Case number:
U-I-191/17

ECLI:
ECLI:SI:USRS:2018:U.I.191.17

Challenged act:
Referendum and Popular Initiative Act (Official Gazette RS, No. 26/07 – official consolidated text) (RPIA)

Elections and Referendum Campaign Act (Official Gazette RS, Nos. 41/07, 11/11, and 98/13) (ERCA), 1st para. of Art. 3 insofar as it refers to the Government and the 6th para. of Art. 4.

Operative provisions:
The Referendum and Popular Initiative Act (Official Gazette RS, No. 26/07 – official consolidated text) is inconsistent with the Constitution.

The first paragraph of Article 3 insofar as it refers to the Government and the sixth paragraph of Article 4 of the Elections and Referendum Campaign Act (Official Gazette RS, Nos. 41/07, 11/11, and 98/13) are inconsistent with the Constitution.

The National Assembly must remedy the unconstitutionalities referred to in the preceding Points of the operative provisions within one year of the publication of this Decision in the Official Gazette of the Republic of Slovenia.

Until the regulation in the Referendum and Popular Initiative Act has changed, in appeal proceedings the Supreme Court shall:
– dismiss the appeal if it does not establish irregularities in a referendum procedure or if it establishes irregularities that did not or could not have affected the referendum results;
– grant the appeal, annul the voting, and order new voting if it establishes irregularities in the referendum procedure that did or could have affected the referendum results;
– grant the appeal, annul the voting, and establish by itself the referendum results if it establishes irregularities in the referendum procedure that did or could have affected the referendum results and the consequences of which can be remedied by establishing different referendum results.

Following the serving of the decision of the Supreme Court referred to in the second indent of the preceding Point of the operative provisions, the State Election Commission shall determine within two days, by an order, a new date of voting, with regard to which it must take into consideration the time for a referendum campaign, considering the established nature of the violation. A judgment of the Supreme Court that annuls the voting in the referendum or establishes different referendum results and the order of the State Election Commission on the determination of a new date of voting shall be published in the Official Gazette of the Republic of Slovenia.

Abstract:
The right to vote in a referendum referred to in the third paragraph of Article 90 of the Constitution entails a form of citizens' direct participation in the management of public affairs, therefore it is constitutionally protected by Article 44 of the Constitution.

Judicial protection of the right to vote in a referendum is not primarily intended to protect the subjective legal position of individual voters, but rather the public interest and constitutional values, which are reflected in a fair referendum procedure (respect for referendum rules), the correctness of referendum results, and the trust of citizens that the referendum has been carried out fairly. Judicial protection of the right to vote in a referendum is ensured by taking into account only established irregularities in the referendum procedure that affected or could have affected the referendum results, but not established irregularities that did not or could not have affected such results.

The special character of the right to vote in a referendum and the requirement that referendum disputes be resolved as quickly as possible require special, expeditious, and effective judicial protection. The legislature must determine by law the legal remedy (e.g. an appeal, an action, a request), the entitled applicants who may file the legal remedy, the phase of the referendum procedure in which the legal remedy may be filed and the time limit therefor, the grounds on which the legal remedy may be filed (i.e. the substance of objections), the competent court, the rules of judicial proceedings, and the powers of the court when deciding on a case.

Proceedings for the judicial review of administrative acts as regulated by the Act on the Judicial Review of Administrative Acts, which, mutatis mutandis, also apply in judicial protection proceedings regarding the right to vote in a referendum before the Supreme Court (i.e. a referendum dispute), do not include all of the elements that should be determined in order for the right to judicial protection determined by the first paragraph of Article 23 of the Constitution and the fourth paragraph of Article 15 of the Constitution to be effectively exercised as regards the right to vote in a referendum (the third paragraph of Article 90 in conjunction with Article 44 of the Constitution). Although such indeterminacy and deficiency (i.e. a legal gap) in the statutory regulation significantly affect implementation of the judicial protection of the right to vote in a referendum, the challenged regulation is already unconstitutional because it does not fulfil the requirement as to the clarity and precision of regulations stemming from Article 2 of the Constitution.

In order to exercise the right to free voting, it is essential that voters be adequately informed, which can be ensured in various ways and in different periods of time. One of the key ways is the referendum campaign, which lasts a short period of time directly prior to the day of voting in the referendum and is the formalised form of informing voters of the subject of the referendum.

In view of its constitutional position, the Government is authorised and may even have the obligation to advocate in a public debate a law adopted by the National Assembly and to present its position thereon, and it may also present the consequences of the law not entering into force that it deems negative. The Government can also fulfil this duty during a referendum campaign; however, it must convey information in a fair and reserved manner, namely information both in favour of and opposing the law at issue. Nevertheless, the Government may express its position thereon. Thus, such provision of information must be objective, comprehensive, and transparent. However, referendum propaganda is incompatible with the position of the Government in the system of state power.

The statutory regulation determined by the first paragraph of Article 3 of the Elections and Referendum Campaign Act, which enables the Government to participate in a referendum campaign as an organiser in the same manner as all other organisers of such, entails an excessive interference with the right to participate in the management of public affairs determined by Article 44 of the Constitution, which protects the right to vote in a legislative referendum determined by the third paragraph of Article 90 of the Constitution. Such an interference is not necessary and is thus inconsistent with the Constitution.

Thesaurus:

Legal basis:
Arts. 2, 15.4, 23.1, 44, 90.3, Constitution [CRS]
Arts. 30, 40.2, 48, Constitutional Court Act [CCA]

Cases joined:

Full text:
U-I-191/17
25 January 2018

On the basis of the first paragraph of Article 30 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, 54/10, 56/11, and 70/17), the Constitutional Court hereby issues the following

PRESS RELEASE

Upon the request of the Supreme Court, the Constitutional Court reviewed the conformity of the Referendum and Popular Initiative Act and of the Elections and Referendum Campaign Act with the Constitution, but did not decide on the validity of the referendum on the so-called Act on the second track of the railway line. That matter is to be decided on by the Supreme Court in a procedure initiated upon an appeal to the Supreme Court submitted by Vili Kovačič against the final results of the referendum.

The Constitutional Court established that the Referendum and Popular Initiative Act is inconsistent with the Constitution, as the referendum dispute before the Supreme Court is not regulated in a clear and precise manner. The Supreme Court must have, *inter alia*, express authorisation to annul a referendum if there were irregularities in the procedure that could have affected the results of the referendum.

The Constitutional Court also established that the first paragraph of Article 3 and the sixth paragraph of Article 4 of the Elections and Referendum Campaign Act are inconsistent with the Constitution as they enable the Government to organise and finance a referendum campaign in the same manner as other organisers. The statutory regulation excessively interferes with the right to vote in a referendum. The Government cannot be equal to other campaign organisers, as its constitutional position requires it to objectively, comprehensively, and transparently inform voters of the subject of referendums. In a referendum procedure, the Government can publicly adopt a "*pro*" or "*contra*" position regarding the law in question, but the information it provides must present both the reasons in favour of and against the law. Only by proceeding in such a

manner can it use budgetary funds.

The Constitutional Court neither examined nor decided whether in the concrete referendum procedure regarding the so-called Act on the second track of the railway line the Government acted in conformity with the described requirements. This will also be decided on by the Supreme Court, in conformity with the constitutional starting points contained in the Decision of the Constitutional Court.

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In the proceedings to review constitutionality initiated upon the request of the Supreme Court, the Constitutional Court decided, by Decision No. U-I-191/17, dated 25 January 2018, as follows:

1. the Referendum and Popular Initiative Act is inconsistent with the Constitution (*Point 1 of the operative provisions*);

2. the first paragraph of Article 3 insofar as it refers to the Government and the sixth paragraph of Article 4 of the Elections and Referendum Campaign Act are inconsistent with the Constitution (*Point 2 of the operative provisions*);

3. the National Assembly must remedy the established unconstitutionalities within one year of the publication of this Decision in the Official Gazette of the Republic of Slovenia (*Point 3 of the operative provisions*);

4. until the regulation in the Referendum and Popular Initiative Act is changed, in appeal proceedings the Supreme Court shall:
a) dismiss the appeal if it does not establish irregularities in the referendum procedure or if it establishes irregularities that did not or could not have affected the referendum results;
b) grant the appeal, annul the voting, and order new voting if it establishes irregularities in the referendum procedure that did or could have affected the referendum results. Within two days of the service of the decision of the Supreme Court, the State Election Commission shall determine, by an order, a new date of voting, with regard to which it must take into consideration the time for the referendum campaign, considering the established nature of the violation;
c) grant the appeal, annul the voting, and establish by itself the referendum results if it establishes irregularities in the referendum procedure that did or could have affected the referendum results and the consequences of which can be remedied by establishing different referendum results (*Points 4 and 5 of the operative provisions*).

5. A judgment of the Supreme Court that annuls the voting in the referendum or establishes different referendum results and the order of the State Election Commission

on the determination of a new date of voting shall be published in the Official Gazette of the Republic of Slovenia (*Point 5 of the operative provisions*).

The Constitutional Court adopted the Decision unanimously, composed of nine judges. Judges Dr Jadranka Sovdat and Dr Dr Klemen Jaklič submitted concurring opinions.

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The Supreme Court stayed the referendum dispute regarding the Act Regulating the Construction, Operation, and Management of the Second Track of the Divača–Koper Railway Line and challenged, by a request, the Referendum and Popular Initiative Act because it fails to regulate in a constitutionally consistent manner proceedings for judicial protection of the right to vote in a referendum. The Supreme Court challenged the sixth paragraph of Article 4 of the Elections and Referendum Campaign Act because it allows the Government (i.e. a service thereof) to use budgetary funds in an unconstitutional manner during the referendum campaign, namely as a campaign organiser. Due to the interconnectedness of the statutory provisions, the Constitutional Court also initiated, on its own motion, proceedings to review the constitutionality of the first paragraph of Article 3 of the Elections and Referendum Campaign Act, which enables the Government or a service thereof to be the organiser of a referendum campaign.

The Referendum and Popular Initiative Act

When reviewing the constitutionality of the regulation of judicial protection of the right to vote in a referendum, the Constitutional Court proceeded from the position that such judicial protection is primarily intended to protect not the subjective legal position of individual voters, but the public interest and constitutional values. These values include a fair referendum procedure (i.e. observance of referendum rules), the correctness of referendum results, and the trust of citizens that the referendum has been carried out fairly. The objective character of judicial protection of the right to vote in a referendum is ensured by taking into account only established irregularities in the referendum procedure that affected or could have affected the referendum results, but not established irregularities that did not or could not have affected such results. Affecting the referendum results means that an irregularity is of such nature that it could have led to different (i.e. opposite) final results of the voting. The only possible exception could be irregularities whose quality (not quantity) would fundamentally compromise the fairness of the referendum procedure.

The special character of the right to vote in a referendum and the requirement that referendum disputes be resolved as quickly as possible require special, expeditious, and effective judicial protection in such a dispute. To this end, the legislature must adopt a regulation that fulfils the fundamental requirements of such judicial proceedings. The legislature must determine by law the legal remedy, the entitled applicants who may file

the legal remedy, the phase of the referendum procedure in which the legal remedy may be filed and the time limit for such, the grounds on which the legal remedy may be filed (i.e. the substance of objections), the competent court, the rules of judicial proceedings, and the powers of the court when deciding on such cases.

Due to the special nature of judicial protection of the right to vote in a referendum, only referendum results as such can be challenged in a referendum dispute, and all the alleged irregularities can be claimed therein, including irregularities from the referendum campaign that affected or could have affected the fairness of the procedure as a whole. Only irregularities that affected or could have affected the referendum results due to their quantity or quality can lead to the annulling of the vote or to the repetition thereof. If the [competent] court establishes such irregularities in the procedure, it must have the power to annul in full or in part the voting and to order new voting in full or in part. In the event the consequences of an established irregularity that affected or could have affected referendum results can be eliminated by merely establishing different referendum results, the [competent] court must have the power to do so. Provided that, on the basis of the established facts, the [competent] court establishes that no irregularities have occurred that affected or could have affected the referendum results, it must have the power to dismiss the legal remedy. Which established irregularities in the referendum procedure are such that affected or could have affected referendum results is a matter of assessment of the competent court in each individual referendum dispute.

The Constitutional Court established that proceedings for a judicial review of administrative acts as regulated by the Act on the Judicial Review of Administrative Acts, which is also, *mutatis mutandis*, applicable in proceedings for judicial protection of the right to vote in a referendum before the Supreme Court (i.e. a referendum dispute), do not contain all the elements that should have been prescribed in order to ensure effective exercise of the right to judicial protection of the right to vote in a referendum. It held that such indeterminacy and deficiency (a legal gap) of the statutory regulation significantly restrict the exercise of judicial protection of the right to vote in a referendum. However, the challenged regulation is already unconstitutional due to the fact that it does not fulfil the requirement as to the clarity and precision of regulations as regards their content stemming from Article 2 of the Constitution. In order for the Supreme Court to be able to decide in the specific judicial proceedings it stayed, on the basis of the second paragraph of Article 40 of the Constitutional Court Act, the Constitutional Court drew attention to the legal effects of its declaratory decision and determined the authorisations of the Supreme Court for decision-making on the matter at issue.

Elections and Referendum Campaign Act

With regard to the constitutional position of the Government, the possibility of it participating in a referendum procedure is not constitutionally disputable. The

Government is authorised to advocate in a public debate a law adopted by the National Assembly and to present its position thereon, and it may also present the consequences of the law not entering into force that it deems negative. However, in proceeding in such a manner, it must not hinder or restrict the freedom to form a position in the referendum procedure. The Government must convey information in a fair and reserved manner, namely information both in favour of and opposing the law at issue. Nevertheless, the Government may express its position thereon. Hence, such provision of information must be objective, comprehensive, and transparent. In these efforts, the Government must act diligently and must not distort or conceal the information it is in possession of.

In a referendum campaign as defined by the Act, the organisers of a referendum campaign may act in a biased manner and affect, by means of propaganda, the decision-making of voters as to voting *pro* or *contra* in the referendum. However, referendum propaganda is incompatible with the position of the Government in the system of state power. It is constitutionally inadmissible for the Government to organise a referendum campaign. Since the challenged statutory regulation enables the Government to organise a referendum campaign, this entails an excessive interference with the right to participate in the management of public affairs determined by Article 44 of the Constitution, which protects the right to vote in a legislative referendum determined by the third paragraph of Article 90 of the Constitution. Given that the Government may not be the organiser of a referendum campaign, it must not allocate to itself budgetary funds for it participating as the organiser of a referendum campaign.

When the Constitutional Court establishes that a law is inconsistent with the Constitution, it shall abrogate it, as a general rule. However, considering the reasons for the present Decision, it is not disputable that the Government may participate in a referendum procedure also during a referendum campaign (but not as a campaign organiser) and that it may also allocate some funds to this end. The abrogation of the challenged provisions would entail that the position and functioning of the Government during a referendum campaign would not be regulated. From the viewpoint of Article 2 of the Constitution (the principle of the clarity and precision of regulations as regards their content), this would create an unconstitutional legal gap. Therefore, it is not possible to abrogate the challenged provisions. The Constitutional Court adopted a declaratory decision and imposed a one-year time limit by which the legislature must remedy the established unconstitutionality.

A declaratory decision entails that the unconstitutional law remains in force. However, since in instances wherein a declaratory decision is adopted both the operative provisions and the reasons contained in the reasoning are binding, the Government must – until the legislature responds and adopts a different statutory regulation – perform its activities during the referendum campaign in conformity with the substantive reasons contained in the present Decision that refer to the limitations that apply to the Government during that time.

The unconstitutionality of the statutory regulation on the basis of which the Government organised a referendum campaign does not in itself entail irregularities that affected or could have affected the referendum results. In the referendum dispute that it stayed, the Supreme Court will have to adjudicate whether the concrete activities that the Government carried out in the referendum procedure (i.e. also during the referendum campaign) were in conformity with the reasons stated in the Decision of the Constitutional Court. It will have to adjudicate whether the Government, as the organiser of a referendum campaign, objectively, comprehensively, and transparently informed voters. If it establishes irregularities, it will also have to decide whether they affected or could have affected the results of the voting in the referendum.

Dr Jadranka Sovdat
President

U-I-191/17
25 January 2018

DECISION

At a session held on 25 January 2018 in proceedings to review constitutionality initiated upon the request of the Supreme Court, the Constitutional Court

decided as follows:

1. The Referendum and Popular Initiative Act (Official Gazette RS, No. 26/07 – official consolidated text) is inconsistent with the Constitution.

2. The first paragraph of Article 3 insofar as it refers to the Government and the sixth paragraph of Article 4 of the Elections and Referendum Campaign Act (Official Gazette RS, Nos. 41/07, 11/11, and 98/13) are inconsistent with the Constitution.

3. The National Assembly must remedy the unconstitutionalities referred to in the preceding Points of the operative provisions within one year of the publication of this Decision in the Official Gazette of the Republic of Slovenia.

4. Until the regulation in the Referendum and Popular Initiative Act has changed, in appeal proceedings the Supreme Court shall:
– dismiss the appeal if it does not establish irregularities in a referendum procedure or if it establishes irregularities that did not or could not have affected the referendum results;

– grant the appeal, annul the voting, and order new voting if it establishes irregularities in the referendum procedure that did or could have affected the referendum results;
– grant the appeal, annul the voting, and establish by itself the referendum results if it establishes irregularities in the referendum procedure that did or could have affected the referendum results and the consequences of which can be remedied by establishing different referendum results.

5. Following the serving of the decision of the Supreme Court referred to in the second indent of the preceding Point of the operative provisions, the State Election Commission shall determine within two days, by an order, a new date of voting, with regard to which it must take into consideration the time for a referendum campaign, considering the established nature of the violation. A judgment of the Supreme Court that annuls the voting in the referendum or establishes different referendum results and the order of the State Election Commission on the determination of a new date of voting shall be published in the Official Gazette of the Republic of Slovenia.

REASONING

A

1. The applicant challenges the Referendum and Popular Initiative Act (hereinafter referred to as the RPIA) and the sixth paragraph of Article 4 of the Elections and Referendum Campaign Act (hereinafter referred to as the ERCA). It states that a referendum dispute is pending before the Supreme Court regarding protection of the right to vote in a referendum on the Act Regulating the Construction, Operation, and Management of the Second Track of the Divača–Koper Railway Line (hereinafter referred to as the ARCOMST), in which the applicant challenges not only the act by which the referendum results were established itself, but also the holding of the referendum and the results thereof in their entirety. It alleges that Article 53a of the RPIA (in conjunction with Article 53 of the RPIA) only regulates the dispute regarding the correctness and legality of the act establishing the final results of the voting. Taking into account the finding that broader judicial protection of all objections as regards other violations that arise during a referendum must be ensured within the framework of a referendum dispute, in the opinion of the applicant, the RPIA – in the part regulating the referendum dispute before the Supreme Court – is inconsistent with the Constitution. The applicant alleges that in order to ensure effective judicial protection (Article 23 of the Constitution) and the protection of the rights of both campaign organisers and those who voted in a referendum (Articles 44 and 90 of the Constitution), the legislature should have regulated both the substantive and procedural legal issues by law. Allegedly, it failed to do so. By means of the established available methods of legal interpretation and legal institutes of case law (e.g. analogy), the Supreme Court is allegedly unable to resolve the deficiencies

of entire substantive institutes and the related procedural institutes, and to fill in the legal gaps that have arisen. Therefore, there is allegedly an unconstitutional legal gap in the RPIA.

2. The applicant alleges that the RPIA does not determine any substantive assessment criteria in referendum disputes before the Supreme Court. Allegedly, the legislature determined neither the substance of the objections in an appeal nor the basis for assessing whether such objections in an appeal are justified or not, nor under which conditions and in what instances they are justified. Similarly, when it is necessary to interfere with referendum results or, broadly speaking, with the will of the voters in a referendum, once a violation is established has allegedly also remained legally unregulated. The question of the consequences of the finding that a certain violation in a referendum procedure affected the referendum results allegedly requires a more precise substantive determination. It is allegedly necessary to determine whether in order to justify an interference with the results of a referendum it has to be established that – provided a causal link exists – the violation affected the final results in such a manner that the final results were different than they would have been had there been no violation, or whether the mere establishment that the violation significantly affected the results of the referendum suffices, even if it is not demonstrated that the final results of the referendum would have been different [had there been no violation]. In view of the absence of a statutory basis, the issue of an unconstitutional legal gap is all the more prominent as regards the question of whether the mere potential influence of a violation that has arisen in a referendum procedure on the results of the referendum suffices [to justify] an interference with the results of the referendum ("could have affected").

3. Allegedly, the RPIA is inconsistent with the Constitution also because it fails to determine statutory rules that provide parties and courts clear and predictable rules for courts' decision-making in a referendum dispute that are adapted to the special legal nature of the dispute in question. The applicant alleges that the Act should have precisely regulated a series of procedural questions that should ensure the right to fair judicial proceedings (Article 22 of the Constitution), and in such a framework should also ensure the establishment of the relevant state of the facts on which the legal assessment could be substantively based in view of its legal basis. Allegedly, the RPIA also does not confer on the Supreme Court the power to decide on a referendum dispute. In the opinion of the applicant, it does not suffice that a court's decision is limited to adopting a decision regarding an interference (e.g. an annulment) with the report of the State Election Commission (hereinafter referred to as the SEC), as courts should also have the power to decide how to eliminate the consequences of violations that inadmissibly affected referendum results, e.g. by annulling the vote in its entirety and by requiring that it be repeated, and also, if necessary, by imposing on the Government or other competent authorities or participants in the referendum procedure (e.g. in the referendum campaign) certain limitations or obligations to act. Without such, in the opinion of the applicant, it is possible that judicial protection is ineffective also in the referendum dispute at issue. As a result of such regulation that is so deficient and that

cannot be substituted for by mere *mutatis mutandis* application the Act on the Judicial Review of Administrative Acts (Official Gazette RS, No. 105/06, 62/10, and 109/12 – hereinafter referred to as the AJRAA-1), the RPIA is inconsistent with both Article 2 and Articles 22 and 23 of the Constitution.

4. As regards the ERCA, the applicant concludes that the amount of funds the Government can use for the purpose of a referendum campaign is in fact limited by law, which contributes to limiting inadmissible influence on the equality of the organisers of referendum campaigns. However, it is allegedly impossible to deem the regulation in the ERCA that allows the Government to freely decide, without being regulated by law, to participate in a referendum campaign and to use public funds therein (Article 3 and the fifth paragraph of Article 4 of the ERCA) to be consistent with the Constitution, as such can entail an inadmissible interference with the right to a fair referendum procedure. The fundamental requirement of a fair referendum procedure is precisely to establish the conditions for ensuring that voters are informed to the necessary degree with regard to all aspects that are significant for deciding and free decision-making. Allegedly, in view of the constitutional requirements of a fair referendum procedure, the Government should not – at least not without strict and express limitations – allocate to itself or use special (additional) public funds. Although everyone contributes [to the pool of] public funds, in the opinion of the applicant they must not be used merely to benefit those who concur with the position of the Government, as this may cause unequal treatment in the management of public affairs within the framework of decision-making in a referendum (Articles 44 and 90 of the Constitution). As long as the Government ensures the neutrality of information from the viewpoint of those who support and those who oppose a draft law of the Government and the campaign is not biased, also the use of public funds cannot be disputable, according to the applicant. On the other hand, the applicant also sees no reason for the use of public funds by the Government to be prohibited in each and every case, as it is possible for the Government to use public funds in order to achieve goals that are consistent with ensuring a free referendum procedure, in particular when an imbalance of power, arguments, and information arises in a referendum campaign due to powerful financial interests or other individual interests, which, by financing the campaign against the entry into force of the law in question, jeopardise the public interest as viewed by the Government. Allegedly, it is not possible by means of any of the established methods of legal interpretation to decipher from the ERCA even the objective (i.e. the principle in favour) of the Government's use of public funds in order to organise a referendum campaign, nor limitations or orientations regarding the use of these funds that would ensure that they are used in conformity with the Constitution and that there exists *ex post* effective judicial control over the correct use thereof. Such regulation of the sixth paragraph of Article 4 of the ERCA thus allegedly inadmissibly interferes with the requirement of the clarity and precision of regulations and could thus inadmissibly interfere with the right to a free referendum procedure (Article 2 in conjunction with Articles 44 and 90 of the Constitution). Allegedly, the ERCA (like the RPIA) also does not regulate the consequences of rules on the financing of a

referendum campaign from the viewpoint of the consequences for the results of the referendum.

5. The request was sent to the National Assembly, which states in its reply thereto that Article 53a of the RPIA entered into force on the basis of Decision of the Constitutional Court No. U-I-63/99, dated 8 May 2003 (Official Gazette RS No. 48/03, and OdlUS XII, 41), in which the Constitutional Court held that the RPIA in force at the time was inconsistent with Article 23 of the Constitution, as it failed to ensure effective judicial protection of the right to vote in a referendum. The National Assembly draws attention to the fact that the Constitutional Court determined the manner of execution of its decision, which was essentially similar to the provisions of Articles 53a and 53b of the RPIA. The National Assembly opines that in Order No. U-I-130/17, Up-732/17, dated 28 September 2017 (Official Gazette RS, No. 63/17), the Constitutional Court already adopted a constitutionally consistent interpretation of Article 53a of the RPIA as regards all three questions raised by the applicant, as allegedly they entail a substantively inseparable and co-dependent whole. Allegedly, the Order expressly determined the substance of referendum disputes (all irregularities that could have affected or did affect the fairness of this procedure, and the results thereof, can be claimed therein) and thus also explained the substantive assessment criteria in a referendum dispute (the Supreme Court can only interfere with referendum results if it establishes irregularities that could have affected or did affect the results) and the powers of the Supreme Court in such a dispute. As regards the powers [of the Supreme Court], the National Assembly opines that they are determined by the first paragraph of Article 52 of the RPIA, which determines the powers of the SEC, which on the basis of legal analogy must also be applied in a referendum dispute before the Supreme Court. Furthermore, the power to decide allegedly also follows from Article 66 of the AJRAA-1, which in a procedure initiated by an action for the protection of human rights and fundamental freedoms (Article 4 of the AJRAA-1) confers very extensive powers on the court in such dispute, by which effective judicial protection of human rights and fundamental freedoms is ensured. A regards the ERCA, the National Assembly states that the right to organise and actively carry out a referendum campaign follows from the constitutional powers of the Government, in particular from its power to propose and implement laws, and is an integral part thereof. For such reason, the Government allegedly urgently needs appropriate budgetary funds, as – being a public law entity – it cannot obtain other funds for a referendum campaign. The fact that the Government needs appropriate budgetary funds for financing a referendum campaign that it organises is allegedly implied in the reasoning of Decision of the Constitutional Court No. U-I-295/07, dated 22 October 2008 (Official Gazette RS, No. 105/08, and OdlUS XVII, 56), which refers to the National Council as the proposer of a referendum at the time and as the organiser of a referendum campaign. The National Assembly opines that also the Government is a public law entity, as is the National Council, and that in the legislative procedure it enjoys certain constitutional powers; as the organiser of a referendum campaign it thus needs appropriate budgetary funds to effectively exercise such powers. The National Assembly

stresses that the expenditure of budgetary funds is strictly limited, as the Government may only allocate to the competent service up to 25% of the funds that organisers of referendum campaigns may receive in accordance with the general limitation. It thus opines that the allegation of the unequal position of organisers of referendum campaigns in terms of funds available is unfounded. The National Assembly alleges that as a result of these limitations the challenged provision ensures proportionate spending of budgetary funds and thereby prevents the referendum campaign of one side resulting in an imbalanced, non-objective, or impartial referendum campaign as a whole, and also ensures transparent financing of the Government's referendum campaign.

6. Also the Government submitted an opinion as to the request. It states that the regulation of referendum disputes in Article 53a of the RPIA was adopted on the basis of Decision of the Constitutional Court No. U-I-63/99 and that, furthermore, the Supreme Court has the power, if the first paragraph of Article 66 of the AJRAA-1 (proceedings for the judicial review of administrative acts in order to protect human rights) is applied *mutatis mutandis,* "to determine whatever necessary to eliminate an interference with human rights and fundamental freedoms and to re-establish a lawful situation," which allegedly also includes an authorisation to annul [the results of] the voting in a referendum and to order voting anew. The Government states that from Order of the Constitutional Court No. U-I-130/17, Up-732/17, as well as from legal theory, it follows that due to the objective character of referendum disputes, an interference with referendum results is only admissible when the irregularities are such that the referendum results would have been different had these irregularities not existed. Different results allegedly entail the rejection of the law [at issue] in the referendum if, according to the established results, the law was not rejected, or vice versa. The Government opines that there is no unconstitutional legal gap in the RPIA and that the regulation of judicial protection in a referendum dispute is in conformity with the Constitution, and that it ensures effective judicial protection (Article 23 of the Constitution). It states that, therefore, in the case at issue legal interest for a decision on the constitutionality of the RPIA by the Constitutional Court does not exist. As regards the ERCA, the Government alleges that it is responsible for the situation in all areas in the state; therefore, also in a legislative referendum procedure, which entails a part of the legislative procedure, it must have the possibility to be involved in the referendum campaign as the organiser of a campaign, which is not possible to achieve without appropriate funds. The Government also refers to Decision of the Constitutional Court No. U-I-295/07, in which the Constitutional Court held that the National Council, acting in accordance with its constitutional powers, was able to participate in a referendum campaign as an – at the time – entitled applicant of a request to call a legislative referendum, due to which it had to be ensured appropriate funds to this end. The Government opines that the same applies to the Government itself, in view of its constitutional position and its tasks. Allegedly, the referendum regarding the ARCOMST is an example of a decision that is of key importance for the future development of the state and is related to complex consequences in the international arena. For such reason,

the Government, in view of its constitutional position and competences as an authority responsible for implementing the state's policies, should allegedly present the positions in favour of the ARCOMST within the framework of the referendum campaign. Allegedly, without being presented the facts as regards the content and the significance of the Act, and the consequences of the possible rejection thereof in a referendum, voters clearly cannot obtain all the information necessary to decide on the matter. As regards the amount of funds allocated for a referendum campaign, the Government considers it appropriately limited. The Government states that with funds limited to such a level it only can provide basic information to voters and, considering such a limitation, it states that it is absolutely impossible for a situation to occur wherein the Government would act in the campaign in an excessive or biased manner, thereby affecting the results of a referendum. It also alleges that there exists a public interest in the ARCOMST entering into force as soon as possible.

7. Vili Kovačič, the appellant in the stayed referendum procedure (hereinafter referred to as the appellant), declared his participation in proceedings to review the constitutionality of the challenged laws. He concurs with the position of the Supreme Court, i.e. that effective judicial protection of the rights guaranteed on the basis of the constitutional and statutory regulation of referendums is necessary and that the procedure for the protection of rights requires better legislative regulation. However, he is opposed to the finding of the Supreme Court that as a result of certain unconstitutional legal gaps the statutory regulation of referendum disputes currently in force prevents the Supreme Court from deciding in the referendum dispute at hand and from abrogating the referendum [results]. He opines that in cases where it is manifest that a referendum is unfair and that violations of international standards and of a fair campaign have occurred, the state (i.e. either the Supreme Court or the Constitutional Court) should be able, merely on the basis of the Constitution, to establish a violation, to annul the decision of the voting authorities, and to call a new referendum, even if no detailed regulation regarding the appeal procedure exists. He alleges that Order of the Constitutional Court No. U-I-130/17, Up-732/17, and international constitutional case law provide the Supreme Court with a sufficiently clear framework for adopting a decision. Proceedings for the judicial review of administrative acts and civil proceedings also provide a sufficient framework for the Supreme Court to be able to consider the case and to decide on the dispute. He opines that the Constitutional Court has already explained in Order No. U-I-130/17, Up-732/17 that voters can allege any and all irregularities. The regulation is allegedly also sufficiently clear as regards the criteria for abrogating a referendum, as international constitutional case law, from which it is allegedly clear what is deemed to be a "fair and free" election and voting, provides sufficient orientation as to when referendum results must be annulled. The appellant draws attention to the recent decision by which the Constitutional Court of Austria annulled a presidential election and ordered that it be repeated, although no violation was established that could have affected the results. It allegedly clearly follows also from the case law of other democratic states and the European Court of Human Rights, and from international

organisations (i.e. the Organization for Security and Co-operation in Europe and the Council of Europe), that courts must be exceptionally strict and sensitive to the slightest irregularities as regards elections. The appellant also disagrees with the statement of the Supreme Court that the RPIA should determine some sort of quorum or a minimum number of voters who jointly can claim a violation in a referendum procedure, as this would allegedly entail a limitation and even an encroachment on both his and other voters' human right to a legal remedy. He proposes that the Constitutional Court in this part dismiss the request of the Supreme Court as unfounded and require it to apply the RPIA in a constitutionally consistent manner, namely such that it enables the appellant [to exercise] all the rights he has in proceedings before a court, including the right to a public hearing and to hear witnesses, and [ensures that courts] are exceptionally sensitive to irregularities and, if they establish irregularities, that they annul the results of the referendum and order that the referendum be repeated. The appellant concurs with the findings of the Supreme Court as to the unconstitutionality of the sixth paragraph of Article 4 of the ERCA. In his submission dated 5 January 2018, he additionally states that in the event the Constitutional Court does not concur with his allegations, he is submitting a "subordinate separate petition" for the initiation of a procedure for the review of the constitutionality of Article 3 and the sixth paragraph of Article 4 of the ERCA and Order of the Government No. 02401-7-2017/2, dated 20 July 2017, by which the Government appointed a task force to organise a referendum campaign in favour of the entry into force of the ARCOMST and for coordinating communication therein, as well as of Government Order No. 41012-50/2017/2, dated 27 July 2017 on the allocation of funds to this task force enabling it to participate in the referendum campaign regarding the ARCOMST.

8. The submission of the appellant was submitted to the applicant and the National Assembly.

9. The Constitutional Court sent the reply of the National Assembly and the opinion of the Government to the applicant and the appellant, who replied thereto. The appellant insists upon his position stated in his submission to the Constitutional Court dated 5 January 2018 and in his petition for the initiation of proceedings for a review of constitutionality. He alleges that the EUR 97,000 that the Government allocated to itself for the campaign, together with the other discriminatory conditions, significantly affected the number of voters participating in the referendum and the results thereof. He also draws attention to other irregularities in the referendum campaign that the Government allegedly committed and that allegedly put him, a participant [in the procedure], as a petitioner of the referendum and as the organiser of a referendum campaign regarding the ARCOMST, in an unequal position, and affected the referendum results. He claims that the abrogation of the ARCOMST in a referendum is in the public interest, not its entry into force, which would entail the most expensive, the longest in terms of time needed for construction, and the most harmful solution as regards the construction of the second track of the railway line. He proposes that the Constitutional Court carry out a public hearing.

B – I

10. The Constitutional Court did not accept the proposal of the appellant to decide after carrying out a public hearing because it is not necessary to hold a public hearing in order to adopt a decision after reviewing the constitutionality of challenged laws.

11. Furthermore, the Constitutional Court also did not decide on the subordinate petition of the appellant in the proceedings at issue. In proceedings for a review of constitutionality, a party to proceedings stayed by a court on the basis of Article 156 of the Constitution has the right to make a statement on the allegations of the participants in such proceedings. However, in such a framework, he or she does not have the right to file subordinate legal remedies.

Review of the RPIA

12. The right to vote in a referendum referred to in the third paragraph of Article 90 of the Constitution entails a form of citizens' direct participation in the management of public affairs, therefore it is constitutionally protected by Article 44 of the Constitution. Like any other right, also the right to vote in a referendum has to be ensured judicial protection (the first paragraph of Article 23 of the Constitution). Since Article 44 of the Constitution protects this right also as a human right, the fourth paragraph of Article 15 of the Constitution applies thereto as well, which in particular and expressly guarantees judicial protection of human rights and fundamental freedoms.[1] The obligation of the legislature to designate the competent courts and to determine the decision-making procedure and powers thereof (the types of decisions) in order to ensure effective exercise of the right to judicial protection follows already from these constitutional provisions. Furthermore, the requirement that laws must regulate rights in a clear and precise manner (i.e. the principle of the clarity and precision of regulations) follows already from the principles of a state governed by the rule of law (Article 2 of the Constitution). Not least at all, also the second paragraph of Article 15 of the Constitution determines that the manner in which human rights and fundamental freedoms are exercised shall be regulated by law where this is necessary due to the particular nature of an individual right or freedom. Clear and precise statutory regulation is necessary in order to ensure effective exercise of the right to judicial protection of the right to vote in a referendum.

13. The right to vote in a referendum has (like the right to vote) a special legal nature; namely, despite being a personal right, it can only be exercised in a collective manner, i.e. together with other voters in a manner organised in advance and according to a procedure determined in advance.[2] Essentially, certain principles apply thereto that are equal to those that apply to the right to vote, in particular the principles of universal suffrage, equality, and free and secret voting. Due to these similarities, also the

requirements as to judicial protection of the right to vote in a referendum are similar to the requirements concerning judicial protection of the right to vote in an election which in both instances must be adapted to the special nature of these rights. Judicial protection of the right to vote in a referendum is not primarily intended to protect the subjective legal position of individual voters, but rather the public interest and constitutional values. These constitutional values include a fair referendum procedure (i.e. observance of referendum rules), the correctness of the referendum results, and the trust of the citizens in the fair implementation of the referendum.[3] The objective character of judicial protection of the right to vote in a referendum is ensured in such a manner that not all established irregularities in the referendum procedure are taken into account, but only those that affected or could have affected the referendum results.[4] The irregularities that could not have affected the referendum results cannot be taken into account, as this would inadmissibly affect the effective exercise of the right of other voters to vote in a referendum and the effective implementation of the referendum in general. The collective exercise of the right to vote [in a referendum] entails that it is an inherent characteristic of this right that only those irregularities that could have had a decisive influence on the "collective" referendum results can be relevant. The only possible exception could be irregularities whose quality (not quantity) would fundamentally compromise the objective fairness of the referendum procedure (e.g. the discrimination of certain groups as regards the existence of the right to vote [in a referendum]). In such instances, it is necessary to assess whether – considering the circumstances of the case and the established irregularities – a reasonable person would doubt the fairness of the referendum results.

14. In a legislative referendum, voters decide whether to confirm a law adopted by the National Assembly prior to its promulgation (Article 9 of the RPIA). Within eight days following the finality of the report of the SEC on the referendum results, the National Assembly promulgates the decision adopted in the referendum and publishes it in the Official Gazette of the RS (Article 53b of the RPIA). Only after such publication does the National Assembly send the law that was confirmed in the referendum to the President of the Republic for promulgation (the first paragraph of Article 91 of the Constitution). Since a referendum dispute suspends the finality of and causes uncertainty as to the entry into force of the law in question, it is necessary that it be reasonably time limited.

15. The special character of the right to vote in a referendum and the requirement that referendum disputes be resolved as quickly as possible require special, expeditious, and effective judicial protection in such a dispute. To this end, the legislature must adopt a regulation that fulfils the fundamental requirements of judicial proceedings – i.e. it must determine who, when, and how referendum results can be challenged and which irregularities in the referendum procedure can be claimed. The legislature must determine by law the legal remedy (e.g. an appeal, an action, a request), the entitled applicants who may file the legal remedy, the phase of the referendum procedure in which the legal remedy may be filed and the time limit therefor, the grounds on which the legal remedy may be filed (i.e. the substance of objections), the competent court, the

rules of judicial proceedings, and the powers of the court when deciding on a case. The law in question must *inter alia* determine appropriate time limits for the procedural steps of the parties and the court, the rules regarding the burden of allegation and the burden of proof of the parties, the rules regarding the adversarial procedure, and substantive assessment criteria.

16. Due to the pronounced objective nature of judicial protection of the right to vote in a referendum, only referendum results as such can be challenged in a referendum dispute, and all the alleged irregularities can be claimed therein, including the irregularities in the referendum campaign that affected or could have affected the fairness of the procedure as a whole (not only from the viewpoint of individual voters), and thus the correctness of the results.[5] The irregularities that can lead to the abrogation in part or in whole of the voting or to its repetition are only those that affected or could have affected the referendum results due to their quantity or quality.[6] Affecting the referendum results means that an irregularity is of such nature that it could have led to different (i.e. opposite) final results of the voting. If the [competent] court establishes such irregularities in the procedure, it must have the power to annul in full or in part the voting and to order new voting in full or in part. In the event established irregularities that affected or could have affected the referendum results can be eliminated by merely establishing different referendum results, courts must have the power to do so. In view of the above, a person that has the right to initiate judicial protection proceedings must allege and substantiate that in the referendum procedure such irregularities occurred that affected or could have affected the referendum results, such that the results would have been different had the irregularities not occurred. The court must verify the person's allegations and establish whether they are justified, and decide on the basis of the established state of the facts. The person claiming the existence of conduct that entails a relevant irregularity must provide appropriate proof substantiating the claims. If irregularities occurred that affected or could have affected the referendum results, the court must annul the voting in the referendum and order that it be repeated if these irregularities cannot be eliminated by establishing different referendum results (even by possibly establishing different partial results of voting at individual polling stations that lead to different results of the referendum as a whole). Which established irregularities in the referendum procedure are such that affected or could have affected the referendum results can only be a matter of assessment of the competent court in each individual referendum dispute. Provided that, on the basis of the established facts, the [competent] court establishes that no irregularities have occurred that affected or could have affected the referendum results, it must have the power to dismiss the legal remedy.

17. Also the Code of Good Practice on Referendums (hereinafter referred to as the Code) adopted by the so-called Venice Commission draws attention to the need for appropriate regulation of judicial protection of the right to vote in a referendum. In fact, the Code is not a directly binding legal source; however, the recommendations therein to a significant degree overlap with the requirements in the Constitution, therefore they can be constitutionally relevant. Chapter 3.3 [Section II] of the Code, which refers to the

system of effective judicial protection, determines a series of recommendations that the Member States of the Council of Europe should observe. The recommendations that in particular merit mention state that the final decision regarding observance of the rules of a referendum procedure must always be reserved for a court, and that the decision-making procedure, the competent authorities, and the powers thereof must be clearly determined, and courts must have the authority to annul the referendum in full or in part if they establish irregularities that may have affected the outcome, and to order that the voting be repeated. The Code also stresses that all voters must be entitled to a legal remedy, with regard to which a reasonable quorum may be imposed regarding the legal remedies of voters against the results of a referendum. Short time limits must be prescribed for filing legal remedies and for deciding thereon, and the adversarial principle must be observed in such procedure.

18. The Constitution does not include provisions on judicial protection of the right to vote in a referendum.[7] In light of the absence of express constitutional provisions, it falls within the discretion of the legislature as to which court is to be competent for ensuring judicial protection of the right to vote in a referendum. The legislature conferred the competence of the adjudicating authority on the Administrative Court insofar as irregularities relating to the work of voting authorities are concerned (the third paragraph of Article 52 and Article 53 of the RPIA). The competence of the adjudicating authority as regards the report of the SEC on referendum results was conferred on the Supreme Court. The legislature determined in Article 53a of the RPIA that any voter may file an appeal against the report of the SEC on the results of voting in a referendum within three days of its publication in the Official Gazette of the Republic of Slovenia. The Supreme Court must decide on an appeal within thirty days. No appeal is allowed against the decision of the Supreme Court. The Supreme Court decides by *mutatis mutandis* application of the law regulating proceedings for the judicial review of administrative acts. The RPIA does not contain any other provisions concerning judicial protection of the right to vote in a referendum.

19. In light of the request of the applicant for a review of the constitutionality of the RPIA, the Constitutional Court only carried out a review insofar as it refers to a referendum dispute before the Supreme Court, which is competent to decide on a referendum dispute as a regular court of the first and last instance. The Constitutional Court did not have to adopt a position as to whether the legislature, in order to prevent a potentially excessive number of appeals, should require a quorum of voters who may file an appeal before the Supreme Court against established referendum results. Namely, the appeal was filed in conformity with the regulation in force, which allows every voter to initiate a referendum dispute.[8]

20. In a referendum dispute, the Supreme Court decides by *mutatis mutandis* application of the law regulating proceedings for the judicial review of administrative acts (the third paragraph of Article 53a in conjunction with the third paragraph of Article 53 of the RPIA). *Mutatis mutandis* application of statutory provisions does not allow the Supreme Court to

substantively adapt, complement, or modify legal sources to the degree that the Supreme Court would substitute for the legislature. *Mutatis mutandis* application of a law entails statutorily determined analogous application of other statutory provisions that otherwise do not expressly refer to a legally unregulated legal situation. In this context, the statutory provisions referred to by a law can be appropriately (e.g. literally, systematically, or logically) adapted. If the Supreme Court does not have support for analogous application of the procedural rules referred to by a law because the elements of both procedures do not match in substantive terms, this entails a classic legal gap in the law.[9] The existence of legal gaps in the legal order is in itself not inconsistent with the Constitution. Legal gaps can be filled by the established means of legal interpretation. If this is not possible and if the requirement of express statutory regulation follows from the Constitution, without which an individual human right cannot be exercised, this entails a so-called unconstitutional legal gap.

21. Proceedings for the judicial review of administrative acts as regulated by the AJRAA-1, which, *mutatis mutandis*, also apply in judicial protection proceedings regarding the right to vote in a referendum before the Supreme Court (i.e. a referendum dispute) do not include all of the elements that should be determined in order for the right to judicial protection determined by the first paragraph of Article 23 of the Constitution and the fourth paragraph of Article 15 of the Constitution to be effectively exercised as regards the right to vote in a referendum (the third paragraph of Article 90 in conjunction with Article 44 of the Constitution). From this perspective, the regulation in the RPIA is deficient. It does not follow from any law which irregularities can be alleged in a referendum dispute, nor are the criteria in accordance with which courts should assess a violation of the rules of a referendum procedure or the powers that the Supreme Court has during decision-making determined. The powers the Supreme Court has in accordance with the AJRAA-1 merely entail the authorisation to annul the report of the SEC and the possibility to assess the correctness and legality of the report as such, as well as the legality of the decision-making procedure of the SEC. Neither the RPIA nor the AJRAA-1 determine the power to annul a referendum or to order new voting, especially if the established irregularities do not stem from the sphere of the SEC. There are also no special procedural provisions in laws that are adapted to the special nature of the right to vote in a referendum and the special nature of a referendum dispute (e.g. shorter procedural time limits, the determination of the burden of allegation, and the burden of proof).

22. The National Assembly and the Government allege that Article 53a of the RPIA is a consequence of Decision No. U-I-63/99, in which the Constitutional Court established the unconstitutionality of the RPIA in force at the time because it did not ensure effective and comprehensive protection of the right to vote in a referendum. The Constitutional Court also adopted the manner of execution of its decision, namely by determining, *inter alia*, (1) that any voter can file an appeal against the report of the State Election Commission on referendum results within three days of the publication thereof in the Official Gazette of the Republic of Slovenia, (2) that the Supreme Court shall decide on the appeal within

thirty days and that no appeal is allowed against its decision, and (3) that the first paragraph of Article 52 and the second and third paragraphs of Article 53 of the RPIA apply *mutatis mutandis* in deciding. On the basis of that Decision of the Constitutional Court, the legislature adopted, by the Act Amending the Referendum and Popular Initiative Act (Official Gazette RS, No. 83/04 – hereinafter referred to as the RPIA-C), the new Article 53a of the RPIA, which is currently in force. The Government opines that Article 53a of the RPIA is not inconsistent with the Constitution, as only the manner of execution determined in the mentioned Decision of the Constitutional Court was allegedly transferred into law; a manner of execution as such cannot be unconstitutional. The legislature reacted to the mentioned Decision of the Constitutional Court by integrating the manner of execution into the RPIA-C, however with a significant difference – in Article 53a it determined that only the second and third paragraphs of Article 53 of the RPIA shall apply in proceedings before the Supreme Court, while the legislature did not also prescribe the application of the first paragraph of Article 52, which is crucial because it contains the (SEC's) authorisation to annul voting and order new voting. In this context, it must be underlined that it is precisely in the mentioned Decision that the Constitutional Court held that so-called subsidiary proceedings for the judicial review of administrative acts referred to in the second paragraph of Article 157 of the Constitution do not fulfil the requirements of judicial protection of the right to vote in a referendum. It expressly drew attention to the fact that, in addition to the issues mentioned in the present Decision, the legislature must also regulate other issues that may arise in order to ensure effective judicial protection of the right to vote in a referendum. When, in a decision by which it establishes that a statutory regulation is unconstitutional, the Constitutional Court temporarily regulates, via the means of execution of its decision, individual issues that were the subject of the constitutional review, it limits itself to establishing the most urgent rules in light of the constitutional review that it carried out. The question of whether the authorisations of a court determined by the AJRAA-1 are consistent with the Constitution is not addressed in the present Decision. In remedying an established unconstitutionality, the legislature must not only ensure that it remedy the expressly established unconstitutionality, but also that it regulate all the issues related thereto. In doing so, it is bound by the Constitution. It follows from the opinion of the Government that the legislature did not have to regulate the powers of the Supreme Court already due to the fact that, in accordance with *mutatis mutandis* application of the first paragraph of Article 66 of the AJRAA-1 (subsidiary proceedings for the judicial review of administrative acts), the Supreme Court has the power "to determine whatever necessary to eliminate an interference with human rights and fundamental freedoms and to re-establish a lawful situation," which allegedly also includes annulling [the results of] voting in a referendum. The powers referred to in the mentioned provision of the AJRAA-1 are intended for a court deciding precisely in subsidiary proceedings for the judicial review of administrative acts, in accordance with which courts may only decide if the legislature did not provide any other judicial protection. The legislature regulated referendum disputes by law. The court deciding therein must have powers determined clearly and in advance that it can use when

deciding. The choice thereof cannot be subject to the court's discretion. The voters and the proposer of a referendum must know even prior to the beginning of the referendum procedure what possible irregularities can be claimed in judicial proceedings and what powers the court will have [therein], provided that it grants their legal remedy. Only in such a manner will they be able to appropriately substantiate their legal remedy and request that the court, considering the nature of the claimed irregularities, adopt an appropriate decision. Therefore, it is impossible to concur with the position of the opposing party and the Government. It follows already from the principles of the legal certainty and predictability of statutory regulation, which are two principles of a state governed by the rule of law (Article 2 of the Constitution), that all of the essential elements of judicial protection must be clearly and precisely determined by law, when so required by the special nature of the right at issue and of judicial protection. The right to vote in a referendum and referendum disputes are certainly such instances that require clear, precise, and comprehensive statutory regulation of judicial protection, to which attention is expressly drawn by the recommendations in the Code.

23. In view of the above, it is evident that neither the RPIA nor the AJRAA-1 contain provisions adapted to resolving referendum disputes, which entails that judicial protection of the right to vote in a referendum is not regulated in a constitutionally consistent manner. Although such indeterminacy and deficiency (i.e. a legal gap) in the statutory regulation significantly affect the exercise of the right to judicial protection of the right to vote in a referendum (the first paragraph of Article 23 and the third paragraph of Article 90 in conjunction with Article 44 of the Constitution), the Constitutional Court established that the challenged regulation is unconstitutional already because it does not fulfil the requirement of the clarity and precision of regulations stemming from Article 2 of the Constitution (Point 1 of the operative provisions). Consequently, it did not assess the other allegations of the applicant. As the case at issue concerns an instance where the legislature did not regulate a certain issue that it should have regulated, 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 and 109/12 – 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 imposed on the legislature the obligation to remedy the established inconsistency within the usual time period (Point 3 of the operative provisions).

24. In order for the Supreme Court to be able to decide in the judicial proceedings it stayed, on the basis of the second paragraph of Article 40 of the CCA the Constitutional Court adopted the manner of implementation of its Decision (Points 4 and 5 of the operative provisions). In this respect, the Constitutional Court draws attention to the fact that by such manner of implementation of its Decision, in view of the constitutional review it carried out, also this time it temporarily determined only the most necessary rules enabling the Supreme Court to decide in the judicial proceedings it stayed due to the filing of the request for a review of the constitutionality of the laws that it has to

apply in its decision-making. The legislature will have to respond appropriately to the Decision of the Constitutional Court and ensure that it comprehensively regulates all the questions relating to referendum disputes. This entails the extensive, systemic regulation of the legal (not merely judicial) protection of the referendum, which also has to take into consideration the position and powers of the SEC and Articles 51 through 53 of the RPIA (the issue of double judicial protection before the Administrative Court and the Supreme Court).

25. In the stayed proceedings the Supreme Court will have to take into account the reasons that led to the establishment of the unconstitutionality of the challenged Act. As the Constitutional Court has already stressed a number of times,[10] in the event a declaratory judgment [is adopted], both the operative provisions and the reasons from the reasoning due to which the Constitutional Court established the unconstitutionality of the law are binding on courts. The Supreme Court can dismiss an appeal if it decides that the claimed irregularities are such that they were utterly incapable of affecting the results of the referendum. If during the decision-making the Supreme Court establishes that in the course of preparations for voting, or during the exercise thereof, violations of the referendum procedure occurred and that the established possible irregularities are such that they affected or could have affected the referendum results, it annuls the voting and orders new voting. If the effect of the irregularities cannot be established in terms of numbers, it has to be assessed according to all the circumstances of the case and at the discretion of the Supreme Court whether the claimed irregularity could have affected the referendum results. In doing so, all the circumstances of the case must be taken into consideration, in particular the participation percentage (the fourth paragraph of Article 90 of the Constitution), the difference in the number of votes *pro* and *contra*, the weight of all the established irregularities, as well as their nature and importance within the framework of voting. If there exists a possibility that without the established irregularities the referendum results would have been different, but in light of all the circumstances, this possibility is so minuscule that logically it is not even relevant, then the court does not have to annul the referendum results.[11] Taking the above into consideration, in the manner of execution the Constitutional Court also determined the powers of the Supreme Court when deciding. On the basis of the above, the Supreme Court will be able to determine the concrete state of the facts regarding the alleged irregularities in the referendum procedure and, with respect thereto, adopt an appropriate decision in conformity with the determined powers as listed in Points 4 and 5 of the reasoning of the present Decision. If it does not establish irregularities that affected or could have affected the referendum results, it shall dismiss the appeal. If it establishes irregularities that affected or could have affected the referendum results, the Supreme Court also has the power to annul the voting and to order new voting. In the event of such, the SEC will have to implement its decision in a short period of time. If the Supreme Court annuls referendum results due to irregularities in the referendum campaign, then, when determining the new date of voting, the SEC will have to take into consideration that prior to the day of voting a new 30-day referendum campaign will be

carried out. In such instances, the SEC will also have to carry out all the actions that fall within its competence in order to allow new voting to be carried out. The Judgment of the Supreme Court according to which referendum results are annulled, a new vote ordered, or different results established, and the order of the SEC, must be published in the Official Gazette of the Republic of Slovenia in order to allow all voters to promptly learn thereof.

B – II

The Review of the ERCA

26. The applicant alleges the unconstitutionality of the sixth paragraph of Article 4 of the ERCA, which determines that, by an order, the Government may allocate funds for a referendum campaign to the competent Government service when the latter is the organiser of a referendum campaign. The funds for a referendum campaign allocated to the competent Government service must not exceed 25% of the admissible amount of funds that other organisers of referendum campaigns may receive (the sixth paragraph of Article 23 of the ERCA). The Government must not obtain other funds for carrying out the referendum campaign.

27. With respect to the challenged regulation and the allegations of the applicant, four questions arise, namely the following: 1) whether, in accordance with the ERCA, the Government (or a service thereof) may carry out its own referendum campaign; 2) provided that it may organise one, whether it may allocate budgetary funds to itself for carrying out the campaign; 3) provided that the Government must not carry out a referendum campaign, whether it may nevertheless participate in the referendum procedure; and 4) provided that it may participate in the referendum procedure, whether it may use budgetary funds for such purpose. The first question must be answered first. However, this is not possible by merely assessing the sixth paragraph of Article 4 of the ERCA, which is expressly challenged by the applicant, as also a review of the first paragraph of Article 3 of the ERCA must be carried out, which enables the Government or a service thereof to become the organiser of a referendum campaign. Since the two statutory provisions are interconnected, the Constitutional Court, on the basis of Article 30 of the CCA, initiated proceedings to review the constitutionality of the mentioned provision of the ERCA. As the participants in proceedings have already made a statement as to the content of both of them, the Constitutional Court did not repeat the request that they make a statement on the constitutionality of the first paragraph of Article 3 of the ERCA.

28. Certain general principles that apply to the right to vote determined by Article 43 of the Constitution, including the right to free voting, [also] apply to the right to vote in a referendum, which is protected as a human right within the framework of Article 44 of

the Constitution. Substantively, this right includes the possibility of voters to freely form an opinion or their political will as regards certain issues that are the subject of a referendum, i.e. on the basis of their own beliefs, perceptions, and understanding of the content that is the subject of a referendum. Being informed is crucial to exercise of the right to free voting, i.e. knowing all the data, content, circumstances, and reasons that may be important for freely forming one's informed opinion. In referendum decision-making entailing voting in favour of or against the entry into force of a law that the legislature has already adopted, voters must be informed of the arguments of both sides, both those supporting the law and those opposing it. Particularly in a legislative referendum, where a decision is made to vote for or against a legislative proposal, it is crucial that objective, comprehensive, and transparent information be provided to voters.

29. That voters are adequately informed can be ensured in various ways and in different periods of time. One of the key ways is the referendum campaign, which lasts a short period of time directly prior to the day of the voting in the referendum and is the formalised form of informing voters of the referendum question. In the formal sense, the referendum campaign is defined by the ERCA, which determines in the third paragraph of Article 1 that a referendum campaign encompasses advertisements and other types of propaganda whose purpose is to influence the decision-making of voters in a referendum. This mainly includes propaganda in the media, electronic publications, and propaganda by means of telecommunication services, the posting of posters, and public gatherings (the fifth paragraph of Article 1 in conjunction with the fourth paragraph of Article 1 of the ERCA). The referendum campaign thus encompasses activities that are precisely determined by law in terms of substance and time.[12] A referendum campaign is a series of organised communication activities that include mass media and pursue a precisely determined goal, namely to convince voters to vote for a law or against it. Therefore, by its nature, a campaign is biased and directed towards a precisely determined goal. It promotes either the confirmation or rejection of a law. Because it ensures a plurality of perspectives, a campaign is important for the effective exercise of the right to free voting in a referendum,[13] which entails the realisation of voters' free choice. Therefore, it is important that both those advocating the law and those opposing it have the possibility to freely participate in a campaign.

30. It is precisely in order to enable voters to have a free choice that the Government has a position in a referendum campaign that is different than that of those who may in a biased manner promote only one or the other solution, which is a reflection of their freedom of expression.

31. The Government is an authority of the executive power (the second paragraph of Article 3 of the Constitution) and the highest authority of the state administration of the Republic of Slovenia (Article 1 of the Government of the Republic of Slovenia Act, Official Gazette RS Nos. 24/05 – official consolidated text, 109/08, 8/12, 21/13, 65/14, and 55/17 – hereinafter referred to as the GRSA). The Government determines, directs, and coordinates the implementation of the state's policies in accordance with the

Constitution, laws, and other general acts of the National Assembly. To this end, it issues regulations and adopts legal, political, economic, financial, organisational, and other measures necessary for ensuring the development of the state and for regulating the conditions in all fields falling within the competences of the state. It proposes that the National Assembly adopt laws, the budget of the state, national programmes, and other general acts by which principled and long-term political orientations for individual fields falling within the competences of the state are determined. The Government is accountable to the National Assembly (Article 110 of the Constitution), in particular regarding the policies of the state it pursues and the conditions in all fields falling within the competences of the state; it is also responsible for implementing laws and other regulations of the National Assembly and for the overall functioning of the state administration (the first paragraph of Article 4 of the GRSA). The Government pursues the policies of the state, acts on behalf of the state, and is responsible for the situation in all fields. As the proposer of the majority of the laws, it is in its interest that they are adopted and that they enter into force.

32. Considering the described position of the Government, one must concur with the applicant that the mere possibility of the Government participating in a referendum procedure is not constitutionally disputable. The Government is authorised to advocate in a public debate a law adopted by the National Assembly and to present its position thereon, and it may also present the consequences of the law not entering into force that it deems negative. The Government may even have the duty to inform the public of all information necessary for individual voters to form their political will. The Government can also fulfil this duty during a referendum campaign. However, in proceeding in such a manner, it must not hinder or restrict the freedom to form a position in the referendum procedure. The Government must convey information in a fair and reserved manner, namely information both in favour of and opposing the law at issue. Nevertheless, the Government may express its position thereon. Thus, such provision of information must be objective, comprehensive, and transparent. In these efforts, the Government must act diligently and must not distort or conceal the information it is in possession of. It is logical that the described duties of the Government concurrently also entail the admissible limitation of the freedom of expression of members of the Government and of its other representatives determined by the first paragraph of Article 39 of the Constitution.

33. In a similar manner, the position of the authorities in a referendum campaign is also regulated by the Code (in Chapter 3.1). The Code requires that those supporting the law that is to be decided on in a referendum and those opposing it have equal opportunities, and in particular emphasises the requirement that the authorities maintain a neutral attitude in the referendum campaign. In contrast to elections, with respect to a referendum, the Code does not require the complete impartiality of public authorities or excludes their participation in favour of or against the law that is the subject of decision-making in the referendum. It does require, however, that public authorities refrain from influencing the results by means of biased interventions. It also determines that the authorities must provide voters balanced information regarding the subject of decision-

making in a referendum that includes the positions of both the executive and legislative branches of power and their supporters, as well as the positions of opponents. Paragraph 13 of the Explanatory Memorandum of the Code additionally draws attention to the fact that the prohibition of a biased campaign does not entail that the authorities must not present their positions, but rather entails that they must provide voters adequate information to enable them to freely form an opinion.

34. As regards the participation of state authorities and legal entities of public law in a referendum campaign, the ERCA follows the general approach, which obliges such to have a neutral attitude towards referendum campaigns. Namely, the first paragraph of Article 4 of the ERCA determines that public gatherings are not allowed on the premises of state authorities, municipalities, public institutions, or other entities of public law. Furthermore, it expressly prohibits the use of public funds for the purposes of a campaign, as it is not allowed to finance a campaign with budgetary funds (except with the funds that political parties obtain from the budget in accordance with the law regulating political parties). The only exception to the statutorily prescribed neutral attitude of public authorities are the challenged provisions, in accordance with which a governmental service may participate in a referendum campaign as a campaign organiser, for which the Government may allocate it budgetary funds.

35. In a referendum campaign as defined by the ERCA, the organisers of the referendum campaign may act in a biased manner and, in accordance with the third paragraph of Article 1, affect by means of propaganda the decision-making of voters as to voting *pro* or *contra* in the referendum. Hence, the Act does not presuppose objectivity, comprehensiveness, and transparency as to the manner in which voters are informed. In this respect, the right to freedom of expression is not limited. This holds true for both the organisers favouring and against the entry into force of the law. From such a perspective, the equality of organisers is ensured as a starting point, as each of them freely decides in which direction – towards confirming or rejecting the law – it will direct its participation in a referendum campaign. Referendum propaganda is incompatible with the position of the Government in the system of state power (see Paragraph 31 of the reasoning of the present Decision). Therefore, it is manifest that the position of the Government is not equal to that of other organisers of a referendum campaign. Cooperation in the performance of public tasks in particular binds the Government to protect the constitutionally guaranteed freedom of voters to form and express their political will. Therefore, it cannot be admissible for the Government to participate in a referendum campaign in the same manner as other organisers. On the contrary, because the Government possesses key information, it is tasked with ensuring that the public, amid diverse opinions, is informed objectively, comprehensively, and transparently. In such a manner, the Government, as the bearer of the executive branch of power, ensures the equal treatment of citizens in respect of their fundamental rights. This is important in particular as regards laws that are of key importance to the development of the state or that are supposed to have complex (legal, economic, etc.) national or international consequences that the Government is most acquainted with. If amid an information

asymmetry the Government were allowed to participate in a campaign in the same manner as the other organisers, such role would significantly jeopardise the objective, comprehensive, and transparent manner of informing the public. Namely, for voters to be able to freely express their will as to the subject of decision-making in a referendum, the most important element is precisely that they have at their disposal all information and also different views.

36. In light of the above, the statutory regulation determined by the first paragraph of Article 3 of the ERCA, which enables the Government to participate in a referendum campaign as an organiser in the same manner as all other organisers, entails an excessive interference with the right to participate in the management of public affairs determined by Article 44 of the Constitution, which protects the right to vote in a legislative referendum determined by the third paragraph of Article 90 of the Constitution.

37. In accordance with the established constitutional case law, interferences with human rights and fundamental freedoms are admissible if they are in conformity with the principle of proportionality. The Constitutional Court carries out an assessment of whether an interference with a human right is admissible on the basis of criteria from the established constitutional case law (see Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03, and OdlUS XII, 86; Para. 25 of the reasoning). The Constitutional Court must first establish whether the legislature pursued a constitutionally admissible objective. Once it is established that the interference pursues a constitutionally admissible objective, it always also needs to be assessed whether this objective is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), namely with that principle that prohibits excessive interferences (the general principle of proportionality). The Constitutional Court performs an assessment of whether an interference is possibly excessive on the basis of the so-called strict test of proportionality. This test comprises a review of three aspects: appropriateness, necessity, and proportionality in the narrower sense (see Decision of the Constitutional Court No. U-I-18/02).

38. As regards the existence of an admissible objective of the challenged regulation, the Constitutional Court deems that it is manifestly demonstrated as it is impossible to deny the right and duty of the Government to inform voters of the subject of the referendum at issue. It is equally undisputable that the regulation that allows the Government to formally participate in a referendum campaign is appropriate for attaining the objective of informing the public. However, the statutory regulation does not pass the test of necessity, within the framework of which the Constitutional Court assesses whether the statutory regulation is even necessary in the sense that the objective cannot be attained without it or whether it would be possible to attain the objective in some other manner that would be less restrictive. Since from the right to free voting in a referendum there follow certain duties of the Government (and of other authorities of the state) regarding its participation in the referendum procedure (see Paragraphs 31 through 35 of the

reasoning of the present Decision), it is clear that the Government may only ensure that voters are informed by not participating as an organiser of the referendum campaign but by participating therein either within the framework of its regular functioning or with additional activities by which it objectively, comprehensively, and transparently informs voters of the possible choices. The Government is the authority of state power that has, in light of the nature of its work and the fact that also all administrative authorities with specialist services operate under its umbrella, the most information regarding the subject of the referendum procedure, and also the most diverse information, both for and against the solutions enacted by the National Assembly. Naturally, the Government may also transmit such information during the referendum campaign. However, it is not necessary for it to also formally participate in the referendum campaign as an organiser. The statutory regulation that gives the Government this position thus excessively interferes with the right to free voting in a referendum (the third paragraph of Article 90 in conjunction with Article 44 of the Constitution) and is inconsistent therewith.

39. By Decision No. U-I-295/07, dated 22 October 2008 (Official Gazette RS, No. 105/08, and OdlUS XVII, 56), the Constitutional Court held that, under the previous constitutional regulation of the legislative referendum, funds for a referendum campaign had to be allocated to the National Council from the budget of the state when the National Council was the proposer of the legislative referendum. In the mentioned Decision, the Constitutional Court did not assess whether it is admissible from the viewpoint of Article 44 of the Constitution that the National Council acts as the organiser of a referendum campaign, and also did not *sua sponte* assess the consistency with the Constitution of the first paragraph of Article 3 of the ERCA in force at the time, which allowed all proposers of a referendum to act as organisers of a referendum campaign. Considering the fact that the Constitutional Court indirectly confirmed that the National Council participating in a referendum campaign and spending budgetary funds to this end are consistent with the Constitution, it hereby upgrades this position with the reasons stated in the present Decision. Both the Government and the National Council are authorities of the state, therefore equivalent limitations determined by Article 44 of the Constitution regarding participating in a referendum procedure apply to both of them. The Constitutional Court adds that the current regulation of the legislative referendum is different, as in accordance with the Constitution only voters have the possibility to require that a legislative referendum be held (the first paragraph of Article 90 of the Constitution). The National Council no longer has this possibility.

40. In view of the above, the first paragraph of Article 3 of the ERCA is inconsistent with the Constitution (Point 2 of the operative provisions). Given that the Government (or a service thereof) must not be the organiser of a referendum campaign, it is logical that it must not allocate to itself budgetary funds for acting as the organiser of a referendum campaign. For the same reasons, also the sixth paragraph of Article 4 of the ERCA is inconsistent with the Constitution (Point 2 of the operative provisions). However, the above stated does not entail that the Government does not have the authorisation to allocate budgetary funds for financing the transmission of information in accordance with

its constitutional position and its role in a referendum procedure that stems therefrom, as described in Paragraphs 31 through 35 of the reasoning of the present Decision. Whether an individual case concerns informing voters in an objective, comprehensive, and transparent manner or an inadmissible referendum campaign can only be a subject of assessment in a concrete referendum dispute, in which the competent court shall establish all the necessary facts for such a conclusion (Points 16 and 25 of the reasoning of the present Decision). The Constitutional Court is not competent to adopt a position thereon within the framework of proceedings for a review of the constitutionality of a law.

41. When the Constitutional Court establishes that a law is inconsistent with the Constitution, it shall abrogate it, as a general rule. However, considering the reasons for the present Decision, it is not disputable that the Government may participate in a referendum procedure also during a referendum campaign (but not as a campaign organiser) and that it may also allocate budgetary funds to this end. The abrogation of the challenged provisions would entail that the position and functioning of the Government during a referendum campaign would not be regulated. From the viewpoint of Article 2 of the Constitution (the principle of the clarity and precision of regulations as regards their content), this would create an unconstitutional legal gap. Therefore, it is not possible to abrogate the challenged provisions. On the basis of the first paragraph of Article 48 of the CCA, the Constitutional Court adopted a declaratory decision (Point 2 of the operative provisions).

42. In conformity with the second paragraph of Article 48 of the CCA, the Constitutional Court imposed on the legislature a one-year time limit in which to remedy the established unconstitutionality (Point 3 of the operative provisions). From the viewpoint of the requirement of a fair referendum procedure, [the legislature] must take into account that the functioning of the Government during a referendum campaign must be regulated by law. Taking into account the specific constitutional position of the Government (see Paragraphs 31 and 32 of the reasoning of the present Decision), the law must in particular regulate the manner of its functioning during a campaign and the use of budgetary funds.

43. A declaratory decision means that the unconstitutional law remains in force and, as explained above in this Decision (Paragraph 25 of the reasoning), in the event a declaratory decision is adopted, both the operative provisions and the reasons in the reasoning due to which the Constitutional Court has established an unconstitutionality of the law are binding. Such entails that the Government – until the legislature responds and adopts a different statutory regulation – must perform its activities during a referendum campaign in conformity with the substantive reasons contained in the present Decision that refer to the limitations applicable to the Government during such time.

44. The unconstitutionality of the statutory regulation on the basis of which the Government organised a referendum campaign does not in itself entail irregularities that

affected or could have affected the referendum results. In the referendum dispute it stayed, the Supreme Court will have to decide whether the concrete activities that the Government carried out in the referendum procedure (i.e. also during the referendum campaign) were in conformity with the starting points stated in the present Decision. It will have to decide whether the Government, as the organiser of the referendum campaign, informed voters objectively, comprehensively, and transparently (Paragraphs 25 and 32 of the reasoning of the present Decision). It will also have to assess whether, in light of the reasons stated in the reasoning, the appellant must be given the possibility to file a supplementary appeal (Article 22 of the Constitution). If it establishes irregularities, it will also have to decide whether they affected or could have affected the results of the voting in the referendum.

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45. The Constitutional Court adopted this Decision on the basis of Articles 30 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, 56/11, and 70/17), composed of: Dr Jadranka Sovdat, President, and Judges Dr Matej Accetto, Dr Dunja Jadek Pensa, Dr Dr Klemen Jaklič, Dr Rajko Knez, Dr Etelka Korpič – Horvat, Dr Špelca Mežnar, Dr Marijan Pavčnik, and Marko Šorli. The decision was reached unanimously. Judges Sovdat and Jaklič submitted concurring opinions.

Dr Jadranka Sovdat
President

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[1] See Decision of the Constitutional Court No. U-I-76/14, dated 17 April 2014 (Official Gazette RS, No. 28/14, and OdlUS XX, 25), Para. 14 of the reasoning.
[2] *Cf.* F. Grad in: I. Kaučič (Ed.), *Zakonodajni referendum* [The Legislative Referendum], Inštitut za primerjalno pravo, GV Založba, Ljubljana 2010, p. 164.
[3] *Cf.* J. Sovdat, *Sodno varstvo referenduma* [Judicial Protection of a Referendum], Pravnik, Nos. 9–10 (2013), p. 623.
[4] *Cf.* Order of the Constitutional Court No. U-I-130/17, Up-732/17, Para. 8 of the reasoning.
[5] *Cf.* Order of the Constitutional Court No. U-I-130/17, Up-732/17, Para. 6 of the reasoning.
[6] *Cf.* J. Sovdat, *op. cit.*, pp. 640 and 641.
[7] In accordance with the third paragraph of Article 82 of the Constitution, the Constitutional Court is the adjudicating authority when the election of deputies of the National Assembly is at issue.

[8] *Cf.* Order of the Constitutional Court No. U-I-130/17, Up-732/17, Para. 6 of the reasoning.
[9] M. Pavčnik, *Argumentacija v pravu* [Argumentation in Law], GV Založba, Ljubljana 2013, p. 152.
[10] See, e.g., Decision of the Constitutional Court No. Up-624/11, dated 3 July 2014 (Official Gazette RS, No. 55/14, and OdlUS XX, 36).
[11] See also Para. 13 of the reasoning of this Decision.
[12] In accordance with Article 2 of the ERCA, a referendum campaign may not begin sooner than 30 days prior to the day of voting and must, at the latest, end twenty-four hours prior to the day of the voting.
[13] *Cf.* Order of the Constitutional Court No. U-I-108/17, dated 13 July 2017 (Official Gazette RS, No. 41/17), Para. 3 of the reasoning.
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U-I-191/17
29 January 2018

Concurring opinion of Judge Dr Jadranka Sovdat

1. I concur with the principal reasons for the decision establishing the unconstitutionality of the law regulating proceedings in which the Supreme Court must decide on a referendum dispute and with the principal reasons, which state what conduct of the Government in the referendum campaign was unconstitutional. I also concur with the warning concerning the resulting legal effects of declaratory decisions as follow from established constitutional case law, and with the determined manner of execution of the Decision. In this separate opinion I will add:
A. some emphasis as regards the individual reasons provided in the reasoning of the Decision,
B. the reasons why the path selected to resolve the dispute that arose in connection with the referendum procedure in question is correct, and
C. the warning that the legislature still has a few constitutional skeletons in the closet of Slovene legislation, which will sooner or later fall out of it if the legislature (continues to) refuse to deal with them. The National Assembly and with it the Government, which is one of the constitutionally determined proposers of laws, should have urgently ensured constitutionally consistent statutory regulation of the mechanisms for resolving disputes, which absolutely everywhere (why again is it that Slovenia should be an exception?) inevitably arise when voters directly decide on either to whom they will entrust the exercise of the legislative and (or *"or"* when elected directly) executive power in elections, for the period of a term of office, or the subject of decision-making, when deciding in a referendum is concerned – in the case at issue, deciding in a referendum on a law.

2. Naturally, the legislature is not something imaginary and impersonal – the legislature is composed of the each-time elected representatives of the people in the parliament, whose first and foremost task and responsibility should actually be to ensure not only the statutory framework of a fair election competition so that such can be ensured with regard to every election procedure, but also a statutory framework for resolving electoral disputes in the event they arise. The trust of the voters in the fairness of elections namely concurrently establishes the legitimacy of the power that is exercised on behalf of the voters precisely by those elected; in elections they were granted a mandate exactly for

that. Trust is strengthened by dispelling any doubt regarding the fairness of the election procedure and the credibility of the election results on the basis of which the elected representatives came to power. Therefore, establishing an appropriate mechanism for the judicial protection of a fundamental political right should be a common obligation of all bearers of legislative power. In this respect in particular, there are not and should not be any short-term political interests. For everyone, there should only exist the long-term constitutional interest in ensuring a strong democracy, where those who exercise power assume office through free and fair elections. An integral part of this democracy is also the creation of a mechanism for actual and effective resolution of electoral disputes. Essentially, the decision-making of voters in a referendum also reflects the requirement that voters trust the fairness of the procedure of direct decision-making and the veracity of the final results. The voters who were unable to attain their desired outcome by casting a vote must have trust in the fact that the referendum procedure was carried out fairly and that the outcome of the referendum is credible. The mechanisms for resolving the two types of disputes are naturally the electoral dispute procedure and the referendum dispute procedure, respectively. There is hope that at least after this decision something will happen also as regards the electoral dispute, where the constitutional procedural issues are mostly equal to those that the Constitutional Court had to deal with this time. For instance, as regards the election of the President of the Republic, the legislature did not even imagine that a dispute might arise and that a certain authority would have to resolve such by a decision.

3. If one is faced with unfair procedures or non-credible results, the annulment of an election or referendum does not entail a weakening of these democratic processes. On the contrary, it entails a significant strengthening thereof, which establishes the trust of the voters in the fairness of such procedures and thus trust in the legitimacy of the authorities in power. Concurrently, it also establishes trust in the legal character of the state, which does not turn a blind eye to the disputes that arise because it has established mechanisms that resolve them in a legal manner. For such reason, the statutory regulation of these mechanisms is so important that in every individual case where they arise, the competent judge can ensure the effectiveness of the rights protected therewith, in particular human rights. The election judge and the referendum judge are the guardians of the fairness of the procedure for the direct democratic decision-making of voters.

A With Respect to the Reasons Provided in the Reasoning of the Decision

4. First it has to be stressed that in the decision at issue we are not dealing with the right to require a legislative referendum, which is determined – as the Constitutional Court has been stressing for the last several years – to be a constitutional right[1] by the first paragraph of Article 90 of the Constitution. At least 40,000 voters have this right. The Constitutional Court protects this right – in case the National Assembly opposes it – in special proceedings based on the second paragraph of Section II of the Constitutional Act Amending Articles 90, 97, and 99 of the Constitution of the Republic of Slovenia[2] with *mutatis mutandis* application of Article 21 of the Referendum and Popular Initiative Act.[3] In these proceedings, in which the National Assembly and the proposer of the legislative referendum oppose each other, the Constitutional Court is to decide whether it is even constitutionally admissible to call the legislative referendum that the proposer of the referendum has required.

5. The decision at issue does not concern the right to require a legislative referendum. The concrete referendum was called and carried out on the basis of such right. The Decision at issue concerns the statutory regulation of the right to vote in a referendum as determined by the third paragraph of Article 90 of the Constitution – which is granted to all citizens who have the right to vote. This right is

protected as a human right by Article 44 of the Constitution. It is realised in a referendum procedure when such is scheduled in accordance with the constitutionally determined conditions (the first and second paragraphs of Article 90 of the Constitution). Its judicial protection is ensured in a referendum dispute, which is a special form of judicial protection that by its nature is similar to an electoral dispute to a significant degree.

6. I would like to say a few words about the Code of Good Practice on Referendums. It is true that like the Code of Good Practice in Electoral Matters, which was also adopted by the Venice Commission (in 2002), also the referendums code is not a binding legal source. However, it would be useful to recall the manner in which the two Codes were created. It was not that the Venice Commission adopted completely new recommendations that everyone should follow. On the contrary, the two Codes were created based on diligent expert analyses of long-standing established constitutional standards in democratic states – or, as is clear from their titles – from their long-standing established good practices in carrying out elections and referendums. In the electoral code, which starts with the basic principles of regulating the right to vote, it is even expressly stressed that these standards represent the European electoral heritage, which is an integral part of the European constitutional heritage. This heritage takes into account the plurality of constitutional regulations in individual states; however, it is precisely on the basis of these constitutional regulations that those fundamental recommendations are drafted which, despite the differences that otherwise exist, are common to democratic states in which the rule of law is established and in which human rights and fundamental freedoms are observed. Therefore, it is not surprising that when deciding on alleged violations of the right to vote in legislative elections (Article 3 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 ECHR)) the European Court of Human Rights (hereinafter referred to as the ECtHR) regularly refers to the recommendations of the electoral code[4] and thus changes them into a binding active foundation of the substance of the active and passive rights to vote, and also through the prism thereof assesses the admissibility of limiting these rights, whether they concern the existence of the active right to vote, limitations on running for office, or electoral disputes after the day of voting.

7. In fact, the ECHR does not protect the right to vote in a referendum.[5] However, regardless of the above, it can be said that the influence of the recommendations in the Code of Good Practice on Referendums on the statutory regulation in states and its implementation should be essentially the same as that of the recommendations in the electoral code. These recommendations have been created based on long-standing good practices in democratic states in which referendums are (often) held in order to ensure what is essential – a fair referendum procedure and the credibility of the results thereof, which also those that were opposed to it must respect as binding.

8. Considering the above stated, one cannot simply brush aside the recommendations and say that they are not binding anyway. This cannot be done in particular because – which is also stressed in the Decision – the interpretation of the provisions of the Constitution leads to precisely the same conclusion as is offered as regards individual questions already in the recommendations of the Code, from the viewpoint of both the rules of a referendum dispute that must be regulated by law and of the admissibility of the participation of the Government in a legislative referendum as the organiser of a referendum campaign.

9. I completely concur with the approach taken by the Constitutional Court where the constitutional regulation of judicial proceedings in which a referendum dispute is resolved is concerned. As also I myself have already expressly underlined,[6] it follows from the principles of a state governed by the rule of law that the legislature – when it expressly and particularly regulates the possibility of decision-making on an individual's right or obligation, and all the more so if a human right is at issue –

must also expressly regulate judicial protection, which is also a human right. In such instances, it must be clearly evident from the statutory regulation which judicial path is available to an individual, the time limit, his or her burden of allegation and burden of proof, the authorisations of the court during decision-making, and the possibly available legal remedies against the first instance judicial decision. Therefore, the legislature must not abstain from regulating these obligations and cannot rely on the subsidiary dispute referred to in the second paragraph of Article 157 of the Constitution. This is even truer with respect to referendum disputes, precisely due to the reasons stated in the Decision. In Decision No. U-I-63/99, dated 8 May 2003 (Official Gazette RS, No. 48/03, and OdlUS XII, 41), the Constitutional Court expressly held that subsidiary proceedings for the judicial review of administrative acts in no manner entail constitutionally consistent judicial protection in such a case. In a referendum dispute, it is not even possible to *mutatis mutandis* apply authorisations from subsidiary proceedings for the judicial review of administrative acts, which are based on the subjective concept of a dispute, which is the rule in proceedings for the judicial review of administrative acts,[7] whereas a referendum dispute is based on the objective concept thereof. For this reason alone, it is inherent that neither the authorisations (like many other rules) in subsidiary proceedings for the judicial review of administrative acts nor the authorisations in regular proceedings for the judicial review of administrative acts are appropriate in a referendum dispute. The legislature must regulate the judicial decision-making procedure and the powers of the referendum judge in a clear and sufficiently precise manner.

10. I concur with the fact that in the Decision at issue the Constitutional Court did not have to adopt a position as to whether the law should have determined an appropriate quorum of voters who may file an appeal before the Supreme Court. In the original case that the constitutional review at issue concerns, the appellant already filed an appeal within the time limit and in conformity with the provisions of the law in force at the time of filing. Even if the Constitutional Court decided that imposing a quorum was urgently necessary in order to ensure effective judicial protection at the Supreme Court, the Decision would not be able to affect the original case, because such would entail an inadmissible retroactivity as regards the judicial protection proceedings that the appellant has already initiated.[8] I believe that in the regulation of referendum disputes, which the legislature will have to adopt to respond to the present Decision, the legislature can in fact determine a quorum, but it can also ensure every voter access to the referendum judge. If the legislature decides to impose a quorum, it will definitely be impossible for such quorum to apply to the representative of the proposer of the referendum, i.e. the representative of at least 40,000 voters who proposed that a legislative referendum be held.

11. I completely concur with the reasons as to the unconstitutionality of the regulation that allows the Government to act as the organiser of a referendum campaign with regard to which it expressly decides to advocate for deciding in favour of the entry into force of a law and spends budgetary funds to such end. I also concur with the reasons that, with sufficient precision, explain what the Government nonetheless may do. In the present Decision, the Constitutional Court changed its position from Decision No. U-I-295/07, dated 22 October 2008 (Official Gazette RS, No. 105/08, and OdlUS XVII, 56), in which it decided that the National Council may organise and lead a referendum campaign due to its constitutional power to require a legislative referendum. In fact, in doing so it expressly held that it only carried out a review from the viewpoint of the allegations and position of the National Council – the statements were focused on answering the question of whether the Government can allocate to the National Council budgetary funds for the purposes of a referendum campaign at its own discretion when the National Council requires a legislative referendum. The question is why this emphasis was even needed in the mentioned Decision. Even if it had not been included, it would have been clear that, in accordance with the established constitutional case law, the Constitutional Court in any case carries out a review of the constitutionality of a law only within

the framework of the allegations of the proposer (in the case at issue) – only within the framework of the alleged unconstitutionalities. Obviously, some special reasons led the Constitutional Court to make this emphasis, however they were not written; the Constitutional Court sometimes does that when it states that it did not have to adopt a position as regards certain individual questions. Irrespective of that, it cannot be overlooked that, among the reasons in Decision No. U-I-295/07, it is expressly stated that "the right to organise and carry out a referendum campaign is implicitly derived from the power of the National Council to require a legislative referendum," with regard to which the Constitutional Court referred, in a footnote, precisely to the provision of the law that regulates propaganda. Since the National Council is also a state authority, it is fair to say that in the present Decision the Constitutional Court has changed its previous position, which is actually the case.

12. This time, the Constitutional Court had enough serious constitutional reasons that are stated in the Decision to change the mentioned position. In Decision No. U-I-295/07 it was emphasised that the possibility that the National Council "is able to actively participate also in a referendum campaign, in particular by participating in informing voters," and thus to influence their decision-making, must be ensured. As is evident from the reasons of the present Decision, also the Government has the possibility to participate. However, it may only participate by objectively, comprehensively, and transparently informing voters, i.e. by presenting both of the reasons in favour of the law entering into force and those against it, with regard to which the Government may express its position. The National Council is a state authority, like the Government. However, it is also true that its position is significantly different from the position of the Government – in Decision No. U-I-295/07 the Constitutional Court labelled its role as "the corrective mechanism of the legislative power of the National Assembly." Concurrently, the Constitutional Court particularly stressed that it is significantly differently organised. The National Council represents constitutionally determined interests. Political parties are not organised therein (Paragraph 14 of the reasoning of Decision No. U-I-295/07), which is of course the opposite of the National Assembly and the Government. Namely, political parties can always participate as the organisers of a referendum campaign, including the political parties that form the ruling coalition. The only exception is that it is clear that they cannot obtain special budgetary funds for such purpose. Therefore, the positions of the Government and of the National Council cannot be considered completely equal. For the review at issue, however, it is important they are both state authorities that obtain the totality of their financing from the budget of the state. The position, therefore, had to be changed, although the National Council will not be in the same position again due to the amendment of the Constitution. It is worth drawing attention to the fact that the same that applies to authorities at the state level must also apply to authorities when local referendums are concerned. Also there, the right to vote in a referendum is at issue, which is protected by Article 44 of the Constitution, except that its exercise is limited to the area of the local community when a local referendum is held.

B Procedural Emphases

13. In its renowned Decision No. U-I-18/93,[9] the Constitutional Court stressed very clearly that the term *a state governed by the rule of law* contained in Article 2 of the Constitution includes, in addition to a substantive aspect, also a procedural aspect, and the legal character of the state is not only found in the substantive law of the state, but also in its institutions and "especially in the manner how these institutions apply the law in practice in their procedures." In my opinion, this applies to each and every field of law and to each and every institution in this state, including the Constitutional Court, which must, when exercising its powers, ensure the legal character of the state from the viewpoint of its constitutionally consistent functioning – i.e. the constitutionality of the state – in both respects. It will ensure such if the Constitutional Court itself acts in a legal (constitutional) manner

also from the procedural point of view – in accordance with the procedure determined by the Constitution and, by the authorisation in the first paragraph of Article 162 of the Constitution, the law – and at the same time observes the powers conferred on the other institutions in the system of state power and the procedures determined therefor.

14. As regards protection of the right to vote in a referendum in a concrete referendum procedure, neither the Constitution nor the law (the eleventh indent of the first paragraph of Article 160 of the Constitution) determines the powers of the Constitutional Court. Hence, it has the powers that it has in general, i.e. to decide upon the request of the competent judge in a referendum dispute on the constitutionality of the laws that must be applied in that dispute and to decide in constitutional complaint proceedings whether human rights have been observed in the referendum dispute before the competent judge (with regard to which, it also reviews in such a framework the constitutionality of laws); naturally, only after the decision of the referendum judge is issued. The Constitutional Court acted in accordance with the above when, by Order No. U-I-130/17, Up-732/17, dated 28 September 2017 (Official Gazette RS, No. 63/17), it directed the petitioner and the appellant to first state the constitutional objections against the referendum procedure regarding the law on the so-called second track of the railway line before the court designated by the law as the competent referendum judge. I have already drawn attention to the fact that by Decision U-I-63/99 the Constitutional Court has already assessed constitutional law criticisms as regards judicial protection not being ensured against the establishment of the results of a referendum, as so-called subsidiary proceedings for the judicial review of administrative acts referred to in the second paragraph of Article 157 of the Constitution allegedly do not correspond to the protection of the right determined by the third paragraph of Article 90 in conjunction with Article 44 of the Constitution, which is adapted to the nature of the matter. It is precisely in this respect that it established an unconstitutionality and at the same time abrogated the statutory provision that enabled the law that was the subject of decision-making in a referendum to be sent for publication prior to the report on the results becoming final, i.e. prior to the exhaustion of judicial protection against the report on the results of the legislative referendum. Until the judicial protection procedure before the Supreme Court has concluded, the report of the State Election Commission cannot become final. This is a consequence of Decision No. U-I-63/99. Hence, prior to the decision of the Supreme Court, it is impossible for the law that was the subject of decision-making in a referendum to enter into force. Therefore, it cannot be said that the legal remedy available to the appellant before the Supreme Court is ineffective in this respect. However, I opine that the legislature could allow an eight-day time limit for drafting an appeal before the Supreme Court. Two-day or three-day time limits are appropriate when judicial protection is ensured already during the procedure for direct decision-making itself, such as against the rejection of a candidature in an electoral procedure. Once the day of the voting has passed and the direct decision-making of voters has ended, it is indeed necessary to proceed expeditiously, but not so excessively fast as to deprive the appellant of the time necessary to draft a quality submission as a result. However, it is also true that in the original case that resulted in this constitutional review a great deal of time passed from the day of voting until the State Election Commission adopted and published the report, against which an appeal is allowed.

15. The legislature responded to Decision No. U-I-63/99 and determined that the Supreme Court shall be the referendum judge, [i.e. the adjudicating authority]. It also determined the procedure in accordance with which it shall decide. In fact, in doing so, it committed unconstitutionalities, which first had to be established in the review at issue. If the legislature clearly determines the competent judge and the procedure in accordance with which it shall decide, it cannot be said that the legal remedy by which such judicial proceedings are initiated does not exist, and even less can it be said that judicial protection is ineffective in and of itself. Such judicial proceedings might have constitutional deficiencies, due to which they can be reproached for being ineffective. However, that

does not mean that, as a result, the Constitutional Court may assume the powers of the Supreme Court by finding that the judicial protection expressly regulated by law is ineffective, and instead of supervising the judiciary as the last court in the state on the basis of a constitutional complaint, namely whether the judiciary observes human rights and fundamental freedoms when adjudicating, it itself adjudicates as the court of first and last instance. Often times in its decisions the Constitutional Court has established unconstitutionalities in the statutory regulation of proceedings before the regular courts and has consistently stressed that the Constitution does not ensure ostensible but effective human rights, due to which it established unconstitutionalities also in the statutory regulation of the right to judicial protection or the right to an appeal. However, for this reason alone it is not possible to allow the Constitutional Court to take from the regular courts the power conferred thereon by the law and to decide by itself on a case. This is not the constitutional role of the Constitutional Court.

16. If the legislature does not ensure the effectiveness of the right to judicial protection or the right to an appeal in such a manner that it does not even provide a legal remedy and does not determine the competent judge who will decide thereon, the Constitutional Court, by means of the mechanisms available thereto, can institute such by itself after establishing the unconstitutionality of a law, namely by stepping into the legislative sphere by means of the manner of execution of its decision, which the Constitutional Court has already done multiple times. Of course, only if this can be done in view of the circumstances of the review, provided that the questions at issue are not too complex and do not require the legislature to regulate them.[10] However, if the legislature does regulate a legal remedy and determines the competent judge, but in doing so determines some unconstitutional rules or unconstitutionally refrains from enacting some rules, then the Constitutional Court must ensure, by its intervention, the full effectiveness of such judicial protection when it is called on to decide in such a manner in accordance with the constitutional and statutory powers conferred thereon and in accordance with the proceedings determined by the Constitution or the law. This can be done, as I have already stressed, either in constitutional complaint proceedings after all legal remedies have been exhausted before the statutorily determined competent regular courts – which did not recognise the constitutional disputability of the statutory regulation – or upon the request of a statutorily determined competent court that raises serious doubt concerning the constitutionality of a law that it has to apply in its decision-making. The present Decision of the Constitutional Court was adopted in the latter proceedings. Namely, in accordance with the positions stated in the cited Order of the Constitutional Court, the appellant initiated proceedings before the statutorily determined referendum judge, which responded to his constitutional objections precisely in the manner required by the Constitution. On the basis of Article 156 of the Constitution, the Supreme Court suspended its decision-making procedure and turned to the Constitutional Court with a request for the review of the constitutionality of two laws, because it deemed that it could not interpret a significant part of the statutory procedural regulation and a part of the statutory substantive regulation in a constitutionally consistent manner.

17. By the present Decision, the Constitutional Court performed its constitutional task which virtually all constitutional courts have – to review the constitutionality of a law upon the request of a court. In doing so, the Constitutional Court did not and indeed must not address the establishment of the facts in the concrete judicial proceedings that the Supreme Court suspended, and even less was it allowed, within the framework of proceedings for a so-called concrete review of the constitutionality of a law, to assume the power of the Supreme Court and to decide by itself on the appeal in the proceedings that the Supreme Court suspended precisely because it is not competent to answer the question that the Constitutional Court had to answer by the Decision at issue. In accordance with the Constitution, the establishment of the unconstitutionality of laws is namely exclusively the power of the Constitutional Court (the first indent of the first paragraph of Article 160 of the Constitution in

conjunction with the first paragraph of Article 161 of the Constitution). In contrast, deciding on a matter that a law determines as falling within its powers is an exclusive power of the Supreme Court, in accordance with the second paragraph of Article 127 of the Constitution. In a state governed by the rule of law, no one may take that power from the Supreme Court without an express statutory basis. Also the Constitutional Court may only do so in the proceedings determined by the first paragraph of Article 60 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), but only after it abrogates a judicial decision of the Supreme Court on the basis of the first paragraph of Article 59 of the CCA due to a violation of a human right that the Supreme Court committed during adjudication. Naturally, in proceedings suspended on the basis of Article 156 of the Constitution it is impossible for such judicial decision to already exist. It is actually superfluous to mention that, in accordance with the second sentence of Article 156 of the Constitution, following the decision of the Constitutional Court by which the Constitutional Court decides on a request of the Supreme Court to review the constitutionality of a law, the procedure continues before the Supreme Court; hence, it cannot and it must not continue (at least not before the conditions for filing a constitutional complaint against the decision of the Supreme Court are fulfilled) before the Constitutional Court. In my opinion, also this entails legality, which is an integral element of a state governed by the rule of law in two proceedings determined by the Constitution and two laws – namely in proceedings before the Supreme Court, i.e. the referendum judge, and in proceedings before the Constitutional Court, which decides on the constitutionality of the law that the referendum judge must apply when deciding on a case.

18. Thus far it has only occurred once that in constitutional complaint proceedings the Constitutional Court alone decided as the court of first and last instance (in my opinion, that was in fact unconstitutional, because the Constitutional Court had the possibility to first establish judicial protection), without such power being conferred thereon by the Constitution or a law (or the manner of execution of a decision of the Constitutional Court, which has the force of a law). That case involved the termination of a deputy's office.[11] However, regardless of my disaccord in the mentioned respect, one cannot compare that case with the case at issue concerning a referendum dispute. A referendum judge is a typical judge of facts. These are (in the terminology of proceedings for the judicial review of administrative acts) typical proceedings where the court has full jurisdiction; the competent court must fully establish the actions that form the relevant concrete state of the facts of the possible irregularities in a referendum procedure and decide on the basis thereof, as authorised by law.[12] In accordance with the second paragraph of Article 127 of the Constitution, the legislature expressly determined that the referendum judge that decides on the legal remedy against the report of the competent election commission shall be the Supreme Court. For this reason alone, a referendum dispute differs significantly from the termination of a deputy's office, when in truth judicial protection was not even determined in the law, due to which the question first raised was whether subsidiary proceedings for the judicial review of administrative acts would be a constitutionally consistent legal remedy. As regards the referendum dispute, the Constitutional Court has already answered this question in the negative by Decision No. U-I-63/99 and the legislature has also responded thereto (by determining the referendum judge in a completely equal manner as the Constitutional Court did in its manner of execution imposed by the cited Decision) – it determined the competence of the Supreme Court.

19. On the basis of the present Decision of the Constitutional Court, the Supreme Court will have to decide in the referendum dispute concerned. It will have to decide expeditiously, although it will be unable to observe the non-mandatory time limit determined by law for the adoption of a decision. Not only because in the meantime the Constitutional Court had to decide on the constitutionality of two laws. Also, in general, it has to apply that perhaps the Supreme Court will be unable to observe the time limit, because what in particular is important is that it will decide on the legal remedy in fair

judicial proceedings in which it will observe the appellant's constitutional procedural guarantees and adjudicate in conformity with the constitutional starting points that the Constitutional Court determined in the present Decision for such decision-making. The fairness of a referendum procedure and the veracity of referendum results are more important than observing the non-mandatory time limit for deciding on the case that the legislature imposes on the court, as long as the court proceeds sufficiently expeditiously considering the nature of the dispute.

C A Warning and an Appeal to Eliminate Unconstitutionalities also in Electoral Disputes

20. When regulating supervision over the constitutionality and legality of the elections of the members of parliament, the Slovene constitution-framers took as a model the German regulation. Therefore, the Constitution leaves the first supervision over elections to the National Assembly, and against the decision thereof allows an appeal before the Constitutional Court, which thereby becomes the election judge at the first and last instance (the third paragraph of Article 82 of the Constitution). This solution (compared to the French and Austrian solutions) was not the best, but it is what it is, and the legislature should have followed it through. Therefore, if the constitution-framers transposed the German constitutional regulation, the legislature should also have transposed the German regulation of the law regulating supervision over elections, which in great detail determines the decision-making procedure regarding the appeals of candidates and voters due to alleged voting irregularities before the parliament. But it did not do so. Therefore, in Slovenia there is no appropriate regulation of access to election supervision in parliament, and voters do not have such access at all (they do not even have access to the election judge!). There is no procedure that is, *inter alia*, adversarial, nor appropriate regulation of the burden of allegation and the burden of proof of the person challenging elections. There is no appropriate regulation of the powers of the National Assembly, which naturally should also have the power to abrogate elections if it establishes that election irregularities occurred that could affect the election results. Also the election judge faces issues similar to those that were the subject of constitutional review in the case at issue. But there exists a multitude[13] of legal remedies (the duality also mentioned in the Decision[14]), which start with the election commission, which is the only authority that has a statutory authorisation to abrogate elections, with regard to which, again constitutionally admissibly, judicial protection is not ensured. All of the transgressions as to constitutional deficiencies that the legislature has already committed with regard to the electoral dispute concerning the election of deputies[15] it has also committed (and even added a few) with respect to other elections – i.e. national, European, and local elections – due to the fundamentally equal solutions applied. Although on the statutory level as regards the President of the Republic there only exists a law concerning the election thereof, the [legislature] failed to regulate electoral disputes therein. In this election, in particular, a single vote for one candidate or another can be decisive, and yet the legislature did not even determine the election judge, let alone everything else that should be determined.[16]

21. It must in particular be emphasised that in an electoral dispute any election irregularity that could affect the election results may be alleged, hence not only irregularities in the voting procedure itself or irregularities concerning how the competent election authorities handled the election materials, but also irregularities concerning all the decisions and conduct relating to the existence of the right to vote (electoral rolls), the validity of candidatures, and observance of the rules on election campaigns, including the financing thereof. All [judicial] protection procedures, including electoral disputes before the election judge, must be regulated in a clear and precise manner, with regard to which it is essential that they are adapted to the special nature of the right to vote, and also the powers of election judges must be adapted thereto, which must include, most importantly, the power to annul elections.

22. If with regard to electoral disputes the legislature keeps burying its head in the sand, we are sooner or later going to face constitutional questions equal to those we faced in the case at issue. In fact, the problems will possibly be much worse because not only will the question of the adoption of one law be at issue, but the question of ensuring the effectiveness of power in general. Installing the parliament as soon as possible following the voting day in parliamentary elections serves this end, in order for a government to be formed. If elections must be annulled because the election procedure was not carried out fairly and it is impossible to trust the veracity of the election results, it is clear that this will be an impediment to establishing effective power as long as such voting irregularities are not eliminated in new elections. If the Constitutional Court again has to review the constitutionality of the law regulating electoral disputes because the legislature did not perform its constitutional role in regulating the mechanisms of electoral disputes, the time [for resolving the case] will significantly increase, even it the Constitutional Court performs its role in a relatively short period of time, as it has done this time.

Dr Jadranka Sovdat
Judge

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[1] See Para. 21 of the reasoning of Decision of the Constitutional Court No. U-II-1/12, U-II-2/12, dated 17 December 2012 (Official Gazette RS, No. 102/12, and OdlUS XIX, 39).
[2] Official Gazette RS, No. 47/13 – UZ90, 97, 99.
[3] Official Gazette RS, No. 26/07 – official consolidated text – the RPIA.
[4] See, e.g., the ECtHR Judgment in *Petkov and others v. Bulgaria*, dated 11 June 2009.
[5] See, e.g., the ECtHR decisions regarding the admissibility of appeals in *Hilbe v. Liechtenstein*, dated 7 September 1999, and in *Niedźwiedź v. Poland*, dated 11 March 2008.
[6] See Para. 21 of the partly dissenting and partly concurring separate opinion to Order No. Up-790/14, U-I-227/14, dated 21 November 2014.
[7] Concerning the fact that the subjective concept of proceedings for the judicial review of administrative acts follows already from the Constitution, see E. Kerševan, V. Androjna, *Upravno procesno pravo: upravni postopek in upravni spor* [Administrative Procedural Law: Administrative Procedure and Proceedings for the Judicial Review of Administrative Acts], IUS Software GV Založba, Ljubljana 2017, p. 508.
[8] *Cf.* M. Pavčnik, *Časovnost razlage zakona* [The Temporality of the Interpretation of a Law], Pravnik, 72 (2017) 7–8, pp. 471–494.

[9] Decision dated 11 April 1996 (Official Gazette RS, No. 25/96, and OdlUS V, 40), Para. 20 of the reasoning.
[10] *Cf.* Judgments of the Federal Constitutional Court of Germany No. 2BvC 1/07, 2 BvC 7/07 (2008) and No. 2BvC 4/10, 2BvC 6/10, 2 BvC 8/10 (2011).
[11] See Order of the Constitutional Court No. Up-790/14, U-I-227/14 and the Decision in that case, dated 4 June 2015 (Official Gazette RS, No. 42/15, and OdlUS XXI, 3).
[12] It can act differently if already on the basis of the alleged irregularities it can assess that they manifestly were not able to affect the fairness of the referendum procedure and the veracity of the referendum results.
[13] This inappropriate multiplying of legal remedies begins already in the phase of candidatures; see J. Sovdat, *Volilni spor* [The Electoral Dispute], GV Založba, Ljubljana 2013, pp. 191–200.
[14] By that, I do not wish to say that it would have been wrong if the legislature had first provided a

special legal remedy and a short time limit in which such legal remedy could be filed before the competent election commission, a legal remedy by which it would be possible to eliminate so-called calculation errors when establishing election results (and which would include a request for repeated counting), which at most could entail the establishment of different election results; all of the other objections could be invoked in a separate and uniform legal remedy; as regards deputies of the National Assembly, such legal remedy would first be filed before the National Assembly.
[15] For more on this subject, see J. Sovdat, *op. cit.*, pp. 249–271.
[16] See *ibidem*, pp. 278–290, and J. Sovdat, *Pasivna volilna pravica, kandidiranje in varstvo volilne pravice,* [The Passive Right to Vote, Standing for Office, and Protection of the Right to Vote] in: I. Kaučič (Ed.), *Ustavni položaj predsednika republike* [The Constitutional Position of the President of the Republic], Inštitut za lokalno samoupravo in javna naročila (Lex localis), Maribor 2016, pp. 149–183.

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U-I-191/17
29 January 2018

CONCURRING OPINION OF JUDGE DR DR KLEMEN JAKLIČ TO DECISION NO. U-I-191/17 DATED 25 JANUARY 2018

Which is the Referendum Court?
The Argument of a Hollowed-out Right

I voted for the operative provisions, but I would like to explain my vote because during the discussion I was in favour of a significantly different decision, which in fact did attract some votes, but not a majority. That different decision would fully ensure that it would be impossible for the right of those who voted in a referendum (either FOR or AGAINST) to become hollowed out. This certainly cannot be stated as regards the current decision. Provided that the Supreme Court decides extremely quickly to uphold/annul the referendum, there perhaps exists, even on the basis of the current decision of the Constitutional Court, a tiny possibility that the hollowing out of the right at issue will not occur. However, the danger that by such a decision, following which, like in tennis, the ball is again in the Supreme Court's court, the Constitutional Court itself contributed to the hollowing out of the right concerned, is – much to my regret – significantly greater. Since for such reason I was in favour of a different decision, my conscience is clear as regards the possible failure of those who voted in the referendum to exercise their fundamental rights.

I was in favour of the Constitutional Court deciding by itself on the issue of upholding/annulling the referendum and thus of cutting the Gordian knot definitively and in the shortest possible time frame.[1] Namely, in this case – due to the effective protection of rights – time is of key importance. I had no reason to not believe the allegations of the National Assembly and the Government that the project of the second track of the railway line will probably be jeopardised or even blocked if the final decision on the validity of the referendum is not timely. In order for

the state to be able to absorb the allocated European funds (provided that the results of the referendum are confirmed to be constitutionally consistent), the question of the validity of the referendum should be resolved very quickly, probably in February or at the latest in March. Otherwise, the rights of those who voted FOR the law in the referendum and – supposing that the law is in conformity with the Constitution – succeeded in the referendum would remain unexercised and thus nullified or hollowed out. Equally (although somewhat differently and to a lesser extent), also the effectiveness of the rights of those who voted AGAINST is compromised if the case is transferred multiple times between the Supreme Court and the Constitutional Court. This is the reason I used the phrase "from Pontius to Pilate" to characterise the situation, which I find unacceptable, already in my dissenting opinion to the first decision in this case (Order of the Constitutional Court No. U-I-130/17 and Up-732/17, dated 28 September 2017 (Official Gazette RS, No. 63/17).

Already in the mentioned separate opinion I drew attention to the fact that protection before the Supreme Court is not effective, and stated several reasons for that. Since protection before the Supreme Court is in fact ineffective (as now both the Supreme Court and the Constitutional Court expressly admit), in its previous decision the Constitutional Court then completely erroneously sent the case to the Supreme Court, which the Supreme Court – precisely because protection before it is ineffective – returned to the Constitutional Court. In accordance with the doctrine in force, instead of sending the case to a forum where protection is ineffective, the Constitutional Court should have decided thereon by itself already at that time. In such manner, it would ensure rights effective protection as guaranteed by the Constitution and protect them from the current serious threat that they will remain unexercised.

The Constitutional Court has already developed case law as to how to proceed and protect the exercise of rights in special instances where the existing protection before the regular courts does not ensure effective protection. This precedential case law expressly and clearly requires the Constitutional Court to decide by itself in such instances in order to ensure the expeditious protection of rights.

In the case of the termination of Janez Janša's office as deputy of the National Assembly (Order of the Constitutional Court No. Up-790/14 and U-I-227/14, dated 21 November 2014, Official Gazette RS, No. 85/14), the Constitutional Court precedentially explained that in specific cases (1) where an important right is at issue (in the mentioned case, the right to be elected, and in the case at issue, the active right to vote in a referendum; in both instances, fundamental human rights are concerned), (2) where an important interest of the state is being protected (in the mentioned case, the functioning of the National Assembly in its full composition, and in the case at issue, the realisation of a project that the state claims is strategically important), and (3) where such is required by the temporal limitation of the right (in the mentioned case, the limitation of the term of office of a deputy to four years, and in the case at issue, the even shorter time limit in which European funds can still be absorbed), the Constitution in particular requires that "expeditious and effective judicial protection be ensured."[2] If effective protection does not exist in such instances, the right concerned is jeopardised, which leads to its hollowing out in real life, which cannot be in conformity with the Constitution. As regards Janez Janša's term of office as a deputy, the Constitutional Court correctly assessed that the envisaged judicial protection (in the mentioned case, proceedings for the judicial review of administrative acts) was ineffective, namely with the argument that proceedings for the judicial review of administrative acts entail

(1) two-step adjudication to which a third step is ultimately added in constitutional complaint proceedings, which takes too much time under the described circumstances, and (2) because in proceedings for the judicial review of administrative acts courts do not have express statutory authorisation to reinstate a deputy to such office[3] or to carry out any type of expedited decision-making.

"In view of the mentioned two elements that require expeditious and effective resolution of disputes relating to the early termination of a deputy's office, it is obvious that proceedings for the judicial review of administrative acts as subsidiary judicial protection are not adapted to resolving such disputes. Proceedings for the judicial review of administrative acts as regulated by the AJRAA-1 are carried out in two instances: at the first instance, it is the administrative court that adjudicates, namely either at its seat or at an external department thereof (Articles 9 and 11 of the AJRAA-1), depending on the plaintiff's residence, while the Supreme Court adjudicates on appeals, appeals before the Supreme Court, and reopening proceedings. An action does not impede the execution of the challenged act; an appeal is allowed against a decision to issue an interim injunction (suspending execution or temporarily regulating the situation). An appeal or an appeal before the Supreme Court is allowed against decisions of the court of first instance, depending on the type of decision. The list of powers of the administrative court to act does not include an express authorisation to reinstate a deputy's office. The AJRAA-1 does not contain the requirement to carry out proceedings for the judicial review of administrative acts where the court has full jurisdiction, or provisions to be applied in proceedings where the nature of the dispute requires expeditious decision-making (e.g. shorter procedural time limits). Decisions of courts can also be challenged before the Constitutional Court in constitutional complaint proceedings."[4]

Since the existing judicial protection before a regular court was found to be ineffective (in the same manner as also now it has been expressly found, in the case at issue, regarding a referendum), in that precedential decision the Constitutional Court adopted the position that in such cases, the exercise of a right is only protected if the Constitutional Court itself – and thereby without delay – decides on the matter. According to the precedential position of the Constitutional Court, this is the only constitutionally consistent possibility in instances of ineffective protection before a regular court:

"The Constitutional Court has stressed a number of times already that the purpose of the Constitution is not to recognise human rights only formally and in theory, but it is a constitutional requirement that the possibility of the effective and actual exercise of human rights be ensured (Decision No. Up-275/97, dated 16 July 1998 (OdlUS VII, 231)). Such a constitutional requirement also entails the duty of the state to ensure an effective legal remedy for protecting human rights and fundamental freedoms. The requirement of an effective legal remedy also follows from Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – ECHR). […] The obvious fact that proceedings for the judicial review of administrative acts are not adapted to resolving a dispute on the termination of a deputy's office means that […] effective judicial protection is not ensured, which results in the fact that effective protection of the passive right to vote of the complainant is not ensured. If a legal remedy is ineffective, it is tantamount to a legal remedy not existing. If a legal remedy is inexistent, it is also impossible to exhaust it. Therefore, the procedural requirement for deciding on the constitutional complaint is fulfilled."[5]

If one followed this established case law of the Constitutional Court, the Constitutional Court would have to decide substantively on the case by itself – and not only on the constitutional framework of deciding (i.e. the constitutionality of the ERCA and the RPIA), but, within such a framework, also on whether the Government in truth violated this framework or not, and (provided that it did violate it) on whether the violations were such that they affected or could have affected the very results of the referendum. It is only by such a final decision on the essence of the case that the effective protection of the right to vote in a referendum of both those who voted AGAINST the law in question and – in the described circumstances of a time limitation – even more so of those who voted IN FAVOUR, would be ensured with certainty. What is the use of a right that cannot be exercised because it came too late, namely after the time limit for absorbing the already allocated European funds has expired and thus the realisation of the project has been (as alleged by the state) rendered impossible? In my assessment, the possible contra argument that justice is slow and that the Government was aware of the challenges that could have been anticipated obviously cannot be successful. The issue is not about the rights of the Government, but about the fundamental constitutional rights of individuals who cast votes in a referendum, and their fundamental rights must not be violated due to the unregulated (ineffective) protection thereof. It is not individuals but the state, which includes the Constitutional Court, that has appropriate remedies in place for such instances, which it must apply appropriately and responsibly, and that bears the burden of unregulated judicial protection.[6]

The fact that the deviation (which I am not completely convinced of) from the precedential case law of the Constitutional Court can really be detrimental to rights and that even the Constitutional Court itself has contributed thereto is evident from the fact that by its last two decisions in the "Second Track of the Railway Line" case the Constitutional Court created not three-instance protection (as happened in the case involving Janez Janša's office of deputy and was found to be excessively lengthy and thus ineffective), but even five-instance (really!) protection. First, it was the Constitutional Court that decided on the case (i.e. the court of first instance) and sent it to the Supreme Court (i.e. the court of second instance), which then returned the case to the Constitutional Court (i.e. the court of third instance), which now is returning it to the Supreme Court (i.e. the court of fourth instance), and then a constitutional complaint will be filed by the party that will lose before the Supreme Court, which will be decided on by the Constitutional Court (i.e. the court of fifth instance).[7] Who believes that – following not three, but five instances of decision-making – in this case, which requires an expeditious decision, the final decision will be adopted prior to the expiry of the short time limit for absorbing the funds, which is allegedly a pre-condition for exercising the possible right? I am afraid that the possibilities for this are very slim, but because there perhaps still is a chance, provided that the Supreme Court decides very quickly, I voted in favour of such operative provisions, although I advocated a solution that would be even more correct, namely one where the Constitutional Court would decide on the case by itself. In such a manner, it would ensure effective protection of the rights of both groups of citizens who cast votes in the referendum to the same degree, and thus equal respect therefor.[8]

Had, following such substantive assessment, the majority of Constitutional Court judges in the end perhaps decided to confirm the referendum (e.g. because the influence of the alleged violation was not such as to affect or to possibly affect the final results of the referendum), I

would have accepted such a decision of the majority – regardless of my own assessment – as one of the possible legitimate interpretations that are within the sphere of a so-called "reasonable disagreement."[9] In the same manner as I would have considered the possible opposite decision of the majority reasonable. Not least of all, even experts in the field of studying public opinion (which we Constitutional Court judges are not) would probably not arrive at a consensus as regards conclusions on these issues. What is much more difficult for me to accept is the fact that the Constitutional Court, while the majority of judges remain more or less silent (with the possible exception of individual judges who, however, in my assessment do not succeed in refuting the arguments of the established case law), has departed from the precedentially established effective protection of fundamental rights, and is even by itself actively creating the danger that these rights will be hollowed out and treated unequally.

Dr Dr Klemen Jaklič
Judge

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[1] The appellant before the Supreme Court, Mr Vili Kovačič, whom by a special order in accordance with the CCA the Constitutional Court recognised the status of a participant in the concrete proceedings for a review of the request of the Supreme Court, expressly requested in his application that, under certain conditions (which are fulfilled), the Constitutional Court deem his brief to be a repeated application to the Constitutional Court and decide thereon on the merits. Since this application is substantively a constitutional complaint, this formal procedural prerequisite for deciding on the merits (a filed constitutional complaint) is fulfilled.
[2] Paragraph 10 of the reasoning: "The fact that a serious interference with the passive right to vote of a deputy and a dispute on the termination of the office of a deputy are at issue requires expeditious and effective judicial protection. In order to ensure effective exercise of the legislative power, it is crucial that the question of whether the termination of the office of a deputy of the National Assembly, which is the general representative body, be resolved as quickly as possible. Therefore, expeditious and effective judicial protection must be ensured in the event of a dispute. Expeditious decision-making is also required by the length of a deputy's term of office, which is four years."
[3] In the same manner, in the case at issue also the Supreme Court did not have the power to abrogate the report of the State Election Commission on the referendum results due to the possible violations in the referendum campaign.

[4] Order of the Constitutional Court No. Up-790/14 and U-I-227/14, Para. 11 of the reasoning.
[5] *Ibidem*, Paras. 12 and 13 of the reasoning.

[6] See also the reasoning of the Constitutional Court (cited in footnote 4), where it is explained that this is, naturally, the duty of the state.

[7] If it is Mr Vili Kovačič, the complainant, who loses before the Supreme Court, he has the possibility to file a constitutional complaint. If it is the Government that loses, it does not have the possibility to file a constitutional complaint, however a constitutional complaint can be filed by any group of voters in the referendum, which can still enter the dispute as a third party intervener (until the finality of the decision) or as a co-defendant (see the Civil Procedure Act, which applies *mutatis mutandis* in accordance with the express referral in the CCA).

[8] The possible contra argument that this is not possible because facts should always and only be assessed by regular courts obviously cannot prevail. In fact, the CCA expressly authorises the Constitutional Court precisely in such urgent cases to carry out a public hearing where and if it also has to clarify aspects of the state of the facts in order to adopt a decision. Also the direct participant in the proceedings, Mr Vili Kovačič, expressly proposed, *inter alia*, that this statutory authorisation be implemented. In such circumstances, the contra argument that only regular courts may decide on the decisive elements of the state of the facts would be manifestly general and erroneous.

[9] "Reasonable Disagreement," John Rawls, Political Liberalism, Columbia University Press, 1993.

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Type of procedure:
ocena ustavnosti in zakonitosti predpisov in drugih splošnih aktov

Type of act:
zakon
zakon

Applicant:
Supreme Court

Date of application:
12. 12. 2017

Date of Decision:
25. 1. 2018

Type of decision adopted:
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