state borders as one of the fundamental values which must be protected at the constitutional level. A treaty which would alter the course of the state borders would also entail an alteration of the territory on which the BCC on 25 June 1991 established the state sovereignty of the Republic of Slovenia and would therefore be inconsistent with Section II of the BCC. Regarding Austria, Italy, and Hungary, the altered borders would be internationally recognised state borders, however, they would no longer be the “internationally recognised state borders [of] the hitherto SFRY”, as determined by Section II of the BCC. Regarding Croatia, a treaty establishing the border would entail the alteration of the “border [...] within the hitherto SFRY” if the border were not determined where the border between the republics in the SFRY had been, as the Republic of Slovenia understood the border when declaring independence and

34 Cf., I. Kaučič, F. Grad, *Ustavna ureditev Slovenije* [The Constitutional System of Slovenia], GV Založba, Ljubljana 2003, p. 75, and T. Jerovšek in: L. Šturm (Editor), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 111.

as the Republic of Slovenia constitutionalised it in Section II of the BCC. For the constitutional review of the Agreement this entails that Article 4 of the Constitution and Section II of the BCC constitute a whole and are together a major premise for constitutional deciding. Nonconformity with Section II of the BCC would at the same time also entail nonconformity with Article 4 of the Constitution.

39. Considering the legal nature of the BCC and its historical role as a constitutive act of the state of the Republic of Slovenia, the BCC as a constitutional act is nevertheless different than the Constitution in the sense that it cannot be amended through direct interventions in its text. Such intervention with the BCC would not only entail amending the text retroactively, but also *de facto* changing the legal and factual context in which it was adopted. Therefore, it is completely logical that the BCC, differently than the Constitution, does not envisage a procedure for amending it. Nevertheless, from the substantive point of view, Section II of the BCC is not an unchangeable constitutional provision. Its content can be amended by an act at the constitutional level, i.e. an act adopted in the procedure for amending the Constitution, however, not by directly intervening in the BCC, but by amending the Constitution. Such constitutional amendment can explicitly amend Section II of the BCC, or it may only be an amendment in accordance with the interpretative principle that a later regulation amends an earlier one (*lex posterior derogat legi priori*).

#### B – V

40. Proceeding from the finding that Section II of the BCC constitutionalised the state borders of the Republic of Slovenia and that also today it is an applicable and relevant constitutional law, the question arises what exactly is the substance of this constitutional provision. In the Republic of Slovenia the state territory and state borders are also a constitutional subject-matter, however, the question is in what sense and scope, as well as what this entails regarding amending such.
41. In addition to the role and aim of the BCC in its entirety, when interpreting Section II also the circumstances of law and fact that influenced the adoption of the BCC must be separately taken into account. In addition to the already mentioned constitutional and statutory law of the former SFRY and the former republic of Slovenia, the Constitutional Court, when interpreting Section II of the BCC, considered to be of a key importance the rules and principles of international law that regulated the fundamental relations after the dissolution of the SFRY, particularly regarding the territory and state borders between the newly established and neighbouring states, as well as between the newly established states themselves. With the adoption of the Constitution, the supremacy of international law over constitutional law was not recognised in the constitutional system of the Republic of Slovenia, however, the interpretation of Section II of the BCC must proceed from the fact that questions of the formation of new states and determining their state borders lie primarily within the sphere of international law and that these generally binding rules and principles of international law existed when Slovenia became a sovereign and independent state. When interpreting Section II of the BCC in the light of the rules and principles of

international law which regulate questions of the territorial integrity and continuity of state borders, the Constitutional Court also considered the preamble to the BCC and the Constitutional Act Implementing the BCC (*Ustavni zakon za izvedbo temeljne ustavne listine o samostojnosti in neodvisnosti Republike Slovenije* – hereinafter referred to as the CAIBCC) of 25 June 1991, as well as national and international instruments and political documents, from which it proceeds that already in the process of gaining independence, the state committed itself to respecting international law, as such was important for obtaining recognition by other states.

42. As regards Austria, Italy, and Hungary, Section II of the BCC determines that the state borders are “the internationally recognised state borders between the hitherto SFRY [...] in the part where these states border the Republic of Slovenia”. As the internationally recognised state borders of the hitherto SFRY are defined as the state borders of the Republic of Slovenia, the BCC refers to treaties which were valid legal titles concerning the course of the state borders before independence and also determined precisely where the borders ran their course. In this sense, Section II of the BCC was a unilateral declaration by which the existing international state of affairs on 25 June 1991 was affirmed regarding the state borders with Austria, Italy, and Hungary. Affirming the existing internationally recognised state borders in national law was not absolutely necessary, as already from the rules and principles of international law which applied during the time Slovenia was gaining independence and which bound Slovenia as a newly emerging state, there follows the requirement that the territorial integrity of the neighbouring states and the inviolability of the state borders be respected, and especially the requirement that the treaties that determine the state borders be respected, as the cessation of the former state and the establishment of the new states do not have an influence on the applicability of the treaties regulating the state borders. From the perspective of international law, the aim of Section II of the BCC was primarily to demonstrate the commitment to international law in the process of gaining independence. This also clearly proceeds from the Declaration of Independence (*Deklaracija ob neodvisnosti*) of 25 June 1991, which the former Assembly of the Republic of Slovenia adopted together with the BCC; the Declaration in Section IV, *inter alia*, determines that “the Republic of Slovenia [as an international and legal entity] pledges to respect all the principles of international law and, in the spirit of legal succession, the provisions of all international contracts signed by Yugoslavia and which apply to the territory of the Republic of Slovenia”. A similar provision is contained in Article 3 of the CAIBCC, which was also adopted together with the BCC, and reads as follows: “Treaties concluded by Yugoslavia which apply to the Republic of Slovenia remain in force on the territory of the Republic of Slovenia.”
43. In the part which refers to Croatia, Section II of the BCC determines that “the border [...] within the hitherto SFRY” is the state border between the Republic of Slovenia and the Republic of Croatia. Proceedings from the supposition that the Republic of Slovenia gained independence in accordance with the generally applicable rules and principles of international law, the text of Section II of the BCC in the part which refers to Croatia is to be understood within the meaning of the international law prin-

ciple of *uti possidetis*. This actually already proceeds from the preamble to the BCC, in which the Republic of Slovenia declared its commitment to “respect [...] [the] sovereignty and territorial integrity [of other Yugoslav republics]”. Also the Constitutional Court in Opinion No. Rm-1/00 with reference to the border with the Republic of Croatia has already adopted the position that “in terms of international law, at the moment of the establishment of the independent and sovereign Slovenia, its former republic border “within the former SFRY” became its state border, on the basis of the principle of *uti possidetis*.” Following a detailed definition of this principle, the Constitutional Court, “considering such interpretation of the BCC”, thus in the sense of the principle of *uti possidetis*, reviewed the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation.<sup>35</sup> Moreover, affirmation of the principle of *uti possidetis* at the constitutional level was not necessary, as this is a general principle of international law which takes effect automatically when a new independent state is established. Also in this part the significance of Section II of the BCC from the perspective of international law is primarily a unilateral recognition of the territorial *status quo* between the Republic of Slovenia and the Republic of Croatia until the states determine the course of the border by a treaty.

44. A unilateral constitutional commitment to respect the existing treaties and the principle of *uti possidetis* was also important for the international recognition of the Republic of Slovenia, which is clear from certain political instruments which were drawn at the level of the hitherto European Economic Community (hereinafter referred to as the EEC) during the process of obtaining independence. From the Guidelines for the Recognition of New States in Eastern Europe and the Soviet Union of 16 December 1991, and from the Declaration on Yugoslavia of 16 December 1991,<sup>36</sup> it is namely clear that the Member States of the hitherto EEC were willing to recognise the new states only if they committed themselves to international law, *inter alia*, explicitly also to the principle of the inviolability of all borders which may only be altered peacefully and by common consent.
45. The question what was constitutionalised by Section II of the BCC must thus be answered that it constitutionalised the state borders, inasmuch as they were determined and secured by international law when the Republic of Slovenia became a sovereign and independent state. Under international law, the Republic of Slovenia succeeded to its borders from the former SFRY, however, by Section II of the BCC it determined them at the constitutional level. To paraphrase, Section II of the BCC is a constitutional reflection of international law regulating the question of the borders at the moment when Slovenia became a sovereign and independent state. The constitutionalisation of the state borders furthermore entails that the borders at the

35 Act on the Ratification of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation (*Zakon o ratifikaciji Sporazuma med Republiko Slovenijo in Republiko Hrvaško o obmejnem prometu in sodelovanju* – Official Gazette RS, No. 43/01, MP, No. 20/01).

36 The Guidelines for the Recognition of New States and the Declaration on Yugoslavia were adopted by the Council of Ministers of the European Economic Community. The documents are published in the European Journal of International Law, Vol. 4 (1993), pp. 72 and 73.

constitutional level are determined as they were defined and protected in accordance with international law at the moment of the formation of the new state, thus when the BCC was adopted; the precision of their course at the constitutional level depends on how precisely they are determined at the level of international law.

46. Regarding the state borders with Austria, Italy, and Hungary, there can be no doubt that Section II of the BCC determined the course of the borders as they are determined (i.e. described, determined by coordinates, and drawn on maps) in treaties of the SFRY which Slovenia succeeded to. A treaty that would alter the course of these borders, as they existed on the day the BCC was adopted, would thus be inconsistent with Section II of the BCC in conjunction with Article 4 of the Constitution. The border with the Republic of Croatia has never been determined at the international level, whereas between the republics within the former SFRY it had never been determined “in a manner in accordance with international law”. The land border did exist and was known, however it was not determined by an agreement between the republics which would clearly describe its course in its entire length and determine such by geographic coordinates. Following independence, the hitherto republic border on land became an internationally recognised border which has its international law basis in the principle of *uti possidetis iuris*. Section II of the BCC, which is a constitutional expression of this principle of international law therefore determined the Slovene-Croatian land border as the border was determined and protected by the principle of *uti possidetis iuris* following independence.
47. Differently than the land border, the maritime border between Slovenia and Croatia within the former SFRY was not determined,<sup>37</sup> but the sea was under the direct sovereignty of the federation. Therefore, the question arises how to interpret Section II of the BCC, which determines the state border between the states as “the border within the hitherto SFRY”. As the sea was under direct Yugoslav sovereignty, the states of Slovenia and Croatia cannot demonstrate their legal titles at sea. This entails that succession in accordance with the principle of *uti possidetis iuris* does not apply. On the other hand, what should be taken into consideration is that the Republic of Slovenia is a coastal state and it was a coastal republic already as a part of the former SFRY and *de facto* exercised its authority in a part of the Adriatic Sea and also had access to the High Sea. The interpretation that the hitherto Slovene Assembly adopted the BCC by which it determined the state territory and that this BCC does not include the sea, is not acceptable precisely for this reason. From the point of view of international law, also maritime territory is a matter of succession which is secured by the principle of *uti possidetis iuris* until a treaty is adopted. If a state cannot demonstrate a legal delimitation within a former common state, the state border after independence enjoys legal protection on the basis of the secondary principle of *uti possidetis de facto*. Due to the fact that the interpretation that

37 The maritime border is determined only between the Republic of Slovenia and the Republic of Italy, and namely by the Treaty between the Socialist Federative Republic of Yugoslavia and the Republic of Italy with Annexes from I to X of 10 November 1975 (Official Gazette SFRY, MP, No. 1/77; the Act on Notification of Succession [Akt o notifikaciji nasledstva], Official Gazette RS, No. 40/92, MP, No. 11/92). The Republic of Slovenia is a legal successor to this treaty.

the Republic of Slovenia gained independence without the sea is not acceptable from the legal point of view, Section II of the BCC as regards the maritime border must be interpreted in the sense of the international law principle of *uti possidetis de facto*.<sup>38</sup> This entails that, in accordance with Section II of the BCC, the maritime border between the Republic of Slovenia and the Republic of Croatia is along the line on the sea surface<sup>39</sup> to where Slovenia *de facto* exercised its authority before its independence.

48. The fact that Section II of the BCC constitutionalised the state borders in accordance with the principles of *uti possidetis iuris* and *uti possidetis de facto* entails that the state borders between the Republic of Slovenia and the Republic of Croatia are determined at the constitutional level. However, such constitutionalisation does not entail that also their precise course demarcated in nature is determined. In view of the long-lasting dispute between the Republic of Slovenia and the Republic of Croatia about the course of the border (at certain border sections), although it is determined in the basic constitutional charters on the sovereignty and independence of

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38 Such understanding of Section II of the BCC also proceeds from the acts of the National Assembly and the Government, which were adopted after 25 June 1991, but they demonstrate how the legislative and executive branches of power understand the position regarding the sea on 25 June 1991 from the perspective of international law. In the Memorandum on the Bay of Piran (*Memorandum o Piranskem zalivu*) of 7 April 1993, the Government voiced its support for “the preservation of the integrity of the Bay of Piran under [Slovene] sovereignty and jurisdiction”. The Memorandum rejects the application of the criterion of a medium line, which would be an unfair and unrealistic solution: “Consideration must be given to the fact that the Republic of Slovenia exercised its jurisdiction and authority in the Bay of Piran in the former SFRY and that such was also the situation when both states declared independence on 25 June 1991. In view of such situation, the most appropriate course of action is certainly to apply the principle of *uti possidetis*, which confirms the *de facto* exercise of authority of the Republic of Slovenia as a former republic within the former SFRY over the entire Bay of Piran from the legal point of view.” The positions and resolutions adopted with reference to the Bay of Piran by the National Assembly or the Committee for International Relations (*Odbor za mednarodne odnose* – hereinafter referred to as the Committee) during its 1992-1996 term of office are similar. At a session held on 26 May 1993, the Committee adopted the following position: “With reference to the Bay of Piran, the National Assembly of the Republic of Slovenia reiterates that in modern history Slovenia had undisputed jurisdiction over the Bay of Piran. It appropriately administered such and provided for its protection and preservation. The Bay of Piran belongs to the Republic of Slovenia also in accordance with the international law principle of *uti possidetis*.” At a session held on 28 June 1994 the Committee furthermore adopted the draft position that “Slovenia continues to respect the principle of *uti possidetis*, which particularly entails the full sovereignty of Slovenia over the Bay of Piran.” The last such resolution of the National Assembly was adopted on 18 February 2009 – The Resolution on the Protection of Slovene Interests with regard to the Accession of the Republic of Croatia to the North Atlantic Treaty (*Sklep o zaščiti slovenskih interesov ob pristopanju Republike Hrvaške k Severnoatlantski pogodbi*) – in which the National Assembly rejects “any modifications of the situation that existed on land and at sea on 25 June 1991” and draws attention to the fact that on that day “the Slovene authorities, *inter alia*, exerted their jurisdiction in the settlements on the left bank of the Draginja river, on the territory on the left bank of the Mura river at Hotiza [and that] the Republic of Slovenia had a territorial junction to international waters and exercised its jurisdiction in the entire Bay of Piran.”

39 When applying the term “boundary line”, what must be taken into consideration is that state borders appear as lines only on the surface of the Earth. As they also stretch into the air space and under the land surface, the state borders are in fact surfaces which two-dimensionally delimitate the area of the sovereignty of the neighbouring states.

both states that the border between them is where it was within the former common state,<sup>40</sup> and although considering Opinion No. 3 of the Badinter Committee both states are bound under international law to respect the principle of *uti possidetis* until they agree otherwise, it is evident that this principle in and of itself does not give a completely clear, let alone acceptable answer for both states regarding the course of the state border demarcated in nature.

49. Regarding the land border between the Republic of Slovenia and the Republic of Croatia, the lack of clarity regarding its course can arise at those sections where a clear legal title cannot be demonstrated or where the states, regardless of their commitment to the same principle, interpret the principle of *uti possidetis iuris* differently. The principle of *uti possidetis iuris* as a legal title presupposes the existence of a delimitation between the republics within the former SFRY, however, it does not provide a clear answer regarding the course of the currently internationally recognised state border. The imprecision regarding the exact course of the border, which was transposed also in the national constitutional system through Section II of the BCC, is built into this principle. With regard to the border with Croatia, the principle of *uti possidetis iuris* and Section II of the BCC entail only an incomplete legal basis which presupposes that the states will agree on its course demarcated in nature, either directly by a treaty or by transferring this task to an international judicial body. In this sense, in Opinion No. Rm-1/00 the Constitutional Court has already adopted the position that the text of Section II of the BCC entails that the border is “presumably known, however, not yet concretised in a border treaty and demarcated in nature”. Similarly as in the case of a land border, the principle of *uti possidetis de facto* also does not give a clear answer regarding the precise course of the maritime border. The imprecision regarding a precise course of the maritime border can be even more explicit, as the principle of *uti possidetis de facto* does not proceed from a legal delimitation of the power between the republics within the former SFRY but is based on the delimitation of *de facto* exercise of this authority. The disputable nature of this border is a result of the circumstance that the states interpret the state of the facts before independence differently, and even more so of the circumstance that the Republic of Croatia does not at all recognise this principle as a starting point for determining the course of the maritime border.
50. Regardless of the above-mentioned deficiencies of the principles of *uti possidetis iuris* and *uti possidetis de facto*, the land border between the Republic of Slovenia and the Republic of Croatia is constitutionalised in Section II of the BCC as the border that had its course along the borders of the hitherto municipalities or cadastral municipalities, whereas the maritime border as the border that has its course along the line up to where the Republic of Slovenia *de facto* exercised its authority within the for-

40 A similar provision as Section II of the BCC is contained in Section V of the Croatian *Ustavne odluke o suverenosti i samostalnosti Republike Hrvatske* of 25 June 1991: “Državne granice Republike Hrvatske su međunarodno priznate državne granice dosadašnje SFRJ u dijelu u kojem se odnose na Republiku Hrvatsku, te granice između Republike Hrvatske i Republike Slovenije, Bosne i Hercegovine, Srbije i Crne Gore u okviru dosadašnje SFRJ.”

mer SFRY. In both instances the state border between the states has to be concretised at the level of international law, thus common consent regarding its course demarcated in nature must be reached. Section II of the BCC therefore entails a known delimitation between the states, although it is not precisely determined either on land or at sea. In comparison with the precisely determined borders with Austria, Italy, and Hungary, this provision, in the part which refers to Croatia, is not adequately determined and will be complete in terms of substance only when the land and maritime borders are described and determined geographically.

51. The constitutionalisation of the state borders, on one hand, entails that the National Assembly may not ratify by a law a treaty which would alter the state borders as they are determined in Section II of the BCC. Regarding the border with Croatia, on the other hand, the constitutionalisation does not entail the prohibition that the course of the border is demarcated in nature. Section II of the BCC enables further determination of the course of the state border on land and at sea between the Republic of Slovenia and the Republic of Croatia, however, the legislature is thereby limited by the principles of *uti possidetis iuris* (on land) and *uti possidetis de facto* (at sea). The position of the Constitutional Court in Opinion No. Rm-1/00 must also be understood in this sense, namely that “the BCC and the Constitution do not prohibit the conclusion of treaties that would regulate border issues” and that a treaty “could also contain provisions on the state borders, which would in and of itself not be contrary to the BCC and the Constitution provided that it remains within the framework of Article 4 of the Constitution [...]”. Owing to the connection between Article 4 of the Constitution and Section II of the BCC, it must be added that a treaty regarding the state border should also be within the frameworks of Section II of the BCC.

## B – VI

52. As regards the fact that the Republic of Slovenia and the Republic of Croatia “through numerous attempts [...] have not resolved their territorial and maritime border dispute in the course of the past years” – as is admitted in the preamble to the Agreement<sup>41</sup> – the states have agreed that the Republic of Slovenia and the Republic of Croatia establish an arbitral tribunal whose task will be, *inter alia*, to determine the course of the land and maritime border between the states. The outcome of this agreement is the Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, which was signed by the Presidents of the Governments on 4 September 2009 in Stockholm. On behalf of the Republic of Slovenia, the National Assembly ratifies the Agreement.<sup>42</sup> In accordance with Article 3 (4)

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41 The preamble to the Agreement in this part in the original English version reads as follows: “[...] Whereas through numerous attempts the Parties have not resolved their territorial and maritime border dispute in the course of the past years, [...]”.

42 In Opinion No. Rm-1/97 the Constitutional Court already clarified that from the viewpoint of international law, ratification is a unilateral declaration of the intention of one contracting party addressed to the other contracting party, to the effect that it accepts the content of a signed treaty as binding. Such declaration of intention is delivered by the state on the occasion of exchanging instruments of ratification. According to the fifth

of the Agreement, the Arbitral Tribunal has the power to interpret the Agreement.<sup>43</sup> As the ratification procedure is interrupted by the procedure for the review of constitutionality before the Constitutional Court, the Agreement must also be interpreted by the Constitutional Court for the purposes of the constitutional review.

53. When reviewing the provisions of the Agreement, also the aim of the *a priori* review of the constitutionality of treaties must be taken into account. The Constitutional Court has already adopted positions thereon in Opinion No. Rm-1/97 and later reiterated them in Opinions No. Rm-1/00 and No. Rm-1/02. The constitutional order namely does not accept the supremacy of international law over constitutional provisions. In the hierarchy of legal acts, treaties are above statutory provisions,<sup>44</sup> however, they must be in compliance with constitutional provisions. *A priori* review of the constitutionality of a treaty in the ratification procedure has a preventive purpose. Its aim is to prevent the National Assembly from ratifying a treaty whose implementation would entail that either directly applicable unconstitutional norms would enter into national law (which would require direct unconstitutional functioning of state or other authorities by concrete actions or by the issuance of individual acts) or that the state would bind itself to adopt general legal acts in national law which would be inconsistent with the Constitution in order to adhere to a treaty. The preventive purpose of the *a priori* review is that in time, namely before ratification, the state is prevented from assuming international obligations which would be inconsistent with the Constitution and which the state therefore could not fulfil.<sup>45</sup> The Constitutional Court therefore had to review whether Article 3 (1) (a),

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indent of Article 107 of the Constitution, such instruments are issued by the President of the Republic. The President of the Republic may issue such instrument of ratification after the National Assembly has adopted a law on the ratification of a treaty. The instrument of ratification is an international act, whereas the law on ratification is an act under national law, whose importance is twofold. On one hand, it is an authorisation granted to the President of the Republic, allowing him to issue an instrument of ratification and, on the other hand, it is a normative act by which obligations under international law are transformed into the national law of the state. Thus, with its implementation, the provisions of a treaty are integrated into the national legal order under the condition that they have been ratified in accordance with national law of the Republic of Slovenia.

- 43 Article 3 (4) of the Agreement in the original English version reads as follows: "The Arbitral Tribunal has the power to interpret the present Agreement."
- 44 In accordance with Article 8 of the Constitution, laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. In accordance with the second paragraph of Article 153 of the Constitution, laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties.
- 45 By treaties the Republic of Slovenia binds itself as a state in relation to other parties to such treaties, these being other states or subjects of international public law. By treaties the state undertakes international obligations to which international law applies. The conclusion and implementation of treaties is mainly regulated by the Vienna Convention on the Law of Treaties, which is also binding on Slovenia. An obligation undertaken on the basis of a treaty binds the state to fulfil such obligation. In accordance with Article 26 of the Vienna Convention on the Law of Treaties, every treaty in force is binding upon the parties to it and must be performed by them in good faith (*bona fide*). This is the principle of *pacta sunt servanda*, which is one of the fun-

Article (4) (a), and Article 7 (2) and (3) of the Agreement individually or together bound the state to assume an unconstitutional international obligation.

54. Article 3 (1) (a) of the Agreement, in accordance with which the Arbitral Tribunal is to determine the course of the land and maritime border, entails that the Arbitral Tribunal will have to describe the course of the border line demarcated in nature and determine such by geographic coordinates. As the course of the border between the republics in the former SFRY, and also subsequently, has never been determined in such a precise manner relevant from the perspective of international law, the Arbitral Tribunal will determine the course of the border originally. The award of the Arbitral Tribunal regarding the land border will entail the concretisation of the border in international law, as it was known and determined within the former SFRY in national law, whereas regarding the maritime border such will entail a division of the former legally unilateral, although *de facto* divided, Yugoslav sea in the north Adriatic at the international level.
55. When determining the course of the border, the Arbitral Tribunal is bound by the subject-matter of the dispute as specified by the Parties to the Agreement, whereby the Parties are not limited in specifying the dispute. By an award the Arbitral Tribunal will determine the course of the border on those sections of the border which the states will specify as disputable; in determining the border line, the Arbitral Tribunal will also stay within the territorial frameworks as specified by the Parties. On sections regarding which the Arbitral Tribunal will decide, the border will be determined by its award, whereas in the remaining (i.e. the majority) undisputed part, it will still be based on the principle of *uti possidetis*. This proceeds from Article 3 (3) of the Agreement, which determines that “the Arbitral Tribunal shall render an award on the dispute”,<sup>46</sup> whereas Article 3 (2) of the Agreement in accordance with this determines that “the Parties shall specify the details of the subject-matter of the dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the Parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties.”<sup>47</sup> The Agreement

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damental principles of international contract law. If the fulfilling of an international obligation requires the adoption or amendment of a corresponding normative rule, which should apply in the national legal order, in accordance with international law, the state is obliged to fulfil the said obligation in such manner. Failure to fulfil an obligation constitutes a violation of the treaty and a breach of international law. The fulfilment of a treaty can be realised already by the fact that its provisions pass directly into the national legal order of the state at the time of the entry into force of such treaty. If the provisions of a treaty are not directly applicable, it is necessary, with a view to fulfilling contractual obligations, that appropriate measures be taken by national law – i.e. the adoption of appropriate legal instruments (see Constitutional Court Opinion No. Rm-1/97).

46 Article 3 (3) of the Agreement in the original English version reads as follows: “The Arbitral Tribunal shall render an award on the dispute.”

47 Article 3 (2) of the Agreement in the original English version reads as follows: “The Parties shall specify the details of the subject-matter of the dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the Parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties.”

thus gives the Parties to the Agreement the right and duty to carefully specify their understanding of the matter from the viewpoint of international law and submit all relevant evidence. This is essential in order for the Arbitral Tribunal to reach a legally substantiated and convincing award. In drafting and specifying the subject-matter of the dispute, it is naturally also of key importance that the Republic of Slovenia, when defining its international law positions, also consider to the greatest extent possible the constitutional starting points that proceed from this Opinion and that implicitly proceed from the above-mentioned positions of the National Assembly and the Government. With reference to such, the constitutional starting points do not limit the Republic of Slovenia to specifying, on the basis of Article 3 (2) of the Agreement, with reference to the disputable parts of the land border, the scope of the territories regarding which the Arbitral Tribunal shall determine the course of the border, whereas regarding the maritime border such starting points do not limit the Republic of Slovenia to submitting an appropriate proposal for a fair and just division of the north part of the Adriatic Sea as well as a proposal for a junction of the territorial sea of the Republic of Slovenia to the High Sea.

56. Article 3 (1) (a) of the Agreement is a provision bestowing authority which only provides for the power of the Arbitral Tribunal to determine the course of the land and maritime border between the Parties to the Agreement. Section II of the BCC, which in the sense of the principles of *uti possidetis iuris* and *uti possidetis de facto* constitutionalised the course of the border between the Republic of Slovenia and the Republic of Croatia, does not prohibit the state from determining the course of this border demarcated in nature in an agreement with the neighbouring Croatia. Quite on the contrary, by determining the course of the border demarcated in nature, Section II of the BCC is to be concretised at the international level. Section II of the BCC to an even lesser extent limits the state in any way in selecting the manner in which the course of the border demarcated in nature is to be determined. Section II of the BCC does not determine which international law path the state should select in order to determine the course of the state border; from the point of view of constitutional law, any mechanism of international law for determining the course of the border would be acceptable. Therefore, the states may select any possibility – they may conclude a treaty by which they directly determine the entire length of the course of the border; they may conclude several treaties by which they directly determine the border in sections; also treaties leaving the determination of the course of the border in its entirety or only in individual sections to a permanent international tribunal or other *ad hoc* international judicial body would be constitutionally admissible. In view of the fact that from the viewpoint of Section II of the BCC, the only relevant question is where the course of the state borders runs and not also how course of the state borders should be determined, Article 3 (1) (a) of the Agreement is not inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC.
57. Article 4 (a) of the Agreement will be of key importance for the deciding of the Arbitral Tribunal in terms of content; in accordance with this provision, the Tribunal will apply “the rules and principles of international law” for the determination of the

maritime and land border. The rules and principles of international law will be the criteria for determining the course of the border, however, it follows from other provisions of the Agreement that the Arbitral Tribunal will also consider certain other circumstances of law and fact when interpreting and applying the rules and principles of international law. Thus the Agreement in Article 5 determines the critical date, namely that “no document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side of the dispute and cannot, in any way, prejudice the award.”<sup>48</sup> The Arbitral Tribunal will thus have to consider only circumstances of law and fact as they existed in the disputed areas before 25 June 1991, which is determined in the Agreement as the critical date, and in the light of this, interpret and apply the rules and principles of international law. It will also have to consider the preamble to the Agreement<sup>49</sup>, in which the Parties to the Agreement affirmed their commitment to “a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests”.<sup>50</sup> Also these aspects of inter-state relations will be important when interpreting the relevant rules and principles of international law.

58. Also Article 4 (a) of the Agreement does not determine the course of the state borders between the Republic of Slovenia and the Republic of Croatia. The provision determines the relevant law for the determination of the course of the border, which cannot be alleged to be unconstitutional. In accordance with Article 4 (a) of the Agreement, the Arbitral Tribunal will have to substantiate its decision by means of the rules and principles of international law, which it is to interpret in the spirit of good neighbourly relations and the vital interests of the Parties to the Agreement. One of the basic and decisive principles of international law for the deciding of the Arbitral Tribunal will undoubtedly be the principle of *uti possidetis*. The Constitutional Court cannot discuss what the decision of the Arbitral Tribunal might be; in its nature, such will be a judicial decision whose precise content cannot be predicted. Also a precise analysis of the rules and principles of international law and their application in the hitherto international case law could not provide a clear answer as to where the Arbitral Tribunal will determine the border between Slovenia and Croatia. Guessing what the decision of the Arbitral Tribunal will be cannot be a task of the Constitutional Court. For a constitutional review of Article 4 (a) of the Agreement it suffices to establish that the provision does not determine the course of the border and that the rules on the basis of which the Arbitral Tribunal is to determine the course of the border are not unconstitutional.

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48 Article 5 of the Agreement in the original English version reads as follows: “No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side of the dispute and cannot, in any way, prejudice the award.”

49 In accordance with the second paragraph of Article 31 of the Vienna Convention on the Law of Treaties, the preamble to the treaty is relevant for the interpretation of its normative provisions.

50 The Preamble to the Agreement in this part in the original English version reads as follows: “[...] Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests, [...]”.

59. The legal effects of the award of the Arbitral Tribunal are determined in Article 7 (2) and (3) of the Agreement. The second paragraph determines that the award is binding on the Parties and constitutes a definitive settlement of the dispute, whereas the third paragraph requires the Parties to take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award. The award of the Arbitral Tribunal will thus be definitive, binding, and will have direct legal effects. For its applicability and implementation, either by concrete actions or by adopting the necessary regulations, additional ratification by the National Assembly will not be necessary. The provisions do not determine the course of the state borders; it also does not proceed from Section II of the BCC or Article 4 of the Constitution that the state may not bind itself to respecting the treaty or the award of the arbitral tribunal which it co-established by this treaty. Therefore, also Article 7 (2) and (3) are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC.
60. On the basis of the joint effect of the above-mentioned provisions of the Agreement, it is clear that the Agreement does not determine the course of the state borders between the Parties to the Agreement. The Agreement as such is an instrument whose purpose is to establish a mechanism for the peaceful settlement of the border dispute, as the states cannot by themselves agree on the course of the common state border. The peaceful settlement of disputes is a duty of states at the international level, and in the preamble to the Agreement the Parties to the Agreement even refer to Article 33 of the UN Charter, which enumerates the peaceful means for the settlement of disputes.<sup>51</sup> The aim of the Agreement is to establish the Arbitral Tribunal, define its tasks, determine the rules for its deciding and the legal effects of its decision, and to determine the procedure for its operation. As the provisions of the Agreement which regulate these issues are not unconstitutional, the Constitutional Court decided that the reviewed provisions of the Agreement are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC.
61. The second paragraph of Article 160 of the Constitution determines that the National Assembly is bound by the opinion of the Constitutional Court. In Opinion No. Rm-1/97 the Constitutional Court has already adopted the position that an opinion issued in accordance with the second paragraph of Article 160 of the Constitution is not a consultative opinion. The National Assembly is bound by the opinion of the Constitutional Court, which entails that the National Assembly may decide on ratification only after it is served with the opinion of the Constitutional Court. As the Constitutional Court decided that Article 3 (1) (a), Article (4) (a), and Article 7 (2) and (3) of the Agreement are not inconsistent with the Constitution and the BCC, the decision on the ratification of the Agreement is a matter of the political deciding of the National Assembly.
62. The fact that the state borders are protected at the constitutional level in the Republic of Slovenia, whereas the course of the land and maritime border demarcated in nature will be determined by the Arbitral Tribunal, call for a caution from the Con-

51 The Preamble to the Agreement in this part in the original English version reads as follows: “[...] Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter, [...]”.

stitutional Court. At this very moment it is not possible to predict where the Arbitral Tribunal will determine the course of the state border. Due to the fact that in doing so it will not be bound by the constitutional law of the Republic of Slovenia (nor by law of the Republic of Croatia), but will perform its task on the basis of the rules and principles of international law, which are in and of themselves not unconstitutional, it is indeed possible that the Arbitral Tribunal will determine the course of the border differently than proceeds from Section II of the BCC. This would not change the fact that the Agreement is not unconstitutional, as it is an instrument which only determines the path towards the resolution of this problem; furthermore, this would not entail that the award of the Arbitral Tribunal would be unconstitutional or even that it could be a subject of the review before the Constitutional Court. The award of the Arbitral Tribunal will entail an extraordinary legal situation, as this decision will be a legal instrument which will only exist in the sphere of international law and therefore it will not at all be possible to speak of its unconstitutionality in the sense of the inconsistency of national regulations with the Constitution.

63. This exceptional situation with regard to international law entails that the Republic of Slovenia could also find itself in an exceptional situation with regard to national law. On one hand, it would be bound to respect the Agreement and would have to implement the award of the Arbitral Tribunal, including by revising national legislation as necessary. On the other hand, the statutory implementation of such award could entail that laws would be inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC if in the award of the Arbitral Tribunal the border were determined differently than proceeds from Section II of the BCC. In order to avoid such an exceptional legal situation, which at this moment cannot be predicted, the Constitutional Court calls on the National Assembly to weigh whether it would be reasonable to amend the Constitution in order to prevent any unconstitutionality of the national legislation (laws which regulate municipal territories, courts, administrative units, constituencies, etc.) by which, on the basis of the Agreement, the award of the Arbitral Tribunal is to be implemented.

### C

64. The Constitutional Court issued this opinion on the basis of the second paragraph of Article 160 of the Constitution, Article 70 of the CCA, and the third indent of the third paragraph of Article 46 of the Rules of Procedure of the Constitutional Court, composed of: Jože Tratnik, President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. Points I to IV of the operative provisions of the Opinion were adopted unanimously, and Points V and VI of the operative provisions were adopted by eight votes against one. Judge Mozetič voted against and submitted a dissenting opinion. Judges Deisinger and Zobec submitted concurring opinions.

*Jože Tratnik*  
*President*

1. I agree with points I to IV of the operative provisions of the Opinion, but I cannot agree with points V and VI. I could agree with these points only if I understood the Arbitration Agreement solely as “an instrument whose purpose is to establish a mechanism for the peaceful settlement of the border dispute”, meaning that it is not an instrument whose purpose is to determine the course of the state borders (see point 60 of the reasoning of the Opinion). This is the view of the majority, which follows from the wording of the Agreement and does not take into account its fundamental purpose.
2. In my opinion, such understanding ignores the fact that the main purpose of the Agreement is to “originally” determine the border between the Parties to the Agreement, which is to be determined by the Arbitral Tribunal which is to be established by this Agreement. Its decision will be binding and will constitute a definitive settlement of the dispute (the second paragraph of Article 7 of the Agreement). The Parties to the Agreement undertake, within six months of the award, to take all necessary steps to implement the award, including by revising national legislation if necessary (the third paragraph of Article 7 of the Agreement).
3. The purpose of the Agreement is therefore not the mere establishment of the Arbitral Tribunal, the determination of its tasks, the establishment of the rules of procedures for deciding, and the determination of the legal effects of its decisions, but the original determination of the border between the Parties to the Agreement. This purpose is clear from the Agreement itself, as it constitutes its sole task, and that is the determination of the border between the two countries. I cannot simply ignore this fact when assessing the Agreement. Undoubtedly, the Agreement itself does not determine the border; the border will be determined by the Arbitral Tribunal. The Agreement authorises the Arbitral Tribunal to determine the state border between the Parties to the Agreement. Given the legal nature and authority of the Arbitral Award, it is in my opinion indisputable that this decision will interfere with the state border with Croatia, which was constitutionalised by the BCC and Article 4 of the Constitution. This constitutes an interference with the Constitution. This competence of the Arbitral Tribunal is based on the Arbitration Agreement, and therefore, in my opinion, it cannot be reviewed separately from that fact. If treated separately from this fact, it is of course not inconsistent with the Constitution.
4. In my view, the conclusion that necessarily follows from the reasoning of the Opinion (in particular from sections B – III, B – IV, and B – V), the majority of which I agree with, is that the National Assembly should amend the Constitution even before the ratification of the Agreement as the state borders of the Republic of Slovenia are regulated in national law under Section II. of the BCC “and constitutionalised” and are therefore a part of the Constitution. Otherwise, the National Assembly, as the institution empowered to amend the Constitution, will find itself in a situation where due to the decision of the same Assembly, but now in its legislative capacity, it will have to amend the Constitution. The decision of the legislature (the ratification of the Arbitration Agreement),

which was adopted by a majority of the votes cast by the deputies present at the session where the quorum was attained, binds the legislature, as the institution empowered to amend the Constitution, to amend or supplement the Constitution by a two-thirds majority of all deputies. I think that therefore the National Assembly cannot adopt such a decision or, if it does so, such would be inconsistent with the Constitution.

5. It follows from the Opinion that the BCC in conjunction with Article 4 of the Constitution constitutionalised the state borders of the Republic of Slovenia (point 34), that these provisions entail a constitutional obstacle to altering the state borders, that in a territorially fairly small state such provisions also have a guarantee function and that the constitution framers established the state territory and state borders as one of the fundamental values which must be protected at the constitutional level (point 38). The Opinion continues: "A treaty which would alter the course of the state borders would also entail an alteration of the territory on which the BCC on 25 June 1991 established the state sovereignty of the Republic of Slovenia and would therefore be inconsistent with Section II of the BCC." Next, in point 46 the Opinion clearly emphasises that a treaty that would alter the course of the borders between Slovenia, Italy, Austria, and Hungary which were already determined in treaties would be inconsistent with Section II of the BCC in conjunction with Article 4 of the Constitution. This means that the National Assembly should not ratify such a treaty without a previous amendment to the Constitution (as the institution empowered to amend the Constitution). If there were no amendment to the Constitution, the National Assembly should reject the ratification of such a treaty.
6. Regarding the state borders between Slovenia and Croatia, the situation is somewhat different. Here the state border is not defined by a treaty. However, the Opinion emphasises that the border between the two states (in national law) was determined at the constitutional level "in accordance with the principles of *uti possidetis iuris* and *uti possidetis de facto*" (point 48). In addition, the Opinion emphasises in point 50 that "the land border between the Republic of Slovenia and the Republic of Croatia is constitutionalised in Section II of the BCC as the border that had its course along the borders of the hitherto municipalities or cadastral municipalities, whereas the maritime border is constitutionalised as having its course along the line up to where the Republic of Slovenia *de facto* exercised its authority within the former SFRY." In point 51 of the Opinion it is also pointed out that the constitutionalisation of the state borders on one hand entails that the National Assembly may not ratify by a law a treaty which would alter the state borders as they are determined in Section II of the BCC. On the other hand, this does not entail the prohibition that the course of the state border between Slovenia and Croatia is determined in nature, since such has not yet been determined in nature. I of course share these views, since otherwise it would not be possible to determine this state border in nature. However, this does not mean that such views should only apply to "real" treaties regulating the state border and not to cases in which a state border which could not be determined by consent to a treaty is regulated by the award of an arbitral tribunal set up by the states in a special treaty in which they undertake to respect and implement its decision.

7. It clearly follows from the part of the Opinion which I agree with that the state borders of the Republic of Slovenia are raised to the constitutional level and that therefore the determination and alteration of the state borders also require amendments to the Constitution. However, being raised to the constitutional level or the constitutionalisation of such entails that in national law they are a part of the Constitution. They are part of the *materia constitutionis*. The procedure for amending the Constitution is defined in the Constitution and is clear. Undoubtedly, the determination or alteration of the state borders is first of all an important question of international law and state borders are altered in a manner consistent with international law only by a treaty or by transferring the solution of this issue to an international judicial body. However, a treaty must be incorporated into national law in order to become a part of it, which in Slovenia occurs by ratification by means of an act. The National Assembly may not ratify a treaty if such is inconsistent with the Constitution. If, however, it would like to ratify such a treaty, it must in advance amend the Constitution (as the institution empowered to amend the Constitution). Such a conclusion is a logical consequence of the finding that the state borders are constitutional subject-matter (i.e. part of the Constitution).
8. It follows from the Opinion that a treaty determining the alteration of the state border may not be ratified without prior amendment of the Constitution. This standpoint, according to the majority, does not apply in the case of the ratification of the Arbitration Agreement, since the latter does not determine the state border and therefore does not in itself amend the Constitution. I wrote already in points 2 and 3 of this separate opinion that this position is too narrow and that I cannot agree with it. The result of the Arbitration Agreement will be an original determination of the state border. This is exactly the same as for the determination of the state border by a treaty. The difference is that in this latter case the determination of the state border is a result of the mutual agreement of both states and in the former case it will be the result of the arbitration award of the Arbitral Tribunal to which both states concerned transferred the authority to reach this decision. Another important difference is also the fact that a treaty regarding the alteration (or determination) of the state border additionally needs to be ratified, whereas this is not necessary for the arbitration award, since the states concerned have already declared in the Agreement by which they established the Arbitral Tribunal that they will accept the arbitral award and that they will respect and enforce it. Therefore, as I wrote already in point 7 of this separate opinion, I see no valid reason for the different treatment of the treaty concerning the establishment of the Arbitral Tribunal, which results not only in the establishment of the Arbitral Tribunal, but above all in the original determination of the state border (of course, by the Arbitral Tribunal).
9. Therefore, it is in my opinion necessary, with regard to the consequences (or the result of the determination of the state border) of the Arbitration Agreement and considering the legal nature of the arbitration award, which stems from the Arbitration Agreement, that considering the ratification of the Arbitration Agreement

the procedure should be the same as with a treaty on a state border, i.e. that it should not be ratified without a corresponding amendment of the Constitution. Any other solution does not seem logical to me and is inconsistent with the Constitution. After the arbitration award is adopted, there will be an amendment to the Constitution, not just legislation. If, however, there is no amendment to the Constitution or if the laws implementing the arbitral award are abrogated due to their inconsistency with the Constitution, this will consequently breach the international obligations of the state which it has already undertaken on the basis of the Arbitration Agreement.

10. In view of the above, I could not vote for points V. and VI. of the operative provisions of the Opinion. I, as well as the majority, do not take sides whether the Agreement is good or not. I as well cannot know and I do not want to guess what the decision of the Arbitral Tribunal will be. In my opinion, this is not really important. Any decision will encroach upon the Constitution, as it will determine the state border. This also applies to the border with the Republic of Croatia. Even this border is constitutionalised. Certainly, this does not mean that it is not allowed to determine it by a treaty or with the assistance of an international judicial body, this is even necessary as it is not yet determined in international law by consent between the two states. Therefore, it is undisputed that an agreement concerning the establishment of such an international judicial body in itself cannot be inconsistent with the Constitution. However, the result of a treaty determining the state border or the decision of such international judicial body will entail the determination of the state border. Nevertheless, in the Republic of Slovenia the state borders are constitutional subject-matter, i.e. part of the Constitution. Therefore, the legislature, without being so authorised by the institution empowered to amend the Constitution, should not alter the state borders nor determine them in a more precise way, since it would thus interfere with the Constitution. Therefore, the caveat stated in points 62 and 63 of the Opinion will be of any significance only if it were (or if it will be) understood in this manner by the deputies. Amending the Constitution makes sense only if it is done prior to the ratification of the Arbitration Agreement. Later, the question will no longer be whether to amend the Constitution, as it will have to be amended if it was meant seriously (which I do not doubt) that the state borders of the Republic of Slovenia are constitutionalised in the national law. And if I may draw attention once again to point 38 of the Constitutional Court Opinion: “these constitutional provisions [Section II of the BCC and Article 4 of the Constitution] entail a constitutional obstacle to altering the state borders. In a territorially fairly small state, as is the Republic of Slovenia, such provisions also have a guarantee function; by these provisions the constitution framers established the state territory and state borders as one of the fundamental values which must be protected at the constitutional level.”

*Mag. Miroslav Mozetič*

1. With this concurring opinion I wish to additionally substantiate what, in my opinion, paragraph IV of the operative provisions of the Opinion entails.
2. In Paragraph 47 of the statement of reasons of the Opinion the Constitutional Court establishes that “the Republic of Slovenia is a coastal state and it [...] *de facto* exercised its authority in a part of the Adriatic Sea and also had access to the High Sea”. This is concretised in footnote 27 and it also follows from the acts mentioned in footnote 38. The standpoint in paragraph 54 is important, namely that the award of the Arbitral Tribunal will entail a division of the former legally unilateral, although *de facto* divided, Yugoslav sea in the north Adriatic at the international level. From this proceeds the obligation of the Republic of Slovenia to submit an appropriate proposal for a fair and just division of this part of the Adriatic Sea as well as a proposal for a junction of the territorial sea of the Republic of Slovenia to the High Sea (Paragraph 55 of the reasoning of the Opinion).
3. a/ This position of the Constitutional Court can be substantiated on the basis of national and international law. Slovenia as part of the former Yugoslavia had territorial access to the High Sea, as was also explicitly admitted by Croatia in one of its notes. In Note of the Ministry of Foreign Affairs of the Republic of Croatia No. 5893/03 of 18 November 2003, Croatia unambiguously stated that Slovenia had had territorial access to the High Sea when it was part of the former SFRY.<sup>1</sup> In compliance with the principle of respecting the status as on 25 June 1991, Slovenia thus still has territorial access to the High Sea.
- b/ Slovenia is the only successor to the Treaty between the Government of the SFRY and the Government of the Republic of Italy with Annexes I to X of 10 November 1975 (i.e. the Osimo Treaty). According to the Osimo Treaty, which defines the border between Slovenia and Italy, this border extends to point T5 in the south, which is the point of Slovenia’s territorial access to the High Sea. It is precisely the Osimo Treaty that establishes Slovenia’s right to a territorial junction to the High Sea in an international context. When in 1954 Yugoslavia acquired Zone B of the Free Territory of Trieste, the purpose of the Osimo Treaty was that Slovenia acquire access to the sea<sup>2</sup> to a full extent with access to the High Sea at point T5. The territorial junction of Slovenia to the High Sea is thus based on international law.
- c/ Slovenia is a successor to the 1968 Agreement between the Government of the Socialist Federal Republic of Yugoslavia and the Government of the Italian Republic on the Delimitation of the Continental Shelf between the Two Countries. Slovenia has notified Italy (Note of the Ministry of Foreign Affairs of the Republic of Slovenia No. ZSD-JVE-46/03 of 24 July 2003 – Annex 6) as well as Croatia

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1 The White Book, p. 10.

2 Vladimir Đuro Degan, Pravni domašaj načela *uti possidetis* glede kopnenih i morskih razgraničenja u regionu s obzirom na granice prema Osimskom ugovoru iz 1975 godine, p. 79 in the book *Osimska meja*, Založba Annales, Koper 2006.

of the succession to this Agreement. Italy has taken note of Slovenia's succession to the Agreement (Note of the Ministry of Foreign Affairs of the Italian Republic No. 003889/205 of 22 December 2003)<sup>3</sup>, thus recognising Slovenia the continental shelf to the south of T5. With the continental shelf, Slovenia logically also has territorial access to the High Sea. In accordance with Article 3(1)(c) of the Agreement, the Arbitral Tribunal will determine the external borders of the continental shelf of Slovenia.

- d/ Prior to 25 June 1991, Slovenia exercised jurisdiction in the Bay of Piran and beyond the Bay to point T5 by the supervision of the Koper Border Police Station at the Yugoslav-Italian maritime border.<sup>4</sup>
- e/ The Bay of Piran had within the SFRY the status of internal sea waters (Official Gazette SFRY, No. 49/87). It retained such status also after independence. In accordance with Article 5 of the Maritime Code (Official Gazette RS, No. 120/06 – official consolidated text), all bays constitute internal sea waters, thus also the Bay of Piran. In the same manner, the Republic of Croatia retained all bays as internal waters.<sup>5</sup> Until 25 June 1991, the Bay of Piran was formally treated as part of Slovenia. For instance, also the territory of the entire Bay of Piran was determined as a cadastral municipality within the borders of the territory of the Republic of Slovenia by the Long-Term Plan of the Socialist Republic of Slovenia for the 1986-2000 period (consolidated cartographic part) with fourteen maps (Official Gazette SRS, No. 36/90). Furthermore, in the Atlas of the Environmental Agency of the Republic of Slovenia the entire Bay of Piran is determined to be Slovene and the border of Slovene territorial waters up to the junction to the High Sea is demarcated. The Agency has data from official registers which were collected on the basis of the Water Framework Directive (WFD) and the land survey data of the Republic of Slovenia, whereby they represent the border of the cadastral municipality Morje [Sea]. A delimitation inside the Bay of Piran is not applicable also in accordance with international law, as the United Nations Convention on the Law of the Sea (Official Gazette SFRY, MP, No. 1/86) in item 6 of Article 10 determined that the delimitation does not apply to “historic” bays, whereas the Bay of Piran has all the characteristics of such a bay.<sup>6</sup>

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3 The White Book, p. 10.

4 Data from the White Book, pp. 10 – 11, footnote 27 of the Opinion. The Marine Fisheries Ordinance of the Coastal Communities, adopted 11 December 1987, defines in Article 7 the fishing sea waters of Slovenia as “extending from Cape Savudrija to Cape Debeli Rtič”. The Republic of Croatia and the communities of Umag and Buje did not contest this Ordinance or such fishing practice before the Brioni Agreement (7 July 1991), which was intended to maintain the existing state of affairs as of 25 June 1991 at sea (Prof. Dr Darja Miheli, Zgodovinski inštitut Milka Kosa, ZRC SAZU, Ljubljana, [www.delo.si/clanek](http://www.delo.si/clanek), 27 October 2008).

5 *Zemljopisni atlas Republike Hrvatske*, Školska knjiga, Leksikografski zavod, Miroslava Krleža, Zagreb 1993, pp. 40-41.

6 There are instances of historic bays in the functioning of certain states in which it is not necessary that they belong to only one state (Prof. Dr Mirjam Škrk, *Seveda nam je blokada nekaj prinesla* [Of Course We Gained Something from the Blocade], *Priloga Večera*, 3 October 2009).

4. The starting points regarding Slovenia's junction to the High Sea are entirely in compliance with Articles 3 and 4 of the Agreement. As stated in paragraph V of the operative provisions and in the statement of reasons, the Agreement establishes a mechanism for the peaceful settlement of the border dispute and is thus from a legal perspective a procedural act. Only one provision of the Agreement is an exception, namely Article 3(1)(b), which entails a completely definite provision of substantive law. This provision namely already determines that Slovenia has a junction to the High Sea, whereas the task of the Arbitral Tribunal is merely to precisely determine the junction of Slovene territorial sea to the High Sea.<sup>7</sup> It is important that pursuant to Article 3(1) of the Agreement, the Arbitral Tribunal shall determine Slovenia's junction<sup>8</sup> to the High Sea, thus the Arbitral Tribunal does not decide thereon or establish such, as such is already determined in the above-cited provision of the Agreement. With reference to such, the term "Slovenia" entails its territory on land, the internal waters and territorial sea, the seabed, and the ground under and the airspace above all this territory. The junction to the High Sea entails a direct junction of the territorial sea to the open sea, whereas the open sea starts at Point T5. The western border of the territorial sea up to point T5 of the Republic of Slovenia, as the only legal successor to the Osimo Treaties, is already determined, therefore the task of the Arbitral Tribunal is merely to determine the eastern border of the territorial sea and the width of the junction to the international waters, which must enable normal transit of all vessels. Such interpretation is also completely in compliance with the applicable law in accordance with Article 4(b) of the Agreement, which requires the application of equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances, which are precisely what was mentioned above.
5. Upon determining the course of the maritime border the Arbitral Tribunal will also have to decide regarding the coastal area. In the area of the former Zone B of the Free Territory of Trieste the border is namely undefined to the greatest extent, therefore the Arbitral Tribunal will have to determine the course of the border originally.

7 The former Croatian Minister for Foreign Affairs and professor of international law, Fellow of the Croatian Academy of Sciences and Arts, Dr Davorin Rudolf claims that the Agreement envisages that Slovenia must obtain access to the high seas ("[...] sporazumom unaprijed predviđeno da Slovenija mora dobiti izlaz na otvoreno more [...]"), [www.index.hr/vijesti/clanak](http://www.index.hr/vijesti/clanak), 30 October 2009.

8 Different interpretations of the English word "junction" have emerged in professional circles. In the dictionary *Veliki angleško-slovenski slovar* [The Large English-Slovene Dictionary] (Grad, Škerlj, Vitorovič, DZS, Ljubljana, 1986) the term is translated as a "*spoj, stik*" [joint, contact], by the Google translation engine as a "*spoj*" [joint], in the Evroterm database as a "*točka združitve*" [point of junction] and in the translation programme Presis as "*priključek*" [connector]. The term "junction" is not only a legal concept, as it has different meanings in different contexts. It has to be put into the context of the Agreement, especially with regard to Article 4(b). Regarding this, the term "junction" is appropriate, as it also allows for a certain derogation from some rules of international law, because, in any case, international law cannot rule out a fair and just decision, i.e. to establish a junction of Slovenia with the High Sea. The term "junction" in this context entails a fusion of the territorial sea with the High Sea.

The principle of *uti possidetis iuris* will in this case be subordinate to the rules and principles of international law (Article 4(a) of the Agreement), thus concretely to the Osimo Treaty and to the London Memorandum, with a special statute as a constituent part of the Memorandum. From the 12<sup>th</sup> century on, the Municipality of Piran comprised also the cadastral municipalities of Kaštel and Savudrija,<sup>9</sup> which were separated by the ordinance of the Military Administration of the Yugoslav Army in 1947. After the termination of the Free Territory of Trieste a civil political and administrative unit of Piran should have been established within the above-mentioned historical framework, whereas by virtue of Article 7 of the above-mentioned special statute, the division of civil administrative units was prohibited. When interpreting the Osimo Treaty and the instruments connected therewith, the Arbitral Tribunal will not be able to overlook the foundation of these international documents. In 1954, Yugoslavia acquired Zone B of the Free Territory of Trieste, whereas Zone A of the Free Territory of Trieste with Slovene ethnic territory and over 140,000 of our Slovene compatriots thereafter belonged to Italy.<sup>10</sup> In view of the fact that in the entire territory of the Free Territory of Trieste the official languages were only Italian and Slovene, the delimitation of the former Zone B of the Free Territory of Trieste should have been different. The Republic of Slovenia will have to appropriately define such in the subject-matter of the dispute in accordance with Article 3 (2) of the Agreement. In such a broader definition of the territory in which the Arbitral Tribunal is to determine the course of the land border there are no limits, as is particularly underlined in Paragraph 25 of the Opinion.

Dr Mitja Deisinger

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**CONCURRING OPINION OF JUDGE JAN ZOBEC,  
JOINED BY JUDGE MAG. MARIJA KRISPER KRAMBERGER**

1. I did not decide to write a separate opinion because I object to any of the main standpoints of the majority. On the contrary, I was motivated only by my concurrence with the standpoint according to which “[t]he award of the Arbitral Tribunal regarding the land border will entail the concretisation of the border in international law, as it was known and determined within the former SFRY in national law, whereas regarding the maritime border such will entail a division of the former legally unilateral, although *de facto* divided, Yugoslav sea in the north Adriatic at the international

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9 Croatia as well invokes historical reasons regarding the disputed border with Bosnia and Herzegovina at Neum, i.e. that Croatia has been entitled to two islands, Veli and Mali Školj, already since the times of the Dubrovnik Republic and the Austro-Hungarian Empire ([www.dnevnik.si/novice](http://www.dnevnik.si/novice), 6 October 2006).

10 For more regarding this issue, see the book by Dr Duša Krmel-Umek, *Dokumenti o Slovencih ob Jadranu od leta 1797 do leta 2009* [Documents on the Slovenes Living by the Adriatic from 1797 to 2009], Razstava pokrajinskega arhiva Koper, Koper 2009, and the article by Dr Milica Kacin Wochinz, *Hrvaški “zgodovinski dolg” Slovencem* [Croatian “Historical Debt” to the Slovenes], *Nova revija*, Ljubljana 1999, pp. 249-254.

level” (Paragraph 54 of the reasoning). I also agree with the finding that “[o]ne of the basic and decisive principles of international law for the deciding of the Arbitral Tribunal will undoubtedly be the principle of *uti possidetis*” (Paragraph 58 of the reasoning). However, unlike the majority I believe that a consistent derivation of these findings and observations entails nothing more than the exclusion of the possibility that the arbitral award would be inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC. Two premises led me to this realisation.

2. The first is the interpretation of Section II of the BCC and the comparison of this interpretation with the substantive provisions of the Agreement (“Applicable Law” – Article 4) which suggests that the criteria by which the borders with the Republic of Croatia are set out in the BCC are, in essence, no different from the criteria by which the border will be determined by the Arbitral Tribunal, i.e. the rules and principles of international law. If there is no inconsistency between these premises on the basis of which the course of the border in nature is concretised (between Section II of the BCC, on one side, and Article 4 of the Agreement, on the other), then it is logically impossible that the criteria that will be applied by the Arbitral Tribunal, not for determining the border (as such is already defined by the BCC and by the provisions of the Agreement, which are consistent with the BCC), but for its concretisation in nature, would be inconsistent with the Constitution. As there would be nothing wrong from the point of view of constitutional law if the Agreement entrusted the Arbitral Tribunal with the determination of the border in accordance with the BCC, there is nothing wrong if this international judicial body is charged with the task of determining the border pursuant to the substantive provisions of the Agreement, which are not inconsistent with the Constitution. In my opinion, the finding that by adopting the BCC the Republic of Slovenia “declared to the world that it had met the international law criteria for the existence of a state, which was important for recognition by other states” and that the aim of the BCC was “to constitute at the constitutional level and to declare at the international level a new sovereign state, which would be an equal subject in the international community” (both in Paragraph 32 of the reasoning) seems of outstanding importance to me. Our state thus gained independence and became a sovereign state in accordance with the rules and principles of international law. The substantive provisions of the Agreement therefore cannot be inconsistent with Section II of the BCC understood in this manner. Especially not given the fact that there is a safeguard included in the Agreement against a certain degree of the unpredictability of the arbitral award of the Arbitral Tribunal ordering this international judicial body as a separate and independent duty (irrespective the applicable substantive law defined in Article 4 of the Agreement) to ensure Slovenia’s junction to the High Sea (Article 3(1)(b) of the Agreement). Therefore, even if the “applicable law” as defined in Article 4 of the Agreement allowed for any possibility that the Republic of Slovenia (in spite of the principle of *uti possidetis de facto*) would not have a junction to the High Sea (e.g. on the basis of the principle of natural prolongation)<sup>1</sup>, the final award

1 Concerning the principle of equity in the case law of international tribunals on the resolution of disputes

would not deprive the state of a junction to the High Sea – this junction is namely protected as a duty of the Arbitral Tribunal particularly emphasised in Article 3(1)(b).

3. The second premise must answer the question of the competence and qualification of the Arbitral Tribunal, i.e. it must take into consideration the possibility that this Tribunal will determine a border which is inconsistent with the BCC. In any case, I agree with the majority that “the decision of the Arbitral Tribunal [will be,] in its nature, [...] a judicial decision whose precise content cannot be predicted” (Paragraph 58 of the reasoning). This is quite logical. If the outcome of the arbitration proceedings were predictable, the Agreement would not have been concluded, as any endeavour on the part of the Tribunal would be completely unnecessary. The purpose of entrusting such determination to the Arbitral Tribunal lies precisely in the fact that its ruling is unpredictable. Is not this the very essence of such disputes? Without an uncertain outcome of the dispute, when it is already clear in advance which of the conflicting parties is right, there can be no dispute. This applies as well to large, international legal disputes between states, as well as to completely ordinary “civil” disputes. What is essential for the review of the constitutionality of the Agreement is therefore not (and as the BCC does not determine the actual course of the border with Croatia in nature, it cannot be) where the border will actually be concretised at the level of international law, but according to which rules this will happen. There can be only one constitutional law dimension of the predictability of the award of the Arbitral Tribunal – and that is the one determined in Article 4 of the Constitution in conjunction with Section II of the BCC. If the award is not inconsistent with these constitutional acts, it cannot be problematic from the point of view of constitutional law. That this will be the case arises from the fact that the substantive provisions of the Agreement together with the safeguard provided in Article 3(1)(b) essentially overlap with the interpretation of Section II of the BCC by the Constitutional Court.
4. I understand the concerns of those who warn about the possibility of disappointment. This is certainly not impossible – on the contrary, it is embedded in the resolution of the dispute by the Arbitral Tribunal. It is highly probable that in the end at least one of the parties to the arbitration proceedings, although they have the same constitutional law views regarding the border, will be disappointed and dissatisfied with the award.<sup>2</sup> However, it should be noted that the border, although it might not be concretised in accordance with our notions of where it should run based on the principles of international law *uti possidetis iuris* (on land) and *uti possidetis de facto* (at sea), which are also the criteria determined in Section II of the BCC, will still be a border determined on the basis of these principles – and therefore it will not be contrary to the Constitution. The substantive provisions of the Agreement are (may be) vague to the extent to which Section II of the BCC is vague regarding the definition

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regarding maritime borders and the principle of natural prolongation as one of the criteria of the principle of equity, see J. Metelko, *Pravičnost u sukcesiji država*, Pravni fakultet u Zagrebu, Zagreb, 1992, pp. 37-88.

2 This is vividly explained by the epigraph of the excellent monography by A. Uzelac, *Istina u sudskom postupku*, Pravni fakultet u Zagrebu, Zagreb, 1997, citing C. S. Pierce: “There is no distinction of meaning so fine as to consist in anything but a possible difference of practice.”

(determination) of the border in order to still remain consistent with the Constitution.<sup>3</sup> At this point, it may therefore be said: there will be nothing wrong with the award of the Arbitral Tribunal from the aspect of constitutional law as long as it falls within this range of latitude. Concretising the border, which is allegedly known, can never be unconstitutional if it is only carried out within this range, i.e. within what is supposedly known and guaranteed by constitutional acts (and by the substantive provisions of the Agreement, which are consistent with the latter). The state border with the Republic of Croatia is certainly constitutionalised, but (unlike the borders with other states, which are determined and concretised by treaties) not demarcated down to every boundary stone, every angle is not marked, nor are the geographical coordinates determined. Only the manner of concretely determining where the border runs in nature is constitutionalised. And as long as the concrete determination of the border moves within this framework of constitutional law, the border so defined cannot be contrary to the Constitution.

5. The question, however, is what if the award oversteps this framework and extends into a field outside that defined in Section II of the BCC and in the substantive provisions of the Agreement, which are essentially consistent with this Section. At first glance, it appears that this situation would be unconstitutional. In theory this would be possible, however actually, and I think even legally, it is not by any means. Firstly, because the Arbitral Tribunal should simply be trusted – trusted in a way that the courts should be trusted in a state governed by the rule of law, trusted to such an extent that what is decided is taken to be true. And secondly, because it also is true.<sup>4</sup> If the border is disputed, because each of the parties in the dispute has their own views on where its

3 I completely agree with the finding that “Section II of the BCC is a constitutional reflection of international law regulating the question of the borders at the moment when Slovenia became a sovereign and independent state” (Paragraph 45 of the reasoning) and that “Section II of the BCC enables further determination of the course of the state border on land and at sea between the Republic of Slovenia and the Republic of Croatia, however, the legislature is thereby limited by the principles of *uti possidetis iuris* (on land) and *uti possidetis de facto* (at sea).” I also concur with the subsequent position that “the position of the Constitutional Court in Opinion No. Rm-1/00 must also be understood in this sense, namely that ‘the BCC and the Constitution do not prohibit the conclusion of treaties that would regulate border issues’ and that a treaty ‘could also contain provisions on the state borders, which would in and of itself not be contrary to the BCC and the Constitution provided that it remains within the framework of Article 4 of the Constitution’” (all Paragraph 51 of the reasoning).

4 No one has direct access to the truth. Even if we say that truth is the accordance of representations with an objective reality, we have said only what the truth is (and even then in a tautological manner: “I have realised the truth when I have realised the truth.”), but we have not said anything about how to identify the truth. The truth, therefore, can not be defined by substantive criteria – none of these have yet provided a satisfactory answer – but by procedural ones. The truth is, therefore, what is generally or intersubjectively accepted as a consensus (the consensual concept of truth), or what a court finds in proceedings which externally legitimise its outcome with its postulates of a fair trial (open, free, based on a discussion of reasonable arguments, which is identified by the adversariality, public nature, directness, and impartiality and independence of the tribunal) – in an ideal verbalised situation, this would be a constituted and in this situation legitimised truth (in a state governed by the rule of law, it is self-evident that the judgments of the courts are accepted as true by any reasonable man, i.e. as the intersubjective truth). Cf. A. Uzelać, *ibidem*, pp. 202, 208, 214, *et seq.*

course should be on the basis of undisputed rules on its concretisation in nature, the dispute may be resolved only in two ways: either by an agreement, or through a third party – an arbitrator. Both methods should be consistent with the Constitution. Regarding the Agreement, both parties must act in accordance with an interpretation of Section II of the BCC and Article 4 of the Constitution that is consistent with the constitutional case law, but if they decide to settle the dispute with the assistance of a third party, they must agree that when resolving the dispute this international judicial body will be bound in the same way and to the same degree as that by which the borders are constitutionalised. What the truth is here (which in itself is not recognisable by means of direct insight), can be said only after both sides of the dispute agree upon it (i.e. the agreement), or when their consent is replaced by a definitive and binding award of the Arbitral Tribunal, which draws its legitimacy also from determining the border in a manner that is consistent with the Constitution. The same logic applies as for resolving any other dispute (i.e. what is established by a court is not the truth because it is a reflection of the objective reality, but rather because the matter has been ruled on definitively, irrevocably, and finally by a court, and because in a state governed by the rule of law, where courts decide according to the procedure and criteria ensuring that the claims, proposals, and arguments of parties will be reasonably and therefore objectively decided upon, the judgments of the courts must be obeyed). Therefore, the border, no matter where it is concretised in nature, will not be unconstitutional – it will not be, because it will be determined by a trustworthy international judicial body in a manner not inconsistent with the constitutional acts. It would be completely different if the Agreement provided that the Arbitral Tribunal shall determine the border in accordance with the state of affairs when the Agreement was concluded – such a manner of determining the border would be inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC, as it is common knowledge that after 25 June 1991 Croatia expanded its actual authority. Similar would hold true if the Arbitral Tribunal was given the power to determine the border *ex aequo et bono*. This term “usually refers to external and abstract justice and its meaning can be only theoretically discussed as there is virtually no case law with regard to its application in border disputes”.<sup>5</sup> It is therefore also not precluded that a border determined in such a manner would be inconsistent with the constitutional acts.

6. I therefore do not share the constitutional law concerns of the majority that “the statutory implementation of [the] award could entail that laws would be inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC if in the award of the Arbitral Tribunal the border were determined differently than proceeds from Section II of the BCC” (Paragraph 63 of the reasoning – such concern necessarily involves a degree of distrust in the ability of the Arbitral Tribunal to decide the dispute on the basis of the constitutionally consistent set of criteria that are defined in the Agreement) and do not see the need for recommendations that the National

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5 V. Sancin, *Kompromis med Slovenijo in Hrvaško* [The Compromise between Slovenia and Croatia], Pravna praksa, 2009, No. 45, Appendix, p. IX.

Assembly “weigh whether it would be reasonable to amend the Constitution in order to prevent any unconstitutionality of the national legislation (laws which regulate municipal territories, courts, administrative units, constituencies, etc.) by which, on the basis of the Agreement, the award of the Arbitral Tribunal is to be implemented” (Paragraph 63 of the reasoning).<sup>6</sup> Such intervention of the institution empowered

- 6 Such a recommendation also seems illogical to me: it is not a duty of the Constitutional Court to advise the legislature to adapt the Constitution to legal acts of lower rank, but vice versa – the Constitution is always the unalterable higher premise. If the majority is of the opinion that even a completely appropriate award of the Arbitral Tribunal might entail such a concretisation of the state border which would be inconsistent with the constitutional interpretation of Section II of the BCC, if therefore according to the opinion of the majority the substantive provisions of the Agreement also allow for such a result of the proceedings before the Arbitral Tribunal according to which the state border with the Republic of Croatia would be established without any consideration of the principle of *uti possidetis*, and if there is a real danger that an international judicial body will disregard a duty imposed upon it by Article 3(1)(b) of the Agreement (to determine Slovenia's junction to the High Sea), then I reject the finding that Article 3(3)(a), Article 4(a), and Article 7(2) and (3) of the Agreement are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC. Precisely because they must be, as delineated in Point VI of the operative provisions of the Opinion, interpreted and reviewed as a whole in terms of content, they would be, in my opinion, contrary to the Constitution. Their combined effect entails that the borders would be determined contrary to their definition determined in Section II of the BCC, that their determination would be binding and definitive for the Republic of Slovenia, and that within six months after the adoption of the award, our state would be obliged to take all necessary steps for its implementation, including the revision of the national legislation, if necessary. So if there is a real possibility that these provisions with their combined effect would lead to a situation where the award with its direct legal effects would definitively and bindingly break through the constitutional guarantee of the state borders with the Republic of Croatia (since the award does not require ratification, all such concerns regarding the realistic possibility that its content would be inconsistent with the constitutional documents must be dealt with in the preliminary review proceedings – there will be no “make-up exam”), then it is not possible to state that the award as an independent instrument of international law that does not require ratification would “only exist in the sphere of international law” and that “therefore it will not at all be possible to speak of its unconstitutionality in the sense of the inconsistency of national regulations with the Constitution” (Paragraph 62 of the reasoning). In so far as the state borders are constitutionalised (and thus legally internalised), then it is clear even without special analysis that the award, if it deviated from the constitutional provisions determining the state border, would indeed also have internal legal effects – to exactly the same extent that Article 4 of the Constitution and Section II of the BCC entail them. An award which was the result of criteria other than those guaranteed by constitutional provisions which are – and in the manner as they are – interpreted in this Opinion of the Constitutional Court, would necessarily be unconstitutional. In such a case only two options would be available, but both are bad: either to amend the Constitution to comply with the international obligation or to commit a breach of international law. The first option seems to me (“only”) legally unacceptable, because it means that in the preliminary (*a priori*) constitutional judicial review of a treaty, which aims exactly at preventing the possibility of the occurrence of such a quandary, the Constitutional Court failed. I cannot accept that the Constitutional Court, being aware of the real possibility that such a quandary might occur, would, rather than decide in the opinion that the contested provisions of the Agreement are inconsistent with the Constitution, suggest that the National Assembly consider whether it would be sensible to amend the Constitution so that the unconstitutionality of national legislation could not even occur. Hence, if this option actually exists, then it is completely logical that the Agreement, which would be the direct cause of the realisation of this option, cannot be consistent

to amend the Constitution would not be intended to achieve that the state borders with the Republic of Croatia would also in nature be consistent with the Constitution and the BCC (that they are not inconsistent with these constitutional acts is provided for by the substantive provisions of the Agreement in conjunction with the duty of the Arbitral Tribunal to determine Slovenia's junction to the High Sea), but would rather be required only in the imaginary case of potential unwarranted conduct of the Arbitral Tribunal such that it determined the state border by some other constitutionally inconsistent criteria, criteria that are (hence also) inconsistent with the substantive provisions of the Agreement or due to the failure to complete the duty determined in Article 3(1)(b) of the Agreement to determine the junction of Slovenia with the High Sea. An interference by the institution empowered to amend the Constitution, indicated in Paragraphs 62 and 63 of the reasoning, would entail nothing other than the deconstitutionalisation of the borders. Its constitutional message would namely be that the definition of the borders determined in Section II of the BCC no longer applies, that the borders may also be determined in some other manner, without regard to the principles of international law *uti possidetis iuris* and *uti possidetis de facto*. All this is only due to the merely theoretical possibility that this international judicial body will not carry out the duty entrusted to it under the Agreement, or otherwise that its award would be arbitrary. I reject such a possibility – and together with it also reject the warnings to the institution empowered to amend the constitution in Paragraphs 62 and 63 of the reasoning.

7. To conclude, I would like to add my own, very personal view of the importance of Section II of the BCC (as interpreted by the Constitutional Court in this Opinion) and its relation to the conclusion of treaties concerning the border. Since the Republic of Slovenia proclaimed by this constitutional document "*urbi et orbi*" that it met the criteria recognised by international law for the existence of a state, and as the BCC is a permanent and inexhaustible constitutional source of the statehood of the Republic of Slovenia, it therefore cannot be understood otherwise than as, *inter alia*, a lasting commitment of the state to international law. I therefore see in the conclusion of the Agreement the last and final act of the independence of our state, an act that will bring a lasting solution to the border issue in a manner consistent with the Constitution and thus bring peace to our neighbourly relations. Therefore I will be bold and adopt the standpoint that any suspension of the solution of this extremely important issue (which over time can lead to irreversible adverse consequences for our state) would in its essence be contrary to the Constitution. It is contrary to the Constitution firstly because it would oppose the requirements of a definitive determination and stability of the state borders, requirements clearly conveyed by the purpose of Section II of the BCC (to determine and stabilise the border in a manner

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with the Constitution. I am afraid that on the basis of such hypothesis the Constitutional Court would not accomplish the aim of a preliminary review – to prevent legal provisions inconsistent with the Constitution from entering into the national legal order or to prevent a breach of international law. Another (even worse) option is to act contrary to an obligation of international law.

consistent with international law), secondly because it is not in accordance with the principles of international law that the state committed itself to respecting – already in the process of gaining independence – the principles that are built into the very formation (the gaining of independence) of the Republic Slovenia and which can be inferred precisely from Section II of the BCC (the inviolability of the state territory and the territorial integrity of states, the peaceful settlement of disputes, the prohibition of the threat of force or use of force directed against the territorial integrity or political independence of any state, the principles of the peaceful co-existence of states and good neighbourly relations – borders that are irrevocably fixed and stable are a prerequisite for these principles, and vice versa: undefined, unclear and disputed borders are a permanent source of conflicts, disputes, provocations, incidents, and all sorts of tension and a serious obstacle to peaceful and good neighbourly relations between the two states), and finally also because the Republic of Croatia has since independence extended its actual authority to a substantial part of the territory which in terms of the international legal principle of *uti possidetis* belongs to the Republic of Slovenia<sup>7</sup> (without the need for any special argumentation, it is clear that the Agreement is the first step towards remedying this unconstitutional state of affairs due to the Croatian occupation of Slovene territory).

*Jan Zobec*

*Mag. Marija Krisper Kramberger*

<sup>7</sup> According to the relevant White Paper of the Ministry of Foreign Affairs of the Republic of Slovenia, since 25 June 1991 the Republic of Croatia has arbitrarily appropriated a total of 1318 hectares of Slovene territory (Dragonja: 113 hectares, Snežnik: 70 hectares, Sekulić: 335 hectares, Mura: 800 hectares), and entered this territory into their regulations and maps, and the Republic of Slovenia has protested against these acts in diplomatic notes and by blocking individual chapters of Croatia's accession negotiations. The President of the Republic of Croatia has therefore issued a statement of non-prejudice and in the Agreement these documents and maps should not be taken into account. Merely according to the data of the Mission of the Republic of Croatia to the European Union, its territory increased by 520 hectares from the year 2002 to the year 2009.

Order No. **U-I-214/00**, dated 14 September 2000

### ORDER

At a session held on 14 September 2000 in proceedings to examine the petition of Ante Belobrajdič, Koper, the Constitutional Court

*decided as follows:*

1. The petition to initiate proceedings to review the constitutionality of Points I and II of the Constitutional Act Amending Article 80 of the Constitution of the Republic of Slovenia (Official Gazette RS, No. 66/2000) is rejected.
2. The petition to initiate proceedings to review the constitutionality of the Ordinance on the Promulgation of the Constitutional Act Amending Article 80 of the Constitution of the Republic of Slovenia (Official Gazette RS, No. 66/2000) is rejected.
3. The petition to initiate proceedings to review the constitutionality of the Decree Calling Regular Elections to the National Assembly (Official Gazette RS, No. 67/2000) is dismissed.

*Reasoning*

#### A

1. The petitioner challenges the Constitutional Act Amending Article 80 of the Constitution of the Republic of Slovenia (hereinafter referred to as the CA80), claiming that Points I and II thereof are contrary to the provisions of the fourth paragraph of Article 80 and the first paragraph of Article 90 of the Constitution. The petitioner argues that as the fourth paragraph of Article 80 of the Constitution, which requires that the National Assembly adopt a law regulating the electoral system by a two-thirds majority vote of all deputies, remained in force, the two provisions now contradict each other. He argues in particular that the National Assembly should respect the will expressed in the referendum on the electoral system and it should also respect the first paragraph of Article 90 of the Constitution, which provides that the deputies are bound by the results of a referendum. By adopting the CA80 the National Assembly allegedly circumvented this constitutional provision, believing that it was not bound by the referendum decision. This is allegedly also contrary to

the definition enshrined in the Constitution that Slovenia is a democratic state and a state governed by the rule of law.

2. The petitioner also challenges the Ordinance on the Promulgation of the Constitutional Act amending Article 80 of the Constitution of the Republic of Slovenia (hereinafter referred to as the ORCA80) and the Decree Calling Regular Elections to the National Assembly (hereinafter referred to as the Elections Decree), but he does not describe their alleged unconstitutionality or illegality and does not state the reasons for which they are unconstitutional or illegal.
3. The petitioner substantiates his legal interest with the fact that, as a citizen, he is also a voter and that it is in his interest for the two-round system for which he voted in the referendum to be enacted.

## B

4. One of the procedural requirements for initiating a procedure before the Constitutional Court is the jurisdiction of the Constitutional Court. The jurisdiction of the Constitutional Court is regulated in Article 160 of the Constitution and Article 21 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter referred to as the CCA). Neither a power to review the mutual consistency of constitutional provisions nor the power to review the constitutionality of the provisions of a constitutional act are listed among the powers of the Constitutional Court in the mentioned provisions.
5. The Constitutional Court has already considered the question of the power to review the constitutionality of the provisions of a constitutional act in case No. U-I-332/94 (OdlUS V, 42). In that case, the petitioner challenged the constitutionality of certain provisions of the Constitutional Act Amending the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (Official Gazette RS, No. 45/94). The Constitutional Court rejected that petition for lack of jurisdiction (Order No. U-I-332/94, dated 11 April 1996). In the reasoning of the Order of rejection, the Constitutional Court defined the criteria that would have to be fulfilled for the Court to be able to review the constitutionality of provisions that would be, and despite the fact that they would be, contained in a constitutional act (Paragraphs 3 and 4 of the reasoning of the Order).
6. In proceedings to examine the petition in case No. U-I-332/94, the Constitutional Court held that Article 174 of the Constitution merely provides that “a constitutional act shall be adopted in order to implement the Constitution and to ensure a transition to the application of the provisions of the Constitution.” At the same time it emphasised that such does not entail that this is the only kind of constitutional act and that the National Assembly could not adopt a constitutional act with a different intention and content, provided it was constitutional in nature. It follows from the above that, already in the procedure to examine the abovementioned petition, the Constitutional Court established the formal criterion as the criterion for determining its own jurisdiction with regard to the constitutional act in accordance with Article 174 of the Constitution, while in the remaining instances concerning the regulation of specific subject matter by a constitutional act the substantive criterion is applicable as well.

7. In the hitherto practice of the constitution framers (following the adoption of the Constitution currently in force), the constitutional act has been used to enact amendments to the Constitution in accordance with Article 169 of the Constitution. The constitution framers applied a constitutional act as the act amending the Constitution to amend Article 68 of the Constitution (the Constitutional Act Amending Article 68 of the Constitution of the Republic of Slovenia, Official Gazette RS, No. 42/97). The constitutional act is thus used as an act amending the Constitution, and its provisions are therefore constitutional provisions regardless of their content or nature. Furthermore it is also used as an act determining the implementation and transition to the application of constitutional provisions (including those that entail amendments to the Constitution adopted by the constitutional act). The provisions of such a constitutional act are provisions that contain constitutional subject matter if they regulate the implementation or transition to the new constitutional regulation. The constitutional act is, however, also used as an act that may be adopted by the constitution framers with a different intention and different content – in other words, not with the intention of amending the constitutional provisions or implementing the constitutional provisions and transitioning to their application. Only with regard to this kind of constitutional act a substantive criterion, i.e. the content and nature of the provisions of the constitutional act, is decisive for determining the jurisdiction of the Constitutional Court.
8. The challenged constitutional act (the CA80) contains two points. The provision of Point I amends the wording of the Constitution, and thus entails an amendment to Article 80 of the Constitution. It is true that the constitution framers used the term “supplement” and not the constitutional term “amendment”; however, in the opinion of the Constitutional Court, the provision of Point I of the CA80 entails an amendment to Article 80 of the Constitution. This Article divides the regulation of the subject matter regarding elections between the Constitution and the laws. The Constitution specifies the electoral system in general terms but leaves the implementation of the system thus specified to the laws. The Constitution provides for a similar division with regard to a legislative referendum (Article 90) and uses the same formulation in both instances when referring to the statutory regulation (the fourth paragraph of Article 80 and the fifth paragraph of Article 90 of the Constitution). The decision as to where the constitutional regulation ends and where the statutory regulation begins is at the discretion of the constitution framers. As the challenged Point I amends subject matter that has already become integral to the subject matter of the Constitution, Point I itself has undoubtedly become a component of the Constitution. Thus, from the point of view of whether the Constitutional Court has jurisdiction or not, the challenged provision of Point I of the CA80 entails a constitutional provision already according to the formal criterion. As such, it cannot be subject to constitutional review; therefore, the Constitutional Court rejected the petition to review the CA80 insofar as it relates to Point I thereof, for lack of jurisdiction (Point 1 of the operative provisions). The Constitutional Court also reached the same decision in, for example, Order No. U-I-195/97, dated 29 January 1998 (OdlUS VII, 19).

9. The provisions of Point II of the CA80 first provide that the elections of deputies to the National Assembly in the year 2000 and [subsequent elections held] until an amendment to the law regulating elections to the National Assembly enters into force shall be held in accordance with the National Assembly Elections Act (Official Gazette RS, No. 44/92 etc. – hereinafter referred to as the NAEA), and subsequently specify the manner of application or the non-applicability of some of the provisions of the NAEA. Unlike Point I of the CA80, the provisions of Point II thereof do not entail an amendment to the wording of the Constitution. Taking into account Paragraphs 6 and 7 of the reasoning of this decision, it is therefore necessary to first establish what kind of constitutional act those provisions constitute in order to decide whether the Constitutional Court has jurisdiction to review them.
10. As the Constitutional Court has already indicated in Paragraph 8 of the reasoning of this Order, the Constitution divides the regulation of the subject matter regarding elections between the constitution framers and the legislature. The Constitution itself specifies the electoral system in general terms and leaves the implementation of the system thus specified to a law – the NAEA (the fourth paragraph of Article 80 of the Constitution). The latter can certainly be subject to constitutional review. In view of the division of the subject matter between the Constitution and the laws, the content of Point II of the CA80, except for the last paragraph, essentially constitutes statutory subject matter, as it does not regulate (amend or supplement) the subject matter that was initially part of the constitutional regulation of the electoral system. As such, it should be regulated by a special law as envisaged by the fourth paragraph of Article 80 of the Constitution. It is also evident from the content of the first paragraph of Point II of the CA80 that the intention of the constitution framers was to explicitly provide that the elections of the deputies to the National Assembly in the year 2000 be held in accordance with the NAEA and the amendments determined by the constitution framers in that provision. These amendments were intended to apply to the elections in 2000 and until an amendment to the law regulating elections to the National Assembly had entered into force. The provisions of Point II of the CA80 therefore regulate subject matter that is, and will continue to be, subject to statutory regulation. According to the substantive criterion, such provisions could therefore be subject to review in proceedings before the Constitutional Court, unless their purpose was to ensure the transition to the new constitutional regulation.
11. As the Constitutional Court has already established in Paragraph 8 of the reasoning of this Order, Point I of the CA80 entails an amendment to the constitutional regulation of the electoral system. It introduced elections according to the principle of proportional representation with a four-percent electoral threshold and enacted the requirement that the voters must have a decisive influence on the allocation of seats to the candidates. It thus entails an amended constitutional regulation which, with regard to the existing electoral legislation, required that its implementation be determined and the transition to the application of the amended regulation ensured. This is precisely what the constitution framers did with the provisions of the first paragraph of Point II of the CA80 in accordance with the first paragraph of Article 174 of

the Constitution. The Constitutional Court deems that they concern provisions that regulate questions regarding the transition to the new constitutional regulation and they will also be included in the NAEA. They are therefore (already according to the formal criterion) constitutional norms by nature, the review of which does not fall within the jurisdiction of the Constitutional Court. Consequently, it also rejected the petition to review the constitutionality of the CA80 insofar as it relates to Point II thereof (Point 1 of the operative provisions).

12. An act amending the Constitution (Article 169 of the Constitution), adopted by the National Assembly by a two-thirds majority, is a constitutional act. As regards the entry into force of the constitutional amendments adopted by such act, Article 171 of the Constitution provides that these amendments enter into force upon their promulgation. The promulgation is in itself an act based directly on the Constitution or, in instances of implementing or any other kind of constitutional act, on the constitutional act itself. In order to perform the act of promulgation, the National Assembly is not required to adopt any special regulation. Therefore the challenged ORCA80 may not be deemed a regulation the constitutionality of which the Constitutional Court would be competent to review. It is an individual act through which promulgation is performed. As individual acts may not be subject to constitutional review in proceedings initiated upon a petition, the Constitutional Court rejected the petition to review the constitutionality of the ORCA80 (Point 2 of the operative provisions).
13. In accordance with the NAEA, regular elections are called by the President of the Republic (Article 14). In accordance with the Constitution, regular elections are called every four years and the Constitution determines exhaustively the instances and conditions for an extension of the deputies' terms of office (the first and second paragraphs of Article 81). The NAEA expressly determines the deadline for calling and holding elections. It also determines the content of the act calling the elections (Article 16). It is an act issued by the President of the Republic and entails the commencement of the electoral process. The petitioner does not expressly describe the unconstitutionality or illegality of the Elections Decree; however, it is evident from the petition that he proposes its abrogation in relation to the part of the petition concerning the abrogation of the CA80. As a consequence of the abrogation of the challenged constitutional act, the Constitutional Court should also have abrogated the calling of the elections. As the Constitutional Court rejected the petition to review the constitutionality of the CA80, in light of the provisions of the CA80, the petition to review the constitutionality of the Elections Decree is manifestly unfounded. Therefore it was dismissed as such by the Constitutional Court (Point 3 of the operative provisions).
14. As the Constitutional Court rejected the petition in part for lack of jurisdiction and in part as manifestly unfounded, it did not consider the issue of the petitioner's legal interest.

## C

15. The Constitutional Court adopted this Order in accordance with Article 21 and the second paragraph of Article 26 of the CCA, and the first indent of Article 52 of the

Rules of Procedure of the Constitutional Court of the Republic of Slovenia (Official Gazette RS, No. 89/98), composed of: Franc Testen, President, and Judges Dr Janez Čebulj, Dr Miroslava Geč-Korošec, Lojze Janko, Milojka Modrijan, Dr Mirjam Škrk, Dr Lojze Ude, and Dr Dragica Wedam-Lukić. The decision was reached unanimously.

*Franc Testen*  
*President*



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