Opravilna št.:	**U-II-1/10**
Akt:	Act on Amendments and Modifications of the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (The Gazette of the National Assembly, No. 149/09, EPA 735-V) (ZUSDDD)
Izrek:	
Evidenčni stavek:	Pursuant to the first paragraph of Article 21 of the Referendum and Public Initiative Act, upon receiving a petition from the National Assembly the Constitutional Court is competent to assess whether the rejection of an act in a referendum would affect such important constitutional values that, due to this, it would be permissible to interfere with the constitutional right to decision-making in a referendum. In the weighing of constitutional values, it should be considered whether by adopting the act the legislature also regulates other issues that bear no direct relation to the elimination of an unconstitutionality as such. However, the Constitutional Court does not rule upon the suitability of a statutory regime, as it has no such competence. By adopting the Act Amending the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia the National Assembly responded to the unconstitutional position found by the Constitutional Court in Decision No. U-I-246/02. On the basis of this Act it will be possible to definitively regulate the legal status of citizens of other republics of former Yugoslavia who have been erased from the register of permanent residents, if and insofar as their status remains unregulated to this day. By adopting the Act, which recognised actual residence status retroactively, the legislature introduced moral satisfaction as a particular form of redress for the violations of human rights caused by erasure from the register of permanent residents. Thereby it also accomplished the duty determined in the fourth paragraph of Article 15 of the Constitution. If damage was caused to individuals due to their erasure from the register of permanent residents because they were deprived of rights that were conditional on permanent residence in Slovenia, the question of possible state liability could arise but only if the conditions for the establishment of this liability pursuant to Article 26 of the Constitution and pursuant to the statutory regulation are fulfilled. The National Assembly can at any time adopt an act for this purpose, however the claim that this question should also be regulated by the proposed Act and that this Act is unconstitutional because it does not

regulate this question is unfounded.

The retroactive recognition of permanent residence status does not create new rights for the mentioned individuals and does not retroactively create legal relationships. In addition, the issuance of the decisions "retroactively" does not by itself entail that earlier decisions of the competent authorities in respect of individual rights associated with permanent residence are rendered illegal. Such administrative decisions became final and if individuals did not challenge them, they can no longer be interfered with.

The implementation of the Act and the issuance of decisions on its basis will remedy all the established unconstitutionalities which have arisen as a result of the erasure of persons from the register of permanent residents. Their human rights and fundamental freedoms will also be protected in a manner consistent with the Constitution and the National Assembly will fulfil all obligations arising from the decisions of the Constitutional Court.

On the basis of weighing the constitutional values at issue and taking into account the circumstances of the case, the Constitutional Court held that it is necessary to give priority over the right to decision-making in a referendum (Article 90, in conjunction with Article 44 of the Constitution) to the rule of law (Article 2 of the Constitution), the right to equality before the law (the second paragraph of Article 14 of the Constitution), the right to personal dignity and safety (Article 34 of the Constitution), the right to obtain redress for violations of human rights (the fourth paragraph of Article 15 of the Constitution), as well as the authority of the Constitutional Court (Article 2 and the second paragraph of Article 3 of the Constitution).

Geslo: 1.5.51.3.18 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - Decision in other proceedings - Decision on the finding of non-conformity of a request to call a referendum. 1.2.51.3.1 - Constitutional Justice - Types of claim - Capacity to file a petition with the Constitutional Court - Filer of a request - National Assembly. 1.3.4.6 - Constitutional Justice - Jurisdiction - Types of litigation - Admissibility of referenda and other consultations. 2.1.3.1 - Sources of Constitutional Law - Categories - Case-law - Domestic case-law. 1.3.52.5.2 - Constitutional Justice - Jurisdiction - Decision - In a procedure to carry out a referendum - On the constitutionality of a request to call a referendum. 4.9.2 - Institutions - Elections and instruments of direct democracy - Referenda and other instruments of direct democracy. 3.3.2 - General Principles - Democracy - Direct democracy. 5.3.28 - Fundamental Rights - Civil and political rights - Right to participate in public affairs. 5.1.3 - Fundamental Rights - General questions - Limits and restrictions. 1.6.6.1 - Constitutional Justice - Effects - Execution - Body responsible for supervising execution. 5.1.1.3 - Fundamental Rights - General questions - Entitlement to

rights - Foreigners. 3.10 - General Principles - Certainty of the law. 5.2 - Fundamental Rights - Equality. 3.11 - General Principles - Vested and/or acquired rights. 5.3.12 - Fundamental Rights - Civil and political rights - Security of the person. 3.9 - General Principles - Rule of law. 3.4 - General Principles - Separation of powers. 3.12 - General Principles - Clarity and precision of legal provisions. 3.13 - General Principles - Legality. 4.5.6 - Institutions - Legislative bodies - Law-making procedure. 5.3.16 - Fundamental Rights - Civil and political rights - Right to compensation for damage caused by the State. 3.16 - General Principles - Proportionality. 1.5.5.2 - Constitutional Justice - Decisions - Individual opinions of members - Dissenting opinions. 1.5.5.1 - Constitutional Justice - Decisions - Individual opinions of members - Concurring opinions.

Pravna podlaga: Arts. 2, 3.2, 14.2, 15, 15.2, 15.3, 15.4, 22, 23.1, 25, 26, 34, 44, 90, Constitution [URS] Art. 21, Referendum and Popular Initiative Act [ZRLI]

Opomba:

Polno besedilo: U-II-1/10-26
10 June 2010

On the basis of the first paragraph of Article 30 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), the Constitutional Court hereby issues the following
PRESS RELEASE

1. In decision No. U-II-1/10, dated 10 June 2010, the Constitutional Court decided that unconstitutional consequences would occur due to the rejection of the Act on amendments and modifications of the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia at a referendum. The decision was reached by seven votes against two. Judges Deisinger and Mozetič voted against and submitted dissenting opinions. Judges Pogačar, Sovdat, and Zobec submitted concurring opinions.

2. Citizens of other republics of the former SFRY who were removed from the register of permanent residents on 26 February 1992 that actually lived in the Republic of Slovenia, could regularise their legal status under the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia, which the National Assembly passed quickly and within the deadline determined by the Constitutional Court in Decision No. U-I-284/94, dated 4 February 1999. This ended the violations of the human rights to equality before the law and to personal dignity and safety of these persons already at that time. However, this Act did not regulate the status of the persons removed from the register of permanent residents who as

aliens were removed from the country or who left the Republic of Slovenia for reasons directly related to their erasure and could not return to it. In particular, the latter was of central importance to the Constitutional Court in the process of deciding [on this matter] a second time, on 3 April 2003, when by Decision No. U-I-246/02 it established the unconstitutionality of the statutory regulation and gave the National Assembly a six-month time-limit to remedy this unconstitutionality.

3. By adopting the Act on Amendments and Modifications of the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia, the National Assembly reacted to this decision of the Constitutional Court. With the entry into force of this Act, the years-long violation of the principles of a state governed by the rule of law and the principles of the separation of powers, which occurred due to the failure to comply with this decision, will cease. The Act and the issuance of individual decisions based on it will remedy all the established unconstitutionalities; violations of the human rights to equality before the law and to the dignity and safety for everyone involved will cease. However, the Act does not create new rights for individuals nor does it create retroactive legal relationships. Nevertheless, moral satisfaction as a special form of remedy for the consequences of erasure from the register of permanent residents is guaranteed. If damage was caused to individuals due to their erasure from the register of permanent residents because they were deprived of rights that were conditional on permanent residence in Slovenia, the question of possible state liability could arise, but only if the conditions for the establishment of this liability pursuant to Article 26 of the Constitution and the statutory regulation are fulfilled. Without considering the question whether those conditions are fulfilled, the Constitutional Court found that the National Assembly can at any time adopt an act by which it would limit possible state liability in a constitutionally admissible manner; however, the claim that this question should also be regulated by the proposed Act and that this Act is unconstitutional because it does not regulate this question, is unfounded.

4. On the basis of the adopted Act, the legal status of citizens of other republics of the former SFRY who were removed from the register of permanent residents, may be finally regulated. The National Assembly has thus fulfilled all the obligations arising from the decision of the Constitutional Court.

5. Given that by the proposed Act the National Assembly eliminates, in a manner consistent with the Constitution, the existing unconstitutional situation, that it regulates only issues directly related to the essence of the statutory regulation, and that the objections of its unconstitutionality put forward by the proposers of the request to call a referendum are not justified, the Constitutional Court ruled considering the circumstances of this case that

unconstitutional consequences would occur due to the rejection of the Act at a referendum. It held that the principles of a state governed by the rule of law, the right to equality before the law, the right to personal dignity and safety, the right to obtain redress for violations of human rights, and the authority of the Constitutional Court have to be given priority over the right to decision-making at a referendum.

Jože Tratnik
President

THE PRINCIPAL GROUNDS FOR THE DECISION
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1. In 1999 the Constitutional Court first established the unconstitutionality of the statutory regulation concerning the legal status of citizens of other republics of the former SFRY who were removed from the register of permanent residents by Decision No. U-I-284/94.

2. The National Assembly responded to this decision of the Constitutional Court quickly and within the deadline determined by the Constitutional Court by passing the Act.[1] By this Act, it was possible for the citizens of other republics of former SFRY who were removed from the register of permanent residents to obtain a permanent residence permit. In accordance with the subsequent amendments to the Citizenship Act, such persons even had the possibility to obtain citizenship of the Republic of Slovenia under more favourable conditions. On the basis of these two acts, the citizens of other republics of the former SFRY who actually lived in Slovenia could regularise their legal status and regain rights that they might have lost. This is significant as it entails that the human rights of these persons ceased to be violated. However, none of these rights could be asserted by those individuals against whom the measure of the forcible removal of an alien from the country was pronounced or who left the Republic of Slovenia for other reasons that were directly connected with their erasure from the register of permanent residents and were not able to return. Therefore, in 2003 the Constitutional Court decided by Decision No. U-I-246/02 that the Act was unconstitutional.

3. Concerning the decision on the recognition of permanent residence retroactively, the Constitutional Court at that time explicitly stated that a permanent residence permit does not determine a new legal status for these persons, but only establishes, in accordance with the existing situation, the legal status which had already existed. This finding applied only to persons who actually lived in the Republic of Slovenia continuously after their erasure from the register and were able to regularise their legal situation prospectively. In point 8 of the operative provisions the Constitutional Court precisely

determined for these persons the manner of the execution of the Decision, namely that the permanent residence permits to be issued establish permanent residence status retroactively, and ordered the Ministry of the Interior to issue supplementary decisions on the establishment of permanent residence status from the individual's erasure onwards as an official duty. On these grounds, everyone that had actually lived in the Republic of Slovenia could regularise their status, including with the establishment of permanent residence status retroactively, and this would be applicable even if the National Assembly did not react to Decision No. U-I-246/02. However, the special statutory regulation is still necessary to regulate the legal status of persons that were removed from the country as aliens and those who left the Republic of Slovenia for other reasons that were directly connected to their erasure from the register of permanent residents and were not able to return.

4. By adopting the second set of amendments to the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia, the legislature reacted to the unconstitutionality of the regulation in force that was established by the Constitutional Court seven years ago.

5. The proposed Act eliminates, in a manner consistent with the Constitution, the unconstitutionality found in Decision No. U-I-246/02, namely that the status of permanent residence should be retroactively recognised to the persons removed from the register of permanent residents if they meet the condition of actually residing in Slovenia. As each resident of the Republic of Slovenia must register their permanent residence, the legislature recognised permanent residence status to these persons retroactively by establishing a legal fiction that they had a permanent residence permit and were registered at their former address even during the period from their erasure from the register of permanent residents until they obtained a permit for permanent residence. This legal fiction was established for the purpose of eventual proceedings that were or could be initiated by individuals regarding the assertion of their rights conditional upon their permanent residence, but cannot have any other legal consequences on its own, in particular, it cannot be used to retroactively establish legal relationships that could have existed had it not been for their erasure from the register of permanent residents. The Act eliminates, in a manner consistent with the Constitution, also other unconstitutionalities found in Decision No. U-I-246/02. In eliminating the unconstitutionalities the National Assembly justifiably regulated certain other related issues (in particular, the status of the children of the persons removed from the register of permanent residents), since such prevented the emergence of new unconstitutionalities.

6. It is of special importance that by adopting the Act the National Assembly

established moral satisfaction as a special form of remedy for the consequences of the violations of human rights due to erasure from the register of permanent residents. If damage was caused to individuals due to their erasure from the register of permanent residents because they were deprived of the rights that were conditional on permanent residence in Slovenia, the question of eventual state liability could arise, but only if the conditions for the establishment of this liability pursuant to Article 26 of the Constitution and pursuant to the statutory regulation are fulfilled. Without considering the question whether those conditions are fulfilled, the Constitutional Court found that the National Assembly can at any time adopt an act by which it would limit eventual state liability in a constitutionally admissible manner. However, the claim that this question should also be regulated by the proposed Act and that this Act is unconstitutional because it does not regulate this question, is unfounded.

7. It should be emphasised that the retroactive recognition of permanent residence, as required by Decision No. U-I-246/02, does not create new rights for individuals and does not retroactively create legal relationships. In addition, the issuance of the decisions "retroactively" does not by itself interfere with earlier decisions of the competent authorities in respect of individual rights associated with permanent residence. Such administrative decisions became final and if individuals did not challenge them, they can no longer be interfered with.

8. By enforcing the Act and issuing decisions on its basis, all identified unconstitutionalities which occurred due to the erasure of persons from the register of permanent residents will be remedied. The National Assembly thus meets all the obligations of constitutional law stemming from the decision of the Constitutional Court.

9. In light of the above, in order to determine whether unconstitutional consequences exist, the Constitutional Court proceeded to weigh the constitutional values – on the one hand, the right to a referendum, and on the other hand, other constitutional values that do not support it being conducted. Due to the fact that for seven years the National Assembly failed to respond to Constitutional Court Decision No. U-I-246/02 by remedying the unconstitutionalities found by this decision, it violated the principle of a state governed by the rule of law (Article 2 of the Constitution) and the separation of powers (the second sentence of paragraph 3 of Article 3 of the Constitution), as the Constitutional Court has repeatedly emphasised in its decisions. Due to this violation, violations of human rights to equality before the law (the second paragraph of Article 14 of the Constitution), to obtain redress for human rights violations (the fourth paragraph of Article 15 of the Constitution), and to personal dignity and safety (Article 34 of the Constitution) also continue to exist. In weighing these constitutional values, the Constitutional Court took

into account:

– that by the proposed regulation the National Assembly would redress, in a manner consistent with the Constitution, the unconstitutionalities found by Constitutional Court Decision No. U-I-246/02;
– that the referendum should not entail a decision on whether or not unconstitutionalities established by a decision of the Constitutional Court are to be eliminated at all,
– that by the Act the National Assembly regulated only remedies for the unconstitutionalities at issue as well as some related and urgent issues; therefore, there was no abuse of legislative powers,
– that the Act is not unconstitutional as alleged by the proposers of the referendum,
– and that the National Assembly could not eliminate most of the unconstitutionalities in a different manner; this holds even if the Act were to be rejected in a referendum.
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10. On the basis of weighing the constitutional values at issue and in the light of the mentioned circumstances, the Constitutional Court decided that the principles of a state governed by the rule of law, the right to equality before the law, the right to personal dignity and safety, the right to obtain redress for violations of human rights, and the authority of the Constitutional Court have to be given priority over the right to decision-making at a referendum. Therefore, it agreed with the petitioner that unconstitutional consequences would occur due to the rejection of the Act at a referendum.

Note:
[1] Translator's Note: Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 61/1999

U-II-1/10-26
10 June 2010
D E C I S I O N

At a session held on 10 June 2010 in proceedings pursuant to the first paragraph of Article 21 of the Referendum and Public Initiative Act (Official Gazette of the Republic of Slovenia, No. 26/07 – official consolidated text), commenced on the petition of the National Assembly, the Constitutional Court d e c i d e d a s f o l l o w s:

Unconstitutional consequences would occur due to the rejection of the Act on Amendments and Modifications of the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (Gazette of the National Assembly, No. 149/09, EPA 735-V) in a referendum.
Reasoning
A.

1. The National Assembly adopted the Act Amending the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (hereinafter referred to as the ARSCOSS-B) on 8 March 2010 in a shortened legislative procedure. On the basis of Article 90 of the Constitution and Article 12 of the Referendum and Public Initiative Act (hereinafter referred to as the RPIA), on 12 March 2010 a group of thirty-one National Assembly deputies filed a request that a subsequent legislative referendum on the ARSCOSS-B be called. At a session held on 18 March 2010, the National Assembly reached the decision that unconstitutional consequences could occur due to the suspension of the implementation or the rejection of the ARSCOSS-B and it requested that the Constitutional Court decide on this matter pursuant to the first paragraph of Article 21 of the RPIA. Enclosed with the request [of the National Assembly] is the request of the group of deputies to call a legislative referendum, the opinion of the Legislative and Legal Service of the National Assembly, dated 16 March 2010, the opinion of the Government, dated 18 March 2010, and a transcription of the session of the National Assembly at which the decision was reached.

2. According to the National Assembly, the unconstitutional consequences which could occur due to the requested legislative referendum is that by the suspension of the implementation or the rejection of the ARSCOSS-B a situation could arise that would be inconsistent with the Articles 2, 8, 14, and 22 and the second paragraph of Article 120 and the second paragraph of Article 153 of the Constitution.

3. The National Assembly claims that the purpose of the ARSCOSS-B is in particular the elimination of the unconstitutionality found by the Constitutional Court in Decisions No. U-I-284/94, dated 4 February 1999 (Official Gazette of the Republic of Slovenia, No. 14/99, and OdlUS VIII, 22) and No. U-I-246/02, dated 3 April 2003 (Official Gazette of the Republic of Slovenia, No. 36/03, and OdlUS XII, 24). In these two decisions the Constitutional Court found the Aliens Act (Official Gazette of the Republic of Slovenia, No. 1/91 et seq. – hereinafter the AA) and the Act Regulating the Status of Citizens of Other Successor States of the former SFRY in the Republic of Slovenia (Official

Gazette of the Republic of Slovenia, No. 61/99 and 64/01 - hereinafter the ARSCOSS) unconstitutional from the perspective of Articles 2 and 22 and of the second paragraph of Article 120 of the Constitution. The National Assembly points out that the first decision of the Constitutional Court was adopted eleven years ago and the second seven years ago; therefore, any delay in the implementation of those decisions would mean that the unconstitutional situation would continue. In this context, the National Assembly refers to Order of the Constitutional Court No. U-II-3/03, dated 22 December 2003 (OdlUS XII, 101) and Decision of the Constitutional Court No. U-II-2/09, dated 9 November 2009 (Official Gazette of the Republic of Slovenia, No. 91/09).

4. In addition to eliminating the unconstitutionality found by these constitutional decisions, the National Assembly states that the ARSCOSS-B also regulates several other issues not covered by the decisions of the Constitutional Court but which are closely related to these unconstitutionalities and which should therefore be considered when regulating, in a comprehensive and non-discriminatory manner, the status of the citizens of other republics of former SFRY [Socialist Federal Republic of Yugoslavia, hereinafter Yugoslavia] whose registered permanent residence status illegally ceased once the AA became applicable to them. The ARSCOSS-B also regulates the issuance of permanent residence permits for the children of citizens of other republics of former Yugoslavia who were born in the Republic of Slovenia after 25 June 1991, because otherwise these children would be in a worse position than their parents. If the Act did not regulate the status of the children, there would be, in the opinion of the National Assembly, a violation of Articles 2 and 14 of the Constitution and the United Nations Convention on the Rights of the Child (Official Gazette of the SFRY, No. 15/90, Act on Notification of Succession concerning UN Conventions and Conventions Adopted by the International Agency for Atomic Energy, Official Gazette RS, No. 35/92, MP, No. 9/92 - hereinafter the CRC), and, due to the disparity of the statutory regulation with the CRC, consequently also with Article 8 and the second paragraph of Article 153 of the Constitution. A second group of persons who are regulated by the ARSCOSS-B although not covered by the decisions of the Constitutional Court, are the citizens of other republics of former Yugoslavia who at the time of Slovenia attaining independence had registered permanent residence status in the Republic of Slovenia, but this residence status ceased once the AA became applicable to them and they were only subsequently granted citizenship of the Republic of Slovenia, without having first obtained a permanent residence permit. If the Act did not regulate the status of these persons, they would allegedly be unduly disadvantaged in comparison with those who had obtained a permanent residence permit, which would entail a violation of Articles 2 and 14 of the Constitution.

5. The National Assembly is of the opinion that the ARSCOSS-B implements

the decisions of the Constitutional Court in a manner consistent with the Constitution and that all the provisions of the Act are important for this implementation. Since the implementation of the decisions of the Constitutional Court in a manner consistent with the Constitution is an obligation arising from the principles of a state governed by the rule of law (Article 2 of the Constitution), according to the National Assembly, the subject of a requested referendum cannot be a statutory regulation implementing the decisions of the Constitutional Court. The National Assembly also believes that unconstitutional consequences could occur simply due to the fact that the activities necessary to call a referendum or to prepare for holding such would delay the enforcement of the ARSCOSS-B.

6. The Government of the Republic of Slovenia also states that unconstitutional consequences would occur due to the suspension of the enforcement of the ARSCOSS-B or due to its rejection in a referendum. Allegedly, (as Constitutional Court Decision No. U-I-246/02 states) it is contrary to Articles 2 and 22 and the second paragraph of Article 120 that the ARSCOSS does not recognise permanent residence status to the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992, from that date onwards, that it does not regulate the acquisition of a permanent residence permit for the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992 and against whom the measure of the forcible removal of an alien pursuant to Article 28 of the AA was pronounced, and that it does not provide criteria for interpreting the undefined legal term of "actual presence [in Slovenia]", which is a condition for obtaining a permanent residence permit. As the ARSCOSS does not provide a deadline for applying for a permanent residence permit (the Constitutional Court annulled the three-month period in Decision No. U-I-246/02) and it does not grant a permanent statutory basis for the issuance of supplementary decisions, Article 2, the second paragraph of Article 3, Article 87, and the second paragraph of Article 120 of the Constitution were allegedly violated. Since it does not regulate the issuance of permanent residence permits to children of the erased persons who were born in the Republic of Slovenia after 25 June 1991, the ARSCOSS is allegedly inconsistent with Articles 2, 8, and 14 and the second paragraph of Article 153 of the Constitution. Articles 2 and 14 of the Constitution were allegedly infringed also because the ARSCOSS does not regulate the issuance of special decisions to citizens of other republics of former Yugoslavia who at the time of Slovenia gaining independence had registered permanent residence status in the Republic of Slovenia that ceased to be valid when they were removed from the register of permanent residents and were later granted citizenship of the Republic of Slovenia, without having first been issued a permanent residence permit.

7. The government emphasizes that the purpose of the ARSCOSS-B is to fully remedy the injustices caused to the “erased” residents of the Republic of Slovenia in the part that refers to the revocation of their status eighteen years ago. In addition to the implementation of the decisions of the Constitutional Court, the Act should allegedly also eliminate certain deficiencies that have arisen in practice in the implementation of the ARSCOSS and which are also a result of erasure from the register of permanent residents. The ARSCOSS-B allegedly constitutes a legally appropriate and the only possible solution for regularizing the status of the persons who were illegally removed from the register many years ago. According to the Government, a referendum on these issues would ruin the entire system of checks and balances, because it would be a referendum on whether the implementation of the decision of the Constitutional Court is acceptable. The Government emphasizes that the rejection of the ARSCOSS-B in a referendum would create a situation which, pursuant to the provisions of RPIA, could not be reconciled with the Constitution for a full a year after the referendum.

8. In their reply, the proposers of the referendum state various objections concerning the ARSCOSS-B. In the introduction of their reply they emphasize that the ARSCOSS-B regulates the beneficiaries to a permanent residence permit differently [than in the original Act]. Instead of "citizens of other successor states of former Yugoslavia", the new beneficiaries are "aliens who were citizens of other republics of former Yugoslavia on 25 June 1991". This change is not reflected in the title of the Act, which still mentions the regulation of the status of citizens of other successor states of former Yugoslavia. This would allegedly lead to ambiguity in the legal order.

9. According to the proposers of the referendum, the National Assembly should have adopted the ARSCOSS-B by the regular and not by the shortened legislative procedure. The Act allegedly contains numerous solutions that go beyond the mere implementation of the decision of the Constitutional Court; therefore, using the shortened procedure was not founded and constituted a manifest abuse of the procedure. Also, the statement that the ARSCOSS-B will have no financial implications for the state budget is allegedly misleading and completely untrue and constituted a breach of the provisions of the Rules of Procedure of the National Assembly (Official Gazette RS, No. 92/07 - official consolidated text – hereinafter the RPNA) concerning the legislative process. The proposers of the referendum point out that high costs would occur first of all due to the resulting administrative and judicial procedures, and the subsequent payment of compensation and claims for various rights would cost taxpayers even more. Due to the long-term financial consequences of the Act, the referendum would be particularly legitimate and legally founded.

10. The ARSCOSS-B is, according to the proposers of the referendum, also

questionable from the perspective of common human values and especially the fundamental values of the attainment of independence, since it does not exclude opportunists and those who allegedly attacked the independent Republic of Slovenia with firearms from the group of persons entitled to material benefits. In this way, the Act creates new injustices and entails the humiliation and a gross violation of the human rights of everyone who helped co-create the independent Republic of Slovenia. The ARSCOSS-B allegedly constitutes a serious injustice also for all those new citizens who since independence have regularised their status in accordance with the regulations, and who now as taxpayers would have to pay compensation and other costs. It is allegedly legally absurd to grant permanent residence retroactively also to those persons who in the past did not want this status. Allegedly, everyone who fought for an independent Slovenia, including those who paid the highest price in pursuit thereof, was also put in a humiliating position.

11. In the opinion of the proposers of the referendum, the ARSCOSS-B is controversial also because it does not regulate the issuance of decisions in the same manner for all beneficiaries and therefore allegedly violates the second paragraph of Article 14 of the Constitution. The Act should provide for a mandatory review of all decisions that were already issued in order to retroactively equalize the conditions and the procedure. The decision of the Constitutional Court allegedly could not constitute the basis for the issuance of specific administrative decisions, and therefore an adequate Act should have been adopted before any decision was issued. The complementary decisions that have so far relied on point 8 of the operative part of Constitutional Court Decision No. U-I-246/02 are allegedly legally questionable, and their issuance is allegedly contrary to the fourth paragraph of Article 153 of the Constitution. The proposers emphasize that they endorse the principle of individual treatment at all times; it should be determined in specific procedures whether an individual has been wronged. The correct solution would be, in the opinion of the proposers, to retroactively change the status of those persons who were not able to regularize such for reasons beyond their control. It is, however, allegedly absurd to grant status to those persons who did not want to regularize it or even wanted to forcibly prevent others from doing so.

12. The proposers of the referendum also believe that the ARSCOSS-B should contain provisions limiting compensation for damages or defining it as a fixed amount. As the Act does not limit the compensation for damages in any way, this is contrary to the established approach in other instances. Compensation for damages should be reserved for victims of war and the post-war revolutionary violence, for persons who suffered during the Second World War in concentration camps, and also for those who died in the War for Slovenia. Therefore, the totally unlimited possibilities regarding compensation for damages open to the "aggressors" and the "attackers" are allegedly "unlawfully

scandalous".

13. In the opinion of the proposers of the referendum, there is also a series of controversial and "unresolved" legal issues in the constitutional law doctrine. The proposers point out that Article 13 of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (hereinafter the BCC) and Article 81 of the AA have the nature of a constitutional act or even the nature of the Constitution itself. On the basis of these provisions the citizens of other republics of former Yugoslavia had the undisputed duty to regularise their status, namely to request either citizenship or permanent residence status. Since these persons did not comply with the applicable law or neglected to use the legal options available to them, the competent national authorities allegedly acted properly when they concluded that those persons who had not submitted an application to regularize their status as citizen or alien did not want to live in the Republic of Slovenia.

14. The ARSCOSS-B is, in the opinion of the proposers of the referendum, allegedly also discriminatory and therefore unlawful and unacceptable, as upon the issuance of permanent residence permits it enables that a special decision be issued in accordance with which the beneficiary shall be deemed to have continuously resided on the territory of the Republic of Slovenia and there will be no determination of actual residence in Slovenia for a certain period. The proposers emphasize that in cases of the absence of an individual from the territory of the Republic of Slovenia longer than one year, no other circumstances than erasure from the register will be taken into account. The proposers also note that the concept of actual presence is defined unclearly and this could entail inequalities in the enforcement of the Act. The lack of precision and the looseness in terms of substance are also problematic with regard to the principle of the clarity of regulations and also with regard to the principle of legality. The condition of actual presence should be clearly defined in order for the competent administrative authorities to have clear guidelines when exercising their discretion.

15. In light of all of the above, the proposers of the referendum are of the opinion that the mentioned provisions and many other provisions of the ARSCOSS-B are unclear and imprecise and are therefore inconsistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), the principle of constitutionality and legality (Article 153 of the Constitution), and the principle of legality (the second paragraph of Article 120 of the Constitution). They propose that the Constitutional Court establishe that no unconstitutional consequences would occur due to the suspension of the implementation, or the rejection of the ARSCOSS-B in a referendum, or subsidiarily, that unconstitutional consequences would occur due to the implementation of the ARSCOSS-B.

B. – I.

16. By adopting the ARSCOSS-B the legislature reacted to the unconstitutionality of the regulation in force that was established by the Constitutional Court in Decision No. U-I-246/02. By this decision the Constitutional Court established the unconstitutionality of the ARSCOSS, as it does not recognise permanent residence status to the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992 from that date onwards, as it does not regulate the status of those persons for whom the measure of the forcible removal of an alien was pronounced and as it does not define the criteria for determining the condition of actual presence for obtaining a permanent residence permit.

17. In Article 90 the Constitution regulates referendums "on any issue which is the subject of regulation by law (a legislative referendum)". The National Assembly may call a referendum on its own initiative; however it must call a referendum if so required by at least one third of the deputies, by the National Council, or by 40,000 voters. The constitutional provisions concerning the legislative referendum are mainly of an organizational and procedural nature, their goal is the actualisation of the fundamental constitutional principle that citizens exercise power (also) directly (the second paragraph of Article 3 of the Constitution), and the realization of the human right defined in Article 44 of the Constitution concerning the right of citizens to direct and indirect participation in the management of public affairs. Since Article 90 of the Constitution entails the implementation of the human right determined by Article 44 of the Constitution, the right to decision-making in a referendum is also a human right. Statutory interferences must therefore be subject to the legal regime of Article 15 of the Constitution, which governs the exercise and restriction of human rights and fundamental freedoms. Pursuant to the second paragraph of Article 15 of the Constitution, the manner of the exercise of human rights and fundamental freedoms may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. As determined by the third paragraph of Article 15 of the Constitution, human rights and fundamental freedoms may be limited only by the rights of others and in such cases as are provided by the Constitution.

18. The Constitutional Court has already adopted the position that the first paragraph of Article 90 of the Constitution also sets out a substantive framework for the direct participation of citizens in the management of public affairs. In relation to this, it took the view that this provision, which provides that "[t]he National Assembly [...] call[s] a referendum on any issue which is the subject of regulation by law" means that a legislative referendum is permitted on all issues governed by law. In accordance with the first paragraph of Article 21 of the RPIA, upon receiving a petition from the National

Assembly the Constitutional Court is competent to assess "whether the suspension of the implementation [of the] law due to a referendum or its non-implementation would truly affect such an important constitutional right that, due to this – upon weighing the affected constitutional values – it would be permissible to interfere with the constitutional right to decision-making in a referendum" (Constitutional Court Decision No. U-I-47/94, dated 19 January 1995, Official Gazette No. 13/95, and OdlUS IV, 4).

19. The Constitution and Constitutional Court decisions are not binding only upon the National Assembly as the legislative body, but also upon citizens when they exercise power directly by deciding on a particular law in a referendum (Constitutional Court Decision No. U-II-3/03). In a subsequent legislative referendum the voters decide to confirm or reject an adopted act as a whole (in accordance with the all or nothing principle – Article 9 of the RPIA). Individual legal issues cannot be separated out and the decision adopted in a referendum entails that the act as a whole is either confirmed or rejected. When judging on the basis of the first paragraph of Article 21 of the RPIA, the Constitutional Court must assess on the basis of weighing the affected constitutional values from the aspect of the considerations of constitutional law whether it is permissible to infringe upon the right to a referendum. However, the Constitutional Court does not rule upon the suitability of a specific statutory regime, as it has no such competence either when assessing the constitutionality of laws or in the exercise of the competences determined by the first paragraph of Article 21 of the RPIA.
B. – II.

20. The Constitutional Court first established the unconstitutionality of the statutory regulation concerning the legal status of the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents by Decision No. U-I-284/94. It established that the AA was inconsistent with the Constitution as it did not define the conditions for obtaining permanent residence permits for the citizens of other republics of former Yugoslavia who had not opted for Slovenian citizenship or whose application for citizenship was rejected.[1] The position of the Constitutional Court was that the general regime of permits for temporary and permanent residence was not appropriate for the status of the citizens of other republics of former Yugoslavia, and this regime also could not be applied to these persons by means of statutory and legal analogy. Since the AA did not regulate the legal status of the citizens of other republics of former Yugoslavia in the transitional provisions in such a way as to take into account that they had permanent residence status in the Republic of Slovenia and were actually present in this territory, these persons found themselves in "a legally uncertain position". From the transitional provisions of the AA these persons "could not grasp what kind of status is applicable to them as aliens and which provisions

of the Act should apply to them". The Constitutional Court ruled in Decision No. U-I-284/94 that, due to the undetermined legal status of the citizens of other republics of former Yugoslavia, the principle of legitimate expectation, which is one of the principles of a state governed by the rule of law (Article 2 of the Constitution), was violated. It also found a violation of the principle of equality determined by the second paragraph of Article 14 of the Constitution due to the unjustified distinction in the AA between the citizens of other republics of former Yugoslavia and the persons who lived in the territory of the Republic of Slovenia prior to independence as resident aliens. Concerning the legal status of persons who were considered aliens even before the independence of Slovenia, AA namely determined that the permanent residence permits of all aliens who had permanent residence status in Slovenia at the date the AA came into effect would continue to be valid.

21. Therefore, the issue was that the citizens of other republics of former Yugoslavia were, on the one hand, treated unequally in comparison with aliens who were citizens of other states (the second paragraph of Article 14 of the Constitution), and on the other hand, this caused the said persons to find themselves in a legally uncertain position, which the Constitutional Court determined to be inconsistent with Article 2 of the Constitution in Decision No. U-I-284/94. However, in reality this entailed that individuals who had previously relied on the right to permanent residence in Slovenia were no longer able to feel secure against interferences by the state in this acquired right, which curtailed their right to safety determined by Article 34 of the Constitution.[2] As there was a change in the legal status of these persons without the necessary legal basis for the issuance of administrative decisions by the competent administrative bodies on this change in legal status, thus without there being an opportunity in the issuance proceedings for these persons to exercise the right to be heard (Article 22 of the Constitution), or to exercise their rights to legal remedies against such decisions (Article 25 of the Constitution) and to judicial protection (Article 23 of the Constitution), this as well constituted an infringement on their personal dignity, which is also protected by the Constitution in Article 34 and which fundamentally guarantees to every individual that in proceedings in which decisions are made concerning his or her rights, obligations, or legal interests, he or she is treated as a person and not as an object. The interference with the personal dignity and safety of these persons occurred precisely because the legislature failed to fulfil its constitutional duty determined by the Constitutional Court in Decision No. U-I-284/94 to be the obligation to regularize the status of these persons in accordance with Article 2 and the second paragraph of Article 14 of the Constitution.

22. The National Assembly responded to Decision No. U-I-284/94 quickly (and within the deadline determined by the Constitutional Court) by passing the

ARSCOSS. This Act was adopted on 8 July 1999. By this Act it was possible for the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents to obtain a permanent residence permit. On this basis the Ministry of the Interior had issued 11,746 permits for permanent residence as of 10 February 2003.[3] Article 19 of the Act Amending the Citizenship of the Republic of Slovenia Act (Official Gazette of RS, No. 96/02 – hereinafter the CRSA-Č) also determined that a person that had had registered permanent residence status as of 23 December 1990 and was actually present in the Republic of Slovenia from that date onwards had the possibility to obtain citizenship of the Republic of Slovenia under more favourable conditions.[4] In light of the above-mentioned, it can be established that the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents who were actually present in the Republic of Slovenia could have regularized their legal status on the basis of the ARSCOSS and even the CRSA-Č. This also ended the restriction of their human rights determined by the second paragraph of Article 14 and Article 34 of the Constitution. Even before the ARSCOSS came into force, these persons had the possibility to assert before the competent courts the unconstitutionality of any rights lost that were associated with permanent residence status in the Republic of Slovenia,[5] however, this certainly did not refer to the rights that pertain only to the citizens of the Republic of Slovenia.[6] Undoubtedly, the persons at issue who (at least after the ARSCOSS came into force) were actually present in Slovenia, had the possibility after Constitutional Court Decision No. U-I-284/94 and after the entry into force of the ARSCOSS to regularize their legal status and regain rights that they might have lost in connection with losing permanent residence status [in addition to Constitutional Court Decision No. Up-333/96, dated 1 July 1999 (OdlUS VIII, 286), see also Decisions No. Up-60/97, dated 15 July 1999 (OdlUS VIII, 292), No. Up-20/97, dated 18 November 1999 (OdlUS VIII, 300), and No. Up-152/97, dated 16 December 1999 (OdlUS VIII, 302)]. However, none of these rights could be asserted by those individuals against whom the measure of the forcible removal of an alien from the country was pronounced or who left the Republic of Slovenia for other reasons that were directly connected with their erasure from the register of permanent residents and were not actually present in the Republic of Slovenia at the date of the entry into force of the ARSCOSS. The regulation of the legal status of these persons is exactly the issue that was at the forefront when the Constitutional Court reviewed the ARSCOSS in Decision No. U-I-246/02.

23. The Constitutional Court established in Decision No. U-I-246/02 that the ARSCOSS was unconstitutional (following the implementation of the Act Amending the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 64/01 – hereinafter the ARSCOSS-A),

since it did not recognize permanent residence retroactively to those citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992, i.e. for the period from the date of erasure onwards. The Constitutional Court found in this decision that the ARSCOSS was unconstitutional also because it did not regulate the acquisition of permanent residence permits to those individuals against whom the measure of the forcible removal of an alien from the country was pronounced[7] and as for the purpose of retroactive recognition of permanent residence status it did not define the meaning of the notion of actual presence in the Republic of Slovenia, which would have to be proved by the citizens of other republics of former Yugoslavia in order to obtain a permanent residence permit, and, in particular, the Act should have defined the period of absence after which the condition of actual presence would no longer be satisfied. In relation to this, the status of these persons should not have been any worse than the status of persons who had the status of alien already before the independence of the Republic of Slovenia. The interpretation of the condition of actual presence as well should not be any stricter than the interpretation established in the jurisprudence relating to the acquisition of citizenship.[8] The Constitutional Court set a deadline of six months for the legislature to remedy the established unconstitutionalities.

24. The Constitutional Court determined that the unconstitutionality established in Decision No. U-I-246/02 entailed an inconsistency with the principle of legal certainty as one of the principles of a state governed by the rule of law defined in Article 2 of the Constitution, which requires that the status of the said persons does not remain legally unregulated for a specific period. However, it is clear that concerning the persons who were forcibly removed from the country as aliens or who left the Republic of Slovenia for other reasons that were directly connected with their erasure from the register of permanent residents and were not able to return, it also entailed in terms of substance an inconsistency with Article 34 and with the second paragraph of Article 14 of the Constitution.

25. Concerning the decision on the retroactive recognition of permanent residence status, i.e. from the date of the erasure from the register of permanent residents onwards, the Constitutional Court explicitly stated that a permanent residence permit in this case does not determine a new legal status for these persons, but only establishes, in accordance with the existing situation, the legal status which had already existed. This finding applied only to persons who were actually present in the Republic of Slovenia continuously after their erasure from the register and also obtained a permanent residence permit on the basis of the ARSCOSS. Considering the fact that a large number of these persons were able to regularize their legal status prospectively, the Constitutional Court determined in point 8 of the operative provisions the

manner of the implementation of the Decision precisely for these persons, namely that the permanent residence permits that were already issued to the citizens of other republics of former Yugoslavia establish permanent residence status retroactively, i.e. from the date of erasure from the register onwards. It also ordered the Ministry of the Interior to issue supplementary decisions on the establishment of permanent residence status from 26 February 1992 onwards as an official duty to all those citizens of other republics of former Yugoslavia who were removed on that day from the register of permanent residents and had already acquired a permit for permanent residence. On these grounds everyone that was actually present in the Republic of Slovenia could regularize their legal status prospectively on the basis of point 8 of the operative provisions of Constitutional Court Decision No. U-I-246/02, subject to the condition of actual presence in Slovenia, and also retroactively even if the legislature had decided not to respond to the unconstitutionality established in point 1 of the cited Decision. The state bodies competent for the implementation of a decision of the Constitutional Court must namely act in accordance with the part of the decision that prescribes the manner of its exercise until the legislature, if it decides to do so, regulates the issue in another manner that is consistent with the Constitution (see the position of the Constitutional Court in Order No. U-II-3/03).

26. A statutory regulation is, however, needed to remedy the established unconstitutionality determined by points 2 and 3 in conjunction with point 1 of the operative provisions of Constitutional Court Decision No. U-I-246/02, as is apparent also from that decision. In order to regulate the legal status of persons who were forcibly removed from the country or of persons who left the Republic of Slovenia for other reasons that were directly connected with their erasure from the register of permanent residents, the retroactive recognition of their permanent residence status necessitates the constitution of a legal fiction[9] that is (and was) needed for the eventual assertion of rights pertaining to aliens that have permanent residence permits in the Republic of Slovenia. Therefore, such permits, except in that they serve to prove the existence of the right to permanent residence status in eventual proceedings for asserting the rights connected with permanent residence, cannot have any other legal consequences. As is clear from the cited decision of the Constitutional Court, in order to remedy the unconstitutional state of affairs the legislature must also define the notion of actual presence in the Republic of Slovenia, in particular the period of absence after which the condition of actual presence would no longer be satisfied, and specifically regulate the cases where the measure of the forcible removal of an alien from the country was pronounced.

27. It follows from the data provided by the Ministry of the Interior that some citizens of other republics of former Yugoslavia removed from the register of permanent residents, obtained a permanent residence permit on the basis of the

AA or the Aliens Act (Official Gazette of the Republic of Slovenia, No. 64/09 – official consolidated text – hereinafter AA-1),[10] from which it is even possible to infer that some of these persons already regularized their legal status prospectively even in the absence of statutory regulation. It is also evident that at this moment only a small number of administrative proceedings and proceedings for the judicial review of administrative acts concerning the acquisition of permanent residence permits are pending and that the Ministry started to deal with these applications, in accordance with the decisions of the Constitutional Court, individually, as is shown in particular by the data on dismissed and rejected applications and on proceedings that were stayed. However, it cannot be inferred from the data of the Ministry of the Interior that the statuses of all the persons at issue have been regularized prospectively,[11] and in even fewer cases have their statuses been regularized retroactively[12] in accordance with the manner determined by Decision No. U-I-246/02. Above all it is very important, as follows from the petition of the National Assembly, that the Act also regulates some of the issues associated with erasure from the register of permanent residents which became apparent when implementing the ARSCOSS; among such, of particular importance are the issue of the equal treatment of persons who have acquired nationality without having previously obtained a permit for permanent residence, and the issue of the children of persons removed from the register of permanent residents.

28. The legislature failed to respond to Constitutional Court Decision No. U-I-246/02 for a long time. The Constitutional Court emphasized already in Order No. U-II-3/03 that due to a violation of the principles of a state governed by the rule of law determined by Article 2 and the principle of the separation of powers determined by Article 3 of the Constitution, unconstitutional consequences (determined by the then applicable first paragraph of Article 16 of the RPIA to be a reason for the unconstitutionality of a request to call a subsequent legislative referendum) occurred already when the deadline for implementing Constitutional Court Decision No. U-I-246/02 expired unsuccessfully.[13] It also pointed out that any delay in the implementation of the said decision entails a continuation of the unconstitutional state of affairs, therefore the National Assembly must implement the decision as soon as possible. The Constitutional Court again found in Decision No. U-II-3/04, dated 20 April 2004 (Official Gazette of the Republic of Slovenia, No. 44/04, and OdlUS XIII, 29), that the unregulated status of these persons had lasted for more than twelve years, and that therefore any extension of the unconstitutional state of affairs, which may also occur in the form of the failure to adopt an Act which would finally resolve the issue of the permanent residence of these persons, already constitutes unconstitutional consequences (in terms of the first paragraph of Article 16 of the RPIA applicable at that time).
B. – III.

29. The National Assembly responded to the unconstitutionalities established in points 1, 2, and 3 of the operative part of Decision No. U-I-246/02 by passing the ARSCOSS-B.[14] In the proposed first paragraph of Article 1 of the ARSCOSS, the term used to describing the beneficiaries is no longer "citizens of other successor states of former Yugoslavia", but "aliens who were citizens of other republics of former Yugoslavia on 25 June 1991". Such a change is actually necessary because in this manner also the persons who before independence were citizens of the former Yugoslav republics and may have become third-country nationals or stateless persons after their erasure from the register of permanent residents are included among the beneficiaries due to the passage of time.[15] While this change is not reflected in the title of the ARSCOSS-B, this does not introduce any ambiguity in the legal order. In the proposed second paragraph of Article 1 the Act grants a residence permit and permanent residence status at the address at which the particular individual was registered at the time of erasure, even for the period from the erasure until the permanent residence permit was obtained. For the persons who are not actually present in the Republic of Slovenia the Act therefore establishes a legal fiction of permanent residence status by recognizing a fictitious "permanent residence at the address where the [individual] was registered before [...] the erasure [...] for the period until the adoption of the ARSCOSS or until the deadlines that are to be established by this Act for the status regularisation expire", as was explicitly called for by the Constitutional Court in Decisions No. Up-333/96 and No. Up-60/97.

30. In a manner consistent with the Constitution, the legislature eliminates the unconstitutionality found in point 1 of the operative part of Decision No. U-I-246/02. In the reasoning of this decision (points 17 to 20 of the reasoning), the Constitutional Court stated that the issue of the permanent residence status of the erased persons can be regulated in a single manner only and that only this manner is consistent with the Constitution.[16] Therefore, the National Assembly could not regulate this issue in any other way other than to recognise permanent residence status retroactively to those individuals who obtain a permanent residence permit subject to the condition of actual presence in Slovenia. Concerning this, it should be noted that permanent residence status in the country is only possible on the basis of a permanent residence permit and that anyone who resides in the country must register their permanent residence.[17] It is therefore understandable that the legislature retroactively recognised the permanent residence status of the citizens of other republics of former Yugoslavia removed from the registry of permanent residents who are not actually present in the Republic of Slovenia by establishing the legal fiction that they had a permanent residence permit and were registered at their former address even during the period from their erasure from the register of permanent residents until they obtained a permit for permanent residence, certainly under the conditions expressly defined by the Act. As was already

stated, this legal fiction is and was intended for eventual proceedings that could be initiated by individuals regarding the assertion of their rights conditional upon their permanent residence status, but cannot have any other legal consequences on its own, in particular, it cannot be used to retroactively establish legal relationships that could have existed had it not been for their erasure from the register of permanent residents.

31. The ARSCOSS-B eliminates, in a manner consistent with the Constitution, also the unconstitutionality found in point 2 of the operative part of Decision No. U-I-246/02, namely that the Act should regulate the possibility to obtain a permanent residence permit for those citizens of other republics of former Yugoslavia against whom the measure of the forcible removal of an alien was pronounced. This unconstitutionality is eliminated by the proposed first paragraph of the Article 1 in conjunction with the fifth indent of the third paragraph of the new Article 1.č of the ARSCOSS. On this basis, the condition of actual presence in the Republic of Slovenia is fulfilled even if the absence lasted for more than a year, if the person had been removed from the Republic of Slovenia pursuant to the provisions of the AA due to erasure from the register of permanent residents. The citizens of other republics of former Yugoslavia who were forcibly removed from the Republic of Slovenia due to the erasure may apply for a permanent residence permit, and the fact that they were forcibly removed from Slovenia is not taken into account when determining the condition of actual presence.[18] In the assessment of the Constitutional Court, the National Assembly could not eliminate the central part of this unconstitutionality in a different manner. Only statutory legislation providing that the forcible removal of an alien from the country due to erasure from the register of permanent residents does not affect the acquisition of permanent residence permits and the recognition of permanent residence status retroactively is constitutionally acceptable. The legislature has a greater margin of appreciation only when deciding the length of the period of absence due to the measure of the forcible removal of an alien from the country shall be disregarded when determining the condition of actual presence in Slovenia and after what period of time a certain action can be expected from an individual from which it can be concluded that he or she wanted to return to the Republic of Slovenia and to continue to permanently reside here. By the proposed third paragraph of Article 1.č of the ARSCOSS[19] the legislature has obviously also taken into account the fact that some persons removed from the registry of permanent residents could regularize their status prospectively after a certain period of time on the basis of the AA-1. Therefore, the regulation defined in the ARSCOSS-B is also in this part not unconstitutional in itself.

32. The third unconstitutionality determined by Decision No. U-I-246/02 refers to the uncertainty of the legal notion of "actual presence in the Republic of Slovenia". The ARSCOSS prescribed the condition of actual presence for

obtaining a permanent residence permit as an undefined legal notion after already seven years had elapsed since the erasure from the register of permanent residents and when the different statuses of the citizens of other republics of former Yugoslavia who had not acquired citizenship of the Republic of Slovenia became identifiable. It stems from the reasoning of the constitutional decision that the legislature should define what constitutes actual presence according to the ARSCOSS, and in particular it should define the period of absence after which the condition of actual presence is no longer satisfied. The Constitutional Court has explicitly mentioned certain limitations in the reasoning, namely that the status of these persons should not be any worse than the status of persons who had the status of alien already before the independence of the Republic of Slovenia,[20] and the interpretation of the condition of actual presence should not be any stricter than the interpretation established in the jurisprudence relating to the acquisition of citizenship as well. This entailed that the legislature was obliged to meet the requirement of equality before the law defined in the second paragraph of Article 14 of the Constitution.

33. The notion of actual presence in the Republic of Slovenia is defined in the proposed Article 1.č of the ARSCOSS. The Act defines actual presence as the individual having a centre of vital interests in the Republic of Slovenia. This is assessed in accordance with certain criteria, listed as examples – personal, family, economic, social, or other connections which indicate that an individual has real and lasting ties with Slovenia.[21] Such a connection, of course, cannot be attributed to someone who has left the Republic of Slovenia with a view to emigrating, which was already at the time of the erasure and is still today, pursuant to the AA-1 (the sixth indent of the second paragraph of Article 45), a reason for the validity of a permanent residence permit to cease. The term "or other connections" cannot imply whatever other connections, but this statutory provision must be interpreted by an *intra legem* analogy. This means that only those "other connections" of the individual may be relevant that are similar in terms of their quality and intensity to the circumstances explicitly established. The requirement of the cumulative fulfilment of these criteria, which the proposers of the referendum advocate, would be unconstitutional, because the Act would without any reasonable grounds require that the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents have such connections in Slovenia permanently, while such a requirement does not apply for other aliens (the second paragraph of Article 14 of the Constitution). Therefore, it should be taken into account that the condition of actual presence is assessed by whether the individual has a "centre of vital interests" in Slovenia, i.e. that he or she has "real and lasting ties" with the Republic of Slovenia.[22] Personal, family, economic, social, or other connections are just circumstances which enable the competent authority to decide whether an individual fulfils this condition. Depending on the

particular circumstances, only one circumstance might be sufficient to determine actual presence in a particular case, whereas in other cases the existence of two or more circumstances will have to be demonstrated for the fulfilment of the condition of actual presence. In any event, the Act requires, on the basis of the actions (filing an application) of applicants for permanent residence permits, individual consideration of these applications, which is in addition the case for all the procedures under the ARSCOSS, including the procedures pursuant to point 8 of the operative part of Constitutional Court Decision No. U-I-246/02.

34. Besides the condition of actual presence, the ARSCOSS-B determines the period of time and the grounds on the basis of which the individual was justifiably absent from the territory of the Republic of Slovenia. The second paragraph of the proposed Article 1.č of the Act provides that the condition of actual presence in the Republic of Slovenia is fulfilled if the person left the Republic of Slovenia and the continuous absence did not last longer than a year, regardless of the grounds for this absence. An absence which lasted for more than a year does not affect the condition of actual presence if it was due to certain justified grounds.[23] However, the Act provides that even a justified absence could last only up to five years, while it could last for more than five years only if the person had actively tried to return to the Republic of Slovenia and to continue his or her actual presence there.

35. In the assessment of the Constitutional Court, the proposed legislative solutions concerning the condition of actual presence addresses the unconstitutionality found in Decision No. U-I-246/02 in a manner consistent with the Constitution. The provisions are not unclear or their substance imprecise, or at least no more than is the case for similar statutory provisions that otherwise govern the authorization of residence or the acquisition of citizenship. It cannot be asserted that these provisions are unconstitutional in relation to Articles 34 and 2 of the Constitution. The legislature met the constitutional requirements also in relation to the second paragraph of Article 14 because when defining the condition of actual presence it also considered the positions adopted by the Constitutional Court regarding the interpretation of this condition in the decisions concerning the relevant constitutional complaints, particularly in relation to the acquisition of citizenship.[24] Thus, in Decision No. Up-73/95, dated 27 February 1997 (OdlUS VI, 72), the Constitutional Court found that the right to the equal protection of rights (Article 22 of the Constitution) was violated due to the unlawful interpretation of the uncertain legal notion of "actual presence in Slovenia", namely by stating that for the definition of actual presence "only the long-term interruption of the actual presence of the claimants in the Republic of Slovenia is relevant [...] and not the assertion in the claim concerning the impossibility of their return to Slovenia due to war circumstances [...]". In Decision No. Up-77/94, dated 16

September 1997 (OdlUS VI, 188), the Constitutional Court found a violation of Article 22 of the Constitution because the complainant's departure from the Republic of Slovenia together with the Yugoslav Army was considered in itself an interruption of actual presence in Slovenia, whereas not all the relevant facts which could confirm or reject such interpretation were established. Due to such an unconstitutional interpretation of the uncertain legal notion of "actual presence", the competent bodies did not take into consideration the complainant's statements in the application for citizenship that he resigned from the Yugoslav Army after one month "because he did not want to move from the Republic of Slovenia". In Decision No. Up-199/95, dated 5 February 1998 (OdlUS VII, 100), it found a violation of Article 22 of the Constitution because the claimant's assertion that he was not responsible for the reasons for his absence lasting longer than a year was not considered among the decisive factors for the definition of actual presence. In Decision No. Up-200/04, dated 22 June 2006 (Official Gazette of the Republic of Slovenia, No. 76/06), the Constitutional Court found a violation of Article 22 of the Constitution, because the Administrative Court took the position that the fact that the complainant was not able to return to the Republic of Slovenia due to war circumstances and to the expiry of her passport was not essential, but only the fact that the complainant interrupted her actual presence in the Republic of Slovenia and is still living abroad should be considered. In Decision No. Up-211/04, dated 2 March 2006 (Official Gazette of Republic of Slovenia, No. 28/06, and OdlUS XV, 40), which concerned an application for a permanent residence permit which the complainant filed on the basis of the ARSCOSS, the Constitutional Court rejected the position of the courts that the fact the complainant was unable to return to the Republic of Slovenia due to the war was not relevant for the decision whether the complainant fulfilled the condition of actual presence in Slovenia. The position of the Constitutional Court was that the assertions of the complainant concerning the impossibility of returning due to war circumstances or due to a refusal at the border could constitute such circumstances that could justify the complainant’s absence for a longer period of time due to circumstances beyond his control, and that these circumstances have to be regarded as decisive for the definition of actual presence in the Republic of Slovenia. Certainly, in the proceedings decided on the basis of the ARSCOSS also after this amendment of the Act, it will continue to remain a duty of the administrative authorities to determine with certainty in each case, in accordance with the principle of legality and the principle of substantive truth, whether these statutory conditions are met; therefore, a person who asserts these rights will also have to demonstrate, in accordance with the rules of administrative procedure, that the facts to be considered existed for the whole period relevant for the decision in the case. B. – IV.

36. In order to reach a decision on whether such unconstitutional consequences

could occur due to the suspension of the implementation or the rejection of the ARSCOSS-B in a referendum, as required by the first paragraph of Article 21 of the RPIA, it is necessary to identify the constitutional values at issue and decide which of them should be given priority. The right to a referendum, which is protected as a human right under Article 90 of the Constitution, read in conjunction with Article 44 of the Constitution, may be opposed by several constitutional values. These are the ones the legislature defined by the concept of "unconstitutional consequences" in the first paragraph of Article 21 of the RPIA. Whether the right to a referendum should yield to these constitutional values depends on which of these values are at issue and what weight they carry.

37. Until the legislature remedies the unconstitutional gap in the law that the Constitutional Court found in Decision No. U-I-246/02, the statutory regulation concerning the legal status of the citizens of other republics of former Yugoslavia who were erased from the register of permanent residents remains inconsistent with the second paragraph of Article 14, Article 34, and Article 2 of the Constitution (see paragraph 27 of this decision). In addition, the failure to comply with the decision of the Constitutional Court itself entails a new violation of the Constitution, namely Article 2 and the second paragraph of Article 3 thereof. The weight of all these violations is all the more important, as seven years have passed since the second decision (No. U-I-246/02) of the Constitutional Court and as they may lead to violations of rights, including human rights and fundamental freedoms.[25] The Constitutional Court has in the interim reiterated in its subsequent decisions that any prolongation of the unconstitutional situation already entails unconstitutional consequences in terms of the first paragraph of Article 21 of the RPIA (particularly emphasized in Decision No. U-II-3/04), which means that the review which was requested of the Constitutional Court this time had actually already been carried out. With the further passage of time, considering that the legislature has not responded for an additional six years despite the clear warnings of the Constitutional Court, this unconstitutional situation has only deepened. It has become intolerable.

38. In the weighing of constitutional values, it should also be considered whether the legislature, by adopting an act remedying an unconstitutionality, also regulates other issues that bear no direct relation to the elimination of the unconstitutionality as such. The proposed Article 1.a of the ARSCOSS regulates the issuance of permanent residence permits to the children of the erased citizens of other republics of former Yugoslavia, namely those who were born in the Republic of Slovenia after 25 June 1991. The Act also newly regulates the issuance of special decisions to the citizens of the Republic of Slovenia who, at the time of the attainment of the independence of the Republic of Slovenia, had the citizenship of other republics of former Yugoslavia and

permanent residence registered in the Republic of Slovenia, but this residence ceased to be valid once the provisions of the AA became applicable to them; later, they were, however, granted citizenship of the Republic of Slovenia without having first obtained a permanent residence permit (the proposed Article 1.b). The Act also equalises the position of the persons who were issued decisions on the retroactive recognition of permanent residence on the basis of point 8 of Decision No. U-I-246/02 with that of the persons who were issued such decisions in 2009 (the proposed Article 1.c). The decisions issued in 2004 namely merely established permanent residence retroactively, with effect from the erasure from the register of permanent residents onwards. The ARSCOSS-B equalises these decisions with those from 2009 in which a permanent residence permit as well as the registration of permanent residence status were recognised retroactively. Other issues also covered by the ARSCOSS-B include the deadline by which an alien who is issued a permanent residence permit and who at the time of the issuance of this permit does not actually reside in the Republic of Slovenia due to a justified absence, will be required to move back to the Republic of Slovenia and resume their actual presence in the Republic of Slovenia (the proposed Article 1.d); the additional reasons for denying the issuance of a permanent residence permit to an alien (the proposed amendments to Article 3); the deadline for filing an application for a permanent residence permit (the transitional provisions); and a different definition of the competent authorities. The proposed Article 1 of the Act also provides for the issuance of a permanent residence permit (effective only from the issuance onwards) to a specific group of people, namely to those citizens of other republics of former Yugoslavia who have continuously resided in the Republic of Slovenia since 25 June 1991 although they were not registered as permanent residents and therefore could not have been erased from the register of permanent residents.

39. The regulation of these issues has no direct bearing on remedying the established unconstitutionalities and to that extent, the Act regulates more than what is required by the decisions of the Constitutional Court. However, by including these solutions in the ARSCOSS-B, the National Assembly may not be accused that it has regulated issues that are not directly related to the established unconstitutionalities. It may also not be accused that it has done so with the purpose of preventing these issues from becoming subject to a referendum, which would entail an abuse of its legislative function. In remedying unconstitutionalities, the National Assembly is entitled to address the issues which relate to the same subject-matter and are inextricably related to the remedying of unconstitutionalities, particularly, as in this case, to the prevention of new unconstitutionalities. The Constitutional Court considers the regulation of the legal status of the children of those citizens of other republics of former Yugoslavia who have been erased from the register of permanent residents in the same manner as the legal status prescribed for their parents to be necessary from the point of view of the Constitution, as their positions are

directly related. The retroactive recognition of permanent residence should also apply to the Slovene citizens who were not granted a permanent residence permit before being granted citizenship; otherwise, the individuals erased from the register of permanent residents who were granted citizenship of the Republic of Slovenia would be in a worse position than those who have already been granted permanent residence permits and have received supplementary decisions on the retroactive recognition of permanent residence pursuant to point 8 of Decision No. U-I-246/02. Although these two groups were not covered by the decision of the Constitutional Court, such an approach of the National Assembly undoubtedly prevented the emergence of new unconstitutionalities, as an omission of such legislative measures would entail an unconstitutional gap in the law which would result in an unconstitutional distinction between individuals who are in essentially the same position. These unconstitutionalities could not be remedied in any other manner consistent with the Constitution. It should, however, be noted that the need to regulate these issues to a large extent arose later, with the passage of time, which can be attributed to the Government (as the authority constitutionally authorised to propose laws) as well as to the National Assembly, as they have delayed the remedying of the established unconstitutionalities for almost seven years. Regarding the other issues, the Constitutional Court considers them to be of minor importance or regards them as subsidiary issues: some of them to be merely procedural in nature (deadlines, transitional provisions), others, in terms of substance, only "concomitants" of the key substantive issues (such as the grounds for denying a permanent residence permit), while the purpose of the third group of subsidiary issues is solely to provide a comprehensive resolution of the problem of the legal status of the citizens of other republics of former Yugoslavia who actually reside in the Republic of Slovenia (the second group of beneficiaries pursuant to the proposed Article 1 of the ARSCOSS[26]).

40. In light of these considerations, it is evident that by adopting the ARSCOSS-B, the legislature responded in a manner consistent with the Constitution to the unconstitutional position found by the Constitutional Court in Decision No. U-I-246/02. The provisions of the ARSCOSS-B are clear and precise and establish a basis on which it will be possible to definitively regulate the legal status of those citizens of other republics of former Yugoslavia who have been erased from the register of permanent residents, if and insofar as their status remains unregulated to this day. While remedying the unconstitutionalities, however, the Act does not regulate issues that have no direct bearing on remedying this situation, or it regulates only certain less important issues, "concomitants" of the key substantive issues.

41. The proposers of the request to call a referendum have made several complaints with respect to the ARSCOSS-B. The pertinent complaints are those which might carry some constitutional weight. In addition to the

complaints about the ambiguity and vagueness of the Act and those that claim that the Act regulates more than required in order to remedy the unconstitutionalities, which have proved to be unfounded, the proposers of the referendum also complain that the National Assembly violated the legislative procedure, as the ARSCOSS-B was allegedly unjustifiably adopted in a shortened procedure, and additionally the National Assembly has misleadingly stated in the preamble to the draft Act that the Act would have no financial implications for the state budget. Pursuant to the third paragraph of Article 21 of the CCA, the Constitutional Court is also competent to rule on the constitutionality and legality of the procedures under which legislation has been adopted. However, the Constitutional Court has reiterated on many occasions that in reviewing the procedure under which a law has been adopted, it is competent to rule only on the constitutionality of the procedure, that is to say, on violations of the rules laid down in the Constitution (see, for example, Decision no. U-I-215/96, dated 25 November 1999, Official Gazette RS, No. 101/99, and OdlUS VIII, 265, Decision No. U-I-104/01, dated 14 June 2001, Official Gazette RS, No. 52/01, and OdlUS X, 123, and Order No. U-I-192/03, dated 13 May 2004). A violation of the RPNA does not by itself entail that an act is inconsistent with the Constitution; to that end, it must be demonstrated that there has been a violation of the provisions of the Constitution, which the proposers of the referendum do not allege.

42. The proposers of the referendum also complain that the ARSCOSS-B does not regulate the compensation for damages which will allegedly be claimed by the citizens of other republics of former Yugoslavia on the basis of this Act. In their opinion, the compensation for damages should be regulated so as to limit the amount or to determine them as a fixed amount, since there is also a limit to the compensation awarded to the victims of the Second World War and the postwar revolutionary violence, to those who suffered in the concentration camps during the Second World War, and to the relatives of the persons who died in the War for Slovenia.

43. By adopting the ARSCOSS-B, which recognised actual residence status retroactively, the legislature introduced moral satisfaction as a particular form of redress for the violations of human rights caused by erasure from the register of permanent residents. The legislature thereby also accomplished the duty determined in the fourth paragraph of Article 15 of the Constitution. If damage was caused to individuals due to their erasure from the register of permanent residents because they were deprived of rights that were conditional on permanent residence in Slovenia, the question of possible state liability could arise on the basis of Article 26 of the Constitution, which provides for the constitutional protection of claims for compensation against the state and its bodies. The complaint of the proposers of the referendum that this issue should be regulated precisely by the ARSCOSS-B and that the Act is inconsistent with

the Constitution as it does not include such regulation, is unfounded. The regulation of the liability for damages would entail regulating an issue which is not directly and inextricably related to the elimination of unconstitutionalities established in Decision No. U-I-246/02. However, the issuance of decisions pursuant to the ARSCOSS and the ARSCOSS-B does not by itself constitute a new liability of the state nor does it entail new legal bases for claims for compensation, so as to imply a direct relation between the issue of assessing the new compensation claims against the state and the content of the ARSCOSS-B. While the special regulation of state liability is always possible and admissible, the fact that the compensation is not subject to ARSCOSS-B cannot by itself carry any particular weight in determining whether the Constitutional Court should find an occurrence of unconstitutional consequences in terms of the first paragraph of Article 21 of RPIA. The Constitutional Court, without considering the question of whether the failure to adopt the necessary legislative regulation, as established by a decision of the Constitutional Court, might entail unlawful conduct in terms of Article 26 of the Constitution[27], or the question of whether, in the event this unlawful conduct is substantiated, other elements of state liability would be established, observes that the legislature can at any time regulate these questions separately. Already in Decision No. U-II-1/04, dated 26 February 2004, the Constitutional Court took the view that a complete exclusion of the right to claim damages for the unlawful conduct of the state (provided the constitutional and statutory conditions for such a claim are met) is contrary to Article 26 of the Constitution. [28] However, this situation also concerns a human right which can be limited pursuant to the third paragraph of Article 15 of the Constitution, [29] of course under the conditions of the so-called strict test of proportionality.

44. The claim of the proposers of the referendum that on the basis of decisions issued pursuant to the ARSCOSS and the ARSCOSS-B, new claims can be made in respect of various rights is also not true, except insofar as the decisions can be used in future proceedings as evidence of compliance with the condition of permanent residence in the Republic of Slovenia. The Constitutional Court emphasizes that the retroactive recognition of permanent residence within the meaning of Decision No. U-I-246/02 does not create new rights for these individuals and does not retroactively create new legal relationships, as that is of course not possible. In addition, the issuance of decisions “retroactively” on the basis of the ARSCOSS-B does not by itself interfere with earlier decisions of the competent authorities in respect of individual rights related to permanent residence. Such decisions became final if the individuals concerned did not challenge them, and can no longer be interfered with on the basis of the ARSCOSS-B. There were legal remedies (including the constitutional complaint) available in order to challenge the administrative decisions, and, as evidenced by the decisions of the Constitutional Court referred to in paragraph 22 of this decision, the individuals who used these remedies have succeeded in

securing their rights and legal interests.

45. Certain allegations that the proposers made in response to the request of the National Assembly indicate that they do not really want a referendum which would decide whether the adopted Act eliminates the established unconstitutionalities in a manner consistent with the Constitution. The proposers argue that there never was any unconstitutionality. To a large extent, however, they refer to some unnamed legal experts and through these experts express the view that the citizens of other republics of former Yugoslavia had "an indisputable obligation to apply for Slovene citizenship or the status of an alien with permanent residence". Referring to these unnamed experts, they also wonder whether "the so-called erased" are not themselves to blame for the situation "due to their own failure to comply with the law in force or to use the legal remedies available to them". They further contend that the "the competent national authorities […] found it perfectly legal that those who have not applied to regularise their citizenship or alien status do not wish to live in the Republic of Slovenia or are not present here at all". The proposers of the referendum openly attack and reject Constitutional Court Decision No. U-I-246/02. They believe that the Act should provide for a "mandatory review" of the decisions issued on the basis of point 8 of the operative part of the constitutional decision. Again with reference to the unnamed legal experts, they express the view that a decision of the Constitutional Court "cannot entail a basis for the issuance of individual administrative decisions" and that therefore the decisions issued on the basis of point 8 of the operative part of this decision are "legally questionable", although the Constitutional Court already expressly stated in its Order No. U-II-3/03 that the national authorities were to follow the part of the decision which, pursuant to the second paragraph of Article 40 of the CCA, regulates the manner of implementation [of the decision], until the legislature adopts a different regulation. Namely, in a state governed by the rule of law the decisions of the Constitutional Court, which, pursuant to the third paragraph of Article 1 of the CCA, are binding, must be complied with regardless of whether legal experts express doubts about them. The national authorities and therefore also the administrative authorities are bound by a decision of the Constitutional Court and cannot be absolved of this duty to comply by any concerns of the experts, even if these are justified. In order to comply with the decision of the Constitutional Court, the referendum may not, in terms of substance, entail to any degree a decision on whether certain issues should be regulated in a manner consistent with the Constitution. Such a legislative referendum would constitute a referendum on a decision and the authority of the Constitutional Court (therefore on whether there is any unconstitutionality and whether it should be eliminated at all); as such, it would be inadmissible (see Constitutional Court Order No. U-II-3/03).

B. – V.

46. On the basis of weighing the constitutional values at issue and taking into account the relevant circumstances, including the fact that (1) the regulation proposed by the National Assembly remedies the unconstitutionalities found by the Constitutional Court Decision no. U-I-246/02, (2) by adopting the ARSCOSS-B, the National Assembly only provided for the remedy of unconstitutionalities and the regulation of some urgent and related issues, (3) the ARSCOSS-B cannot be accused of unconstitutionality as alleged by the proposers of the referendum; (4) the National Assembly could not remedy the fundamental unconstitutionality in any other manner, and that even if the ARSCOSS-B were to be rejected at a referendum; (5) more than seven years have passed since the adoption of the Constitutional Court Decision no. U-I-246/02; the Constitutional Court held, for the reasons set out in the reasoning part of the Decision, that other constitutional values must prevail. The implementation of the ARSCOSS-B and the issuance of acts on its basis will remedy all the established unconstitutionalities which have arisen as a result of the erasure of persons from the register of permanent residents; their human rights and fundamental freedoms will also be protected in a manner consistent with the Constitution, as the legislature has thereby fulfilled all obligations arising from the decisions of the Constitutional Court. In this case, it is therefore necessary to give priority to the rule of law (Article 2 of the Constitution), the right to equality before the law (the second paragraph of Article 14 of the Constitution), the right to personal dignity and safety (Article 34 of the Constitution), the right to obtain redress for the violations of human rights (the fourth paragraph of Article 15 of the Constitution) as well as the authority of the Constitutional Court (Article 2 and the second paragraph of Article 3 of the Constitution) over the right to decision-making at a referendum. The continuation of the unconstitutional situation as a result of the rejection of the ARSCOSS-B at a referendum would be intolerable from the point of view of the Constitution. Therefore, the Constitutional Court upheld the applicant's position that unconstitutional consequences would occur due to the rejection of the ARSCOSS-B at a referendum.

C.

47. The Constitutional Court reached this decision on the basis of Article 21 of the RPIA and the third indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of: Jože Tratnik, President, and Judges Dr. Mitja Deisinger, Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr. Ernest Petrič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. The decision was reached by seven votes against two. Judges Deisinger and Mozetič voted against and submitted dissenting opinions. Judges Pogačar, Sovdat, and Zobec submitted concurring opinions.

Jože Tratnik
President

Endnotes:
[1] The Constitutional Court wrote in the reasoning: "The said persons registered their permanent residence in the territory of Slovenia in conformity with the applicable laws and regulations and actually resided in the territory of Slovenia. Permanent residence and actual residence in the territory of the Republic of Slovenia are the essential circumstances which assign a special legal position to the persons concerned, which is why the provisions of the AA which regulate the acquisition of permanent or temporary residence are inappropriate for them. The legislature should have regulated the position of the persons concerned and/or their transition to the status of alien in a special manner in the transitional provisions of the AA or in a special statute. This is due to the fact that the provisions which regulate the different legal positions of aliens have as their starting point the assumption that an alien comes to the Republic of Slovenia with the intention of remaining in it for a shorter or longer time and that, in accordance with the provisions of the AA, he or she will gradually (from temporary residence permit to permanent residence permit) start to arrange his or her legal position of alien."
[2] For more on the importance of the human right to safety determined in Article 34 of the Constitution, see Constitutional Court Decision No. U-I-266/95, dated 20 November 1995 (Official Gazette RS, No. 69/95, and OdlUS IV, 116).
[3] A letter from the Ministry of the Interior, Ref. No. 1312/02-016-S-507/02-2003, dated 19 February 2003. At the same time the Ministry communicated that 288 applications had been dismissed, 97 rejected, and that in 949 cases the procedure had been discontinued due to the withdrawal of the application or due to the fact that in the course of the procedure the alien had become a citizen of the Republic of Slovenia. According to the then data of the Ministry, 18,305 citizens of other republics of former Yugoslavia were removed from the register of permanent residents.
[4] According to the data of the Ministry of the Interior (letter Ref. No. 214-93/2010/2, dated 23 April 2010), as of 21 April 2010, of those persons removed from the register of permanent residents [in 1992], 4,117 had been granted citizenship of the Republic of Slovenia who prior to their acquisition of citizenship had not obtained a permanent residence permit in the Republic of Slovenia.
[5] In Decision No. Up-336/98, dated 20 September 2001, (Official Gazette RS, No. 79/01, and OdlUS X, 225) the Constitutional Court decided the constitutional complaint in favour of a complainant whose right to a social security income supplement was denied by the Pension and Disability Insurance Institute and the courts for the period from 1 May 1996 to 18 July

1997 as, due to erasure from the register of permanent residents, the complainant did not have a permanent residence in the Republic of Slovenia. The decision of the Institute and all the decisions of the courts, including the decision of the Supreme Court, were issued prior to Constitutional Court Decision No. U-I-284/94. The Constitutional Court established a violation of the second paragraph of Article 14 and Article 22 of the Constitution on the basis of the reasons determined in Decision No. U-I-284/94.

[6] Such was, for instance, the right to buy an apartment pursuant to Article 117 of the Housing Act (Official Gazette RS, No. 18/91 et seq. – HA), which was granted only to those holders of the housing right who were Slovenian citizens at that time.

[7] In Decision No. U-I-284/94 the Constitutional Court already prohibited the application of this measure in cases concerning the citizens of other republics of former Yugoslavia.

[8] With reference to the citizens of other republics of former Yugoslavia, the concept of actual living was used in Article 13 of the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (BCC). In accordance therewith, Article 40 of the Citizenship of the Republic of Slovenia Act (Official Gazette RS, No. 1/91 et seq. – hereinafter referred to as the CRSA) determined actual presence in the territory of the Republic of Slovenia as one of the conditions for the acquisition of citizenship of the Republic of Slovenia.

[9] "In law, a legal fiction is a synonym for a legal fact deemed to be true even though we know that it does not exist." M. Pavčnik, Teorija prava, prispevek k razumevanju prava [Theory of Law, A Contribution to Understanding Law], Third extended, revised, and supplemented edition, GV Založba, Ljubljana 2007, p. 422.

[10] 4,388 persons had obtained such permits as of 21 April 2010.

[11] The number of persons for whom this status is not regularized cannot be determined, even with the data obtained from the Ministry of the Interior. The Ministry otherwise pointed out (letter Ref. No. 214-93/2010/7, dated 17 May 2010) that out of the 25,671 persons who were (after all records were organized and coordinated, as mentioned in the letter) removed from the register of permanent residents, there is no data concerning 13,412 of these persons holding any regulated status in the Republic of Slovenia (neither citizenship, permanent residence permit, nor temporary residence permit). However, the Ministry also notes that, due to the method of keeping records, it is not possible to know with certainty that all these persons are still alive or how many of them actually emigrated.

[12] According to the Ministry of the Interior, 6,387 retroactive supplementary decisions have been issued.

[13] If the National Assembly does not respond to a Constitutional Court decision which determined the unconstitutionality of a statutory regulation by adopting a law, this does not only constitute a prolongation of the established

unconstitutionality, but it also creates of itself a new unconstitutionality. When the Constitutional Court, pursuant to Article 48 of the Constitutional Court Act (Official Gazette of the Republic of Slovenia, No. 64/07 – official consolidated text – hereinafter the CCA), establishes the unconstitutionality of a law and orders the National Assembly to remedy the established unconstitutionality within a specified period, the National Assembly must adopt a new statutory regulation within that period in order to eliminate the unconstitutionality. Disregarding such Constitutional Court decision constitutes a violation of Article 2 and of the second paragraph of Article 3 of the Constitution, as was repeatedly emphasized by the Constitutional Court (for the first time already in Decision No. U-I-114/95, dated 7 December 1995, Official Gazette of the Republic of Slovenia No. 8/96, and OdlUS IV, 120). As long as the legislature does not respond to the identified unconstitutionality, this violation continues to exist.

[14] The ARSCOSS-B amends the ARSCOSS (which was already amended by the ARSCOSS-A). The Act contains ten articles but the individual articles amend several articles of the ARSCOSS or add several new articles at the same time. For greater clarity, this decision hereinafter will not refer to the articles of the ARSCOSS-B, but to the "proposed" or "new" articles, paragraphs, and indents of the ARSCOSS.

[15] The Constitutional Court uses the new terminology in this decision for reasons of clarity.

[16] "[T]he legislature could not have regulated the issue of the time effect of the legal regulation differently than that the mentioned persons who had acquired a permanent residence permit be retroactively recognized permanent resident status." (point 20 of the reasoning)

[17] The registration of residence is governed by the Residence Registration Act, Official Gazette of the Republic of Slovenia No. 59/06 - official consolidated text, and 111/07 – hereinafter the RRA).

[18] In accordance with the fifth indent of the third paragraph of the proposed Article 1.č of the ARSCOSS, the condition of actual presence in the Republic of Slovenia is fulfilled even if the absence lasted for more than a year and the absence is justified because "the person was forcibly removed from the Republic of Slovenia pursuant to Article 28 of the Aliens Act (Official Gazette of the Republic of Slovenia No. 1/91-I, 44/97, 50/98 - Constitutional Court Decision and 14/99 - Constitutional Court Decision), or Article 50 of the AA-1, unless the person was forcibly removed due to the accessory penalty of expulsion from the country due to a committed offence".

[19] This provision provides: "If the absence on the basis of the grounds referred to in the preceding paragraph, except for the grounds in the second indent, lasted longer than five years, it is considered that the condition of actual presence is fulfilled for a period of five years; for a period of an additional five years the condition is fulfilled only if the conduct of this person indicates that he or she tried during his or her absence to return to Slovenia and continue his

or her actual presence in the Republic of Slovenia."
[20] The Constitutional Court found in Decision No. U-I-284/94 that the failure to regulate the status of these persons in comparison with the legal status of aliens also constitutes a violation of the principle of equality determined by the second paragraph of Article 14 of the Constitution (point 18 of the reasoning). Therefore, from the perspective of equality, an absence of up to one year should not entail that the condition of actual presence is not fulfilled. The AA in force at the time of the erasure from the register of permanent residents namely prescribed in the second indent of Article 20 that the permanent residence permit of an alien ceases to be valid if this person emigrates or stays abroad for more than one year and does not inform the competent authority of this fact.
[21] The first paragraph of the proposed Article 1.č of the ARSCOSS states: "Actual presence in the Republic of Slovenia under this Act means that an individual has a centre of vital interests in the Republic of Slovenia which is to be assessed on the basis of his personal, family, economic, social, or other connections which indicate that the individual has real and lasting ties with Slovenia. A justified absence from the Republic of Slovenia due to the grounds determined by the third paragraph of this Article does not constitute an interruption of actual presence in the Republic of Slovenia."
[22] The conditions are the same as provided by the RRA for the determination of the notion of permanent residence (the third point of Article 3).
[23] The third paragraph of the proposed Article 1.č of the ARSCOSS states: "The condition of actual presence in the Republic of Slovenia is fulfilled even if the absence lasted for more than a year and the absence is justified on the basis of the following grounds:
- If the person has left the Republic of Slovenia as a result of erasure from the register of permanent residents;
- If the person has left the Republic of Slovenia due to being sent to work, to study, or for health treatment by a legal entity from the Republic of Slovenia, or in the case of a minor, by his or her parents or guardians, or where he or she was employed on a ship with a home port in the Republic of Slovenia, for the period of the referral to work, study, or for medical treatment, or for the period of employment on a ship;
- If the person has left the Republic of Slovenia due to not being able to obtain a residence permit in the Republic of Slovenia due to non-fulfilment of the conditions and his or her application for the permit has been dismissed, rejected, or the proceedings were stayed;
- If the person was unable to return to the Republic of Slovenia due to war in some other country of the former Yugoslavia, or for medical reasons;
- If the person was forcibly removed from the Republic of Slovenia on the basis of Article 2 of the Aliens Act (Official Gazette of the Republic of Slovenia No. 1/91-I, 44/97, 50/98 - Constitutional Court Decision and 14/99 - Constitutional Court Decision) or Article 50 of the Aliens Act (Official Gazette of the

Republic of Slovenia, No. 64/09 - official consolidated text), unless the person was forcibly removed due to the accessory penalty of expulsion from the country due to a committed offence;
- If the person was refused entry into the Republic of Slovenia, unless he or she was refused entry due to the accessory penalty of expulsion from the country due to a committed offence, or on the grounds defined in the first, second, fifth, or seventh indents of Article 10 of the Aliens Act (Official Gazette of the Republic of Slovenia No. 1/91-I, 44/97, 50/98 - Constitutional Court Decision and 14/99 - Constitutional Court Decision), on the basis of the reasons defined in the first, second, or sixth indents of the first paragraph of Article 9 of the Aliens Act (Official Gazette of the Republic of Slovenia, No. 61/99, 87/02, and 93/05), or for the reasons determined in points (d) or (e) of the first paragraph of Article 5 of Regulation (EC) No. 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ L No. 105, 13 April 2006)."

[24] The first paragraph of Article 40 of CRSA gave the citizens of other republics who on the date of the plebiscite on the independence and sovereignty of the Republic of Slovenia, i.e. 23 December 1990, had a registered permanent residence in the Republic of Slovenia and were actually present in Slovenia the right to acquire citizenship by exceptional one-time opportunity naturalization. Concerning the part of the provision stating "and is actually present here," the legislature used an undefined legal concept, the interpretation of which has been repeatedly examined by the Constitutional Court, especially with regard to violations of the right to the equal protection of the rights determined by Article 22 of the Constitution.

[25] When deciding in constitutional complaint proceedings, the Constitutional Court usually established a violation of the right to the equal protection of rights (Article 22 of the Constitution), which in judicial proceedings is a specific expression of the general principle of equality determined in the second paragraph of Article 14 of the Constitution. For example, in Decision No. Up-20/97 it found that the complainant was in an unequal position compared to those aliens who were not citizens of other former Yugoslav republics but who had permanent residence in the Republic of Slovenia at the time the AA entered into force, which constituted a violation of the rights determined by Article 22 of the Constitution with regard to one’s residence. In Decision No. Up-336/98 it found a violation of the complainant's right to equality before the law determined by the second paragraph of Article 14 of the Constitution, which is expressed as a violation of Article 22 of the Constitution in proceedings for deciding on the rights, obligations, and legal benefits of individuals, with regard to their residence, because the condition of residence in the Republic of Slovenia, as one of the conditions for entitlement to a social security income supplement, was interpreted in accordance with Article 81 of the AA, an interpretation that the Constitutional Court found to be inconsistent

with the Constitution already in Decision No. U-I-284/94.
[26] This refers to the citizens of other republics of former Yugoslavia who resided in the Republic of Slovenia on 25 June 1991 and were actually present there from that day onwards, as determined already by ARSCOSS in 1999.
[27] The Supreme Court, for example, already ruled on the issue of legislative unlawfulness in Judgment No. II Ips 800/2006, dated 24 June 2009, in which it stated that the legislature's liability for damages can be justified only by the most serious violations of the constitutional provisions and fundamental standards of civilization. It did not state among these violations that the Constitutional Court abrogated as unconstitutional the third paragraph of Article 40 of the CRSA to the extent that it referred, *inter alia*, to the grounds of danger to the public order.
[28] This constitutional provision guarantees everyone the right to compensation for damage caused through unlawful acts in connection with the performance of any function or other activity by a person or body performing such function or activity under state authority, local community authority, or as a bearer of public authority.
[29] The Constitution allows for the exclusion (or suspension) of individual human rights only in the event of a war or state of emergency, and only temporarily (Article 16 of the Constitution), while absolutely prohibiting such for certain rights. In the third paragraph of Article 15 the Constitution does not mention the suspension (or exclusion) of human rights. Therefore, they cannot be suspended by a law but only limited.

Dissenting opinion of Judge Dr. Mitja Deisinger

1. I voted against the Decision because I am of the opinion that the basic precondition requiring the prohibition of the referendum was not fulfilled, namely the occurrence of unconstitutional consequences that would result from the rejection of the Act Amending and Supplementing the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (ARSCOSS-B).

2. The provision of Article 21 of the Referendum and Public Initiative Act (RPIA) is formulated on ill-considered premises, namely it is based on the assumption that the Act would be rejected in the referendum, while the unconstitutional consequences are defined only as a possibility. It is absurd to consider that a referendum may be prohibited even if the Act would definitely be approved in the referendum. If the referendum is prohibited, this indisputably results in a violation of the human rights of the potential participants in the referendum and, on the other hand, in the establishment of potential unconstitutional consequences of the referendum. For this reason, the other side of the provision of Article 21 of the RPIA should be interpreted as

the reliable establishment of the occurrence of unconstitutional consequences due to the rejection of the Act. A virtual or vague possibility of the occurrence of such consequences would distort the meaning of the above-mentioned legal regulation. There is another particularity in Article 21 of the RPIA, namely the prohibition of the referendum follows already if unconstitutional consequences would occur as a result of the postponement of the enforcement of the Act. The Constitutional Court thus must find that unconstitutional consequences would occur already immediately after the Act has been adopted but not yet entered into force, because it is illogical that they would occur only after the Act has been rejected in the referendum.

3. When adopting a decision in compliance with Article 21 of the RPIA, the Constitutional Court is put in a special position, namely it must establish whether unconstitutional consequences exist or would arise, i.e. it must establish the existing or future state of the facts. Therefore, in the case at issue it had to find whether the Act had been adopted based on the previous decisions of the Constitutional Court so as to remedy unconstitutionality, or whether it would be possible to remedy the unconstitutional consequences despite the failure to implement the Act. A decision of the Constitutional Court finding an unconstitutionality and a request by it to remedy this by an act are not sufficient. The Constitutional Court must verify whether the actual situation has changed upon a call for a referendum and/or whether it is possible to remedy the unconstitutional consequences in some other way, as it is obliged to do so in compliance with Article 21 of the RPIA.

4. I shall focus only on the issue of the occurrence of unconstitutional consequences, given the fact that this formal condition must be fulfilled or else the methods of the Constitutional Court’s review of the request of the National Assembly to prohibit the referendum cannot be considered at all.

5. Notwithstanding the previous decisions of the Constitutional Court [on this issue], this case, No. U-II-1/10, involves an assessment of the current situation, which differs from the situation at the time those decisions were issued. The assessment pursuant to Article 21 of the RPIA can only be based on the assumption that the rejection of the Act in the referendum would render it absolutely impossible to resolve the status of the erased persons by means of retroactive recognition of permanent residence.

6. Without the amended Act (ARSCOSS-B) and according to the data of Ministry of the Interior, dated 17 May 2010 (reply to indent 8 on page 4), 6,387 supplementary decisions were issued in compliance with point 8 of the operative provisions of Constitutional Court Decision No. U-I-246/02, retroactively recognising the right to permanent residence status in the Republic of Slovenia as of the day of erasure from the register. The

supplementary decisions were issued to 3,585 persons who acquired citizenship of the Republic of Slovenia and to others who did not acquire citizenship. In Paragraph 45 of its Decision No. U-II-1/10, the Constitutional Court expressly emphasised that the retroactive recognition of residence had not been unlawful. In the event the Act were to be rejected in the referendum, there would be no reason for not approving [an application for permanent residence] in the same way for other applicants too. The likelihood of unconstitutional consequences therefore cannot be attributed to the potential rejection of the Act.

7. Moreover, Paragraph 27 of the Decision stipulates that the amended Act also regulates the status of the children of the erased persons, which had not been considered problematic in previous decisions of the Constitutional Court. Even without the amended Act, these children can acquire permanent residence if they are of full age, whereas in the case of minors, their parents as their legal representatives or their guardians can arrange such on their behalf.

8. I agree that the legislature is bound by the decisions of the Constitutional Court and, in this respect, the adoption of the ARSCOSS complies with this basic premise. Nevertheless, when deciding pursuant to Article 21 of the RPIA, the Constitutional Court cannot ignore the assessment regarding the occurrence of unconstitutional consequences. Point 8 of the operative provisions of Constitutional Court Decision No. U-I-246/02 is substantively the same as the essential substance of the ARSCOSS-B and in an appropriate manner enables recognition of permanent residence status as of the day of removal from the register. Even if there was a referendum that approved or rejected the Act, the authority of the Constitutional Court would not be undermined as its decision would substitute for the Act if the latter was rejected.

Dr. Mitja Deisinger
Judge

Dissenting opinion of Judge Miroslav Mozetič, LLM,
joined by Judge Dr. Mitja Deisinger
I.

1. I voted against the Decision on the prohibition of the referendum on the Act Amending the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (ARSCOSS-B) since due to its rejection unconstitutional consequences would occur. These unconstitutional consequences are related to the continuation of the unconstitutionalities established by Constitutional Court Decision No. U-I-246/02, dated 3 April 2003, and particularly to the fact that the mentioned Decision of the Constitutional Court has not yet been implemented. The

proposed Act, which was adopted by the National Assembly, is intended to eliminate these unconstitutionalities. The reasons for the “prohibition” of the referendum have not convinced me and I believe that the potential rejection of the Act in the referendum would not result in such severe unconstitutional consequences that, considering the affected constitutional rights, it would be permissible to interfere with the constitutional right to decision-making in a referendum.

2. In order to dispel any doubts, I fully support the position of the Constitutional Court, consistently repeated in a series of decisions, that its decisions are binding and that (if an act is found unconstitutional) the National Assembly must comply with the decisions and implement them and that any non-compliance with the decisions of the Constitutional Court entails a serious violation of the Constitution. I also agree with the position that neither the National Assembly nor the voters in a referendum may directly decide on whether or not to comply with a decision of the Constitutional Court,[1] even though this happens frequently, most often indirectly, when the National Assembly does not adopt an appropriate act or, even though it adopts such act, it fails to regulate the issue concerned in accordance with the decision of the Constitutional Court or regulates it in such a way that it is not in compliance with the Constitution. A similar thing would happen if the voters did not approve in a referendum an act eliminating an unconstitutionality established by a decision of the Constitutional Court. Nevertheless, I believe that such a violation of the Constitution (non-compliance with a decision of the Constitutional Court) in itself cannot be the only reason for prohibiting a referendum. I do not agree with the position that the fact that a decision of the Constitutional Court has not been implemented is in itself an unconstitutional consequence. This is a dangerous position which can result in a situation in which we would have to prohibit every referendum which the National Assembly believed could cause unconstitutional consequences or that unconstitutional consequences could continue to exist in the sense of Article 21 of the RPIA (even without particular reasoning). Such an unconstitutional situation can be sanctioned by the Constitutional Court within the framework of its competences by imposing stricter sanctions (declaratory, abrogating decision) and particularly by defining the manner of the execution [of its decisions] which can even be used to determine that a temporary regulation to fill a gap or replace an abrogated legal provision.

3. In my opinion, it is not even very important in the case at issue whether the right to vote in a referendum is a human right or a general constitutional right. In my personal opinion, it above all entails the exercise of power (competence) arising from the second paragraph of Article 3 of the Constitution. A referendum is one of the forms of direct decision-making by citizens (voters) on issues regulated by law (the first paragraph of Article 90).[2] Nevertheless,

certain conditions have to be fulfilled in order to enable the exercise of such competence or the implementation of this general constitutional or human right[3]. This can be decided by the National Assembly or required by the National Council, by a certain number of deputies of the National Assembly, or by a certain number of citizens. This competence or right cannot be affected merely by the issue of who initiated the process of deciding in a referendum. In any case, it is the “representatives" of the citizens (voters) and we can say that (maybe somewhat pathetically) this procedure is always triggered by the citizens, directly or indirectly, who would like to decide on a specific act. In the event of this procedure, voting on an act in a referendum is the last step in the process of adopting an act.[4] Therefore, the fact that voting in a referendum is only possible upon request does not make this any less a constitutional (human) right. It cannot be otherwise, because of the nature of this decision, since it is not a right to be exercised periodically. It is only exercised upon request. The determination of eligible proposers prevents this right from being exercised in an ill-considered manner.[5]

4. What could be the reason, in my opinion, for prohibiting the referendum? If I base my deliberation on Constitutional Court Decision No. U-I-47/94, dated 19 January 1995 (Official Gazette of the RS No. 13/95 and OdlUS IV, 4), an interference with the right to decide in a referendum, which is a human right, is only possible if it is required for the protection of human rights or allowed by the Constitution itself. The Constitution foresees no particular limitations of this right. An interference with the right to decide in a referendum is thus only allowed if required for the protection of the human rights of others. The RPIA grants the competence for such a review to the Constitutional Court (the first paragraph of Article 21), which decides the issue upon the request of the National Assembly.

5. When the National Assembly receives a request to call a referendum, it is obliged to do so unless it believes that a [referendum] decision to enforce or reject an act could result in unconstitutional consequences (the first paragraph of Article 21 of the RPIA). In such a case, it must request within the specified deadline that the Constitutional Court decide on the issue. The Constitutional Court thus reviews if the opinion of the National Assembly that there could be unconstitutional consequences is justified or not and then assesses on the basis of Decision No. U-I-47/94 if the rejection of the act in a referendum would indeed affect such significant constitutional rights that, considering the affected constitutional rights, it would be permissible to interfere with the constitutional right to decide in a referendum (i.e. to prohibit the referendum). I disagree with the position that the National Assembly need not justify its claim that the rejection of the act could result in unconstitutional consequences and that the mere claim and reference to a decision of the Constitutional Court is sufficient. I believe that such a position is not based on the first paragraph of Article 21 of

the RPIA.

6. This is a case of weighing between constitutional rights. On the one hand there are the constitutional rights that are being violated (which has in this specific case been established by the Constitutional Court) and on the other hand there is the constitutional right to a referendum. In this specific case, the weighing must also take into account if the established unconstitutionality would still actually exist, even if the act had not been passed, which answers the key question of whether the rejection of the act at the referendum would indeed result in the occurrence (or continuation) of unconstitutional consequences, reflected in the violation of the rights of affected individuals. It is thus necessary to establish not only if the legislature at the legislative level (abstractly) complies with the Decision of the Constitutional Court but also, and particularly, if the actual state or circumstances that represented (or still represent) the violation of human rights on which the Decision of the Constitutional Court was based still exist. This finding is important when weighing which rights should be given priority. It is clearly evident from the first paragraph of Article 21 of the RPIA that it is the National Assembly which has to reason the existence or occurrence of such unconstitutional consequences, i.e. to reason its opinion that unconstitutional consequences would occur. In my opinion, it is not enough that it merely claims that the proposed act implemented the Decision of the Constitutional Court.

II.

7. There is no dispute that the position of the citizens of other republics of former Yugoslavia who had permanent residence in Slovenia as of 26 February 1992 but failed to apply for Slovene citizenship or had their application rejected, has not been regulated in a legal manner. The Constitutional Court encountered this issue several times in the procedures for reviewing regulations and the procedures involving a constitutional appeal and assessed such situation as unconstitutional.

8. Thus, the unconstitutionality of a legal regulation relating to the legal position of the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents in Slovenia was established for the first time in Decision No. U-I-284/94, dated 4 February 1999 (Official Gazette of the RS No. 14/99 of 12 March 1999). It was established that the AA was in conflict with the Constitution since it did not stipulate the conditions for obtaining a permanent residence permit by the citizens of other republics of former Yugoslavia who decided not to apply for citizenship of the Republic of Slovenia or who have had their application for citizenship rejected. The position of the Constitutional Court was that the general regulation of permits for temporary and permanent residence was not suitable for the position in which the citizens of other republics of former Yugoslavia found themselves,

since it failed to take into account that these persons had valid permanent residence status and actually resided in the territory of Slovenia. It pointed out that it was the permanent residence status and actually residing in the territory of Slovenia that put these persons in a position that required special regulation. It is also prohibited the imposition of the measure of forcible removal from the Republic of Slovenia on such persons.

9. The National Assembly responded to Decision No. U-I-284/94 by passing the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (Official Gazette of the RS, No. 61/99, ARSCOSS). This Act allowed the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents to obtain a permanent residence permit. Furthermore, Article 19 of the Act Amending the Citizenship of the Republic of Slovenia Act (Official Gazette of the RS, No. 96/02) implemented the possibility that a person with permanent residence on 23 December 1992 who actually lived in the Republic of Slovenia as of that day may obtain citizenship of the Republic of Slovenia under more favourable conditions.

10. According to the data of the Ministry of the Interior which the Constitutional Court received in relation to case No. U-I-246/02, 18,305 citizens of other republics of former Yugoslavia who were registered on 26 February 1992 as permanent residents in the Republic of Slovenia were transferred from the register of permanent residents to the records kept on aliens. Based on the explanations of the Ministry of the Interior, dated 17 May 2010 (in case No. U-II-1/10), it is evident that the stated numbers of those “erased or transferred” were obtained by comparing the computer records and the physical records. According to the computer records, 29,064 persons were “erased”. After comparing the two records it was established that 10,759 persons deregistered their permanent residence and emigrated. Of the remaining 18,305 persons, 12,937 filed an application according to the ARSCOSS and 1,033 according to the Aliens Act, i.e. a total of 13,080 persons. The mentioned persons who filed an application in accordance with the Aliens Act obtained a permanent residence permit under the ARSCOSS, since this was more favourable for them. Of the total of 12,047 applications, 10,713 were granted, 288 rejected, and 97 dismissed and 949 procedures were stayed because of the withdrawal of the application or because the alien became a citizen of the Republic of Slovenia in the interim. It can be established that practically all persons who lodged an application managed to obtain a permanent residence permit or citizenship. It can also be established that approximately 5,225 persons failed to lodge an application by the specified deadline, i.e. 28 December 1999 (three months after the entry into force of the Act, which took place on the sixtieth day after the publication of the Act, i.e. 30 July 1999).

11. In view of the stated data, I therefore agree with the finding of the majority, namely that the citizens of other republics of former Yugoslavia removed from the register of permanent residents who actually resided in Slovenia, were able to regulate their legal status on the basis of the ARSCOSS or the CRSA-Č, and I add, of course, if they wanted to. Nevertheless, I am not convinced of the accuracy of the finding that those who were "forcibly removed" or left Slovenia for other erasure-related reasons and who did not actually reside in Slovenia upon the entry into force of the ARSCOSS were not allowed to exercise these rights. We do not even know if they were indeed deported, since the Ministry of the Interior maintained no records of this. In Decision No. U-I-246/02 the Constitutional Court found that few persons were deported since the measure was rarely imposed because the unregulated residence status of the citizens of other republics was generally tolerated (Para. 27 of the reasoning). In addition, the Constitutional Court prohibited the imposition of the measure of forcible removal by Decision No. U-I-284/94 (published in the Official Gazette, dated 12 March 1999). Albeit, I agree that such cases cannot be completely excluded.

12. By Decision No. U-I-246/02, dated 3 April 2003 (Official Gazette of the RS, No. 36/03, dated 16 April 2003), the Constitutional Court established the unconstitutionality of the ARSCOSS (after the enforcement of the ARSCOSS-A) since it did not determine retroactive recognition of permanent residence status, i.e. for the entire period since the erasure, for the citizens of other republics of former Yugoslavia who were removed from the register of permanent residents on 26 February 1992. With the mentioned Decision the Constitutional Court established the unconstitutionality of the ARSCOSS also because it failed to regulate the acquisition of a permanent residence permit for those individuals who were forcibly removed from the country as aliens and since it did not define the notion of actual presence in the Republic of Slovenia that needed to be proved by the citizens of other republics of former Yugoslavia in order to obtain a permanent residence permit under the provision of retroactive recognition of permanent residence status; in particular, the Act should determine the period of absence after which the condition of actual residence is no longer fulfilled. The Constitutional Court also abrogated the provision that determined the deadline for submitting the application.

13. The mentioned Decision had not been (legally) implemented until the adoption of the proposed Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (the ARSCOSS-B) for which a request was filed that it should be approved by the voters in a referendum and which is now the subject of review before the Constitutional Court (in this Decision, No. U-II-1/10). This does not mean that the applications that were filed have not been resolved and because of the

abrogation of the deadline for submission, new applications could have been filed.

14. According to the data of the Ministry of the Interior, 724 persons obtained permanent residence permits and 2,070 obtained citizenship in the period from the adoption of Constitutional Court Decision No. U-I-246/02 (published on 16 April 2003) until 11 May 2010. In the same period, 162 applications were allegedly rejected, 128 dismissed and in 469 cases the procedure was stayed. In total, 3,553 persons filed applications. According to the data, 5,225 persons did not submit an application until 19 February 2003 and if we subtract the 3,553 persons we can establish that 1,672 persons did not submit an application. Considering the fact that many of these persons might have died by now, the number becomes even smaller. The Ministry of the Interior provides a different number of unresolved cases, but they based their calculations on the number of 25,671 erased persons. It is not too convincing in explaining where this figure originates from. The most probable cause resulting from the report of the Ministry of the Interior is that records have not been kept up-to-date since 2003 and that there were obviously still discrepancies between computer and physical records. The fact is, namely, that the data on submitted applications and resolved applications (one way or another) are approximately the same in both reports of the Ministry of the Interior and that the only difference is in the data on the “erased”.

15. These data point to the fact that surprisingly few persons applied for regulation of their status after the publication of Constitutional Court Decision No. U-I-246/02. The reason for this is unknown. Nevertheless, we can claim with a reasonable level of probability that after the publication of Constitutional Court Decision No. U-I-246/02 all the erased persons had the possibility to file an application to regulate their status even if they left Slovenia because of their erasure or even if they were forcibly removed. In my opinion, the fact that the Constitutional Court established certain unconstitutionalities cannot be cause enough for them not taking action [regarding the situation]. As indicated, those who missed the deadline had another opportunity to file an application due to the fact that this provision was abrogated. Even though the Constitutional Court found that the legal term “actual continuous residence” is undetermined to the point that it represents a violation of Article 23 of the Constitution and ordered that it be specified in more detail, the reasoning of the Decision indicates how the term should be interpreted, in particular, the issue of when the interruption of continuous residence occurred. In this framework it was also possible to resolve the cases in which the measure of the forcible removal of an alien was pronounced (which was only possible until 12 March 1999). As frequently highlighted by the Constitutional Court, the interpretation of undefined legal notions lies within the competence of the regular courts. The decisions of the Constitutional Court in procedures involving a constitutional complaint (see

point 34 of the reasoning of the mentioned Decision) also contributed to the interpretation of this term. It is interesting that some of the stated decisions were issued prior to the publication of Decision No. U-I-246/02. Furthermore, the Decision states that the existence of permanent residence status must be determined for the entire time after erasure. In addition to finding that very few applications were filed after the publication of the Decision of the Constitutional Court (compared with the most recent data of the Ministry of the Interior on the number of erased persons with unresolved status), the fact that relatively few court proceedings were initiated is also somewhat surprising. We could observe that this indicated the lack of action (lack of interest) on the part of those affected rather than the unwillingness of the Republic of Slovenia to resolve these issues after the adoption of both decisions of the Constitutional Court.

16. In view of the above, it could be concluded that all those interested have had the opportunity to file an application to resolve their status and that the others probably have no intention of doing so. Nevertheless, if there are still individuals who wish to file an application, they can do so on the basis of the applicable Act. Despite that, I cannot agree with the position that the Act must be amended in order to be able to resolve the applications of the “erased persons” who have not yet regulated their status because they filed no application.[6] Nonetheless, this is negated by the fact that practically all applications filed after the publication of Constitutional Court Decision No. U-I-246/02 have been granted.

17. I therefore conclude that the National Assembly failed to adequately reason its opinion that the potential rejection of the Act would result in such severe unconstitutional consequences that this would justify an interference with voters’ constitutional right to decide on the Act in a referendum.

18. Of course, this does not mean that if the Act were rejected at the referendum, the National Assembly would be freed from the obligation to try again to regulate these issues in other ways, where possible. And it would most certainly not excuse the administrative bodies from deciding on all the applications, taking into account all the positions of the Constitutional Court, and this would apply even more strictly to the courts which would interpret the undetermined legal term “actual uninterrupted residence” when deciding on judicial protection. In my opinion, it is clearly evident from the Decision of the Constitutional Court that when resolving the applications of all those who meet the prescribed conditions it must be established that they were entitled to permanent residence for the entire period after erasure. This does not mean that I am claiming that all the “erased persons” have already regulated their status; I only say that the National Assembly failed to justify the existence of such an unconstitutional state that would justify the prohibition of referendum.

Moreover, it cannot be said that by stating the figures I only tried to illustrate that the number of unresolved issues was small and that therefore the claimed unconstitutional consequences were not severe enough. The purpose of stating the figures was sufficiently clarified in the previous paragraphs. I dare anticipate that the number of unresolved issues stated by the Ministry of the Interior in the most recent communication will not change much or at all until the expiry of the deadline for submitting applications determined anew by the present Act. The issue of the "erased persons", at least in terms of permanent residence status, will thus be resolved upon the expiry of the legal deadline for submitting applications; until that time, it is possible to manipulate the "large" numbers presented by the Ministry of the Interior.

Mag. Miroslav Mozetič
Judge

Dr. Mitja Deisinger
Judge

Endnotes:
[1] Nevertheless, there is a certain amount of pathetic exaggeration in the position that permitting the referendum could "jeopardise the very existence of the Constitutional Court".
[2] Considering this position and concurring that it is not a human right, the question arises if an act can, at all, interfere with the constitutional right of the voters to decide on all issues regulated by an act in a referendum. The Constitution gives no such authority to the legislature, nor does it contain any limiting provisions. From this point of view, Article 21 of the RPIA is also problematic.
[3] This is a human right according to Constitutional Court Decision No. U-I-47/94.
[4] The RPIA regulates the subsequent legislative referendum approving an act.
[5] Abuses are, of course, possible. There are many different ways to influence and in a way manipulate citizens voting in a referendum. Nevertheless, this can also be done with voters in elections (as these are the same people), and the members of a legislature are far from immune to different attempts at influencing their decisions.
[6] The Act further regulates some issues that arose with the passage of time which can be resolved on the basis of adequate interpretation.

Concurring opinion of Judge mag. Jadranka Sovdat

1. I voted for the Decision since I agree with the reasons substantiating the review of the Constitutional Court in this matter. After the Constitutional Court established several times, in its previous decisions related to the issue of

erasure from the register of permanent residents, that there were unconstitutional consequences and that the legislature should respond as soon as possible to the unconstitutionality established in Decision No. U-I-246/02 dated 3 April 2003 (Official Gazette of the RS, No. 36/03, and OdlUS XII, 24), there really should be especially well-founded constitutional reasons based on which the unconstitutionality could continue. More on this will be presented below. I would first like to present the constitutional considerations I have with regard to the statutory regulation of the legislative referendum and related competence of the Constitutional Court stipulated in the first paragraph of Article 21 of the Referendum and Public Initiative Act (Official Gazette RS, no. 26/07 – official consolidated text – hereinafter: the RPIA). However, I am aware that the basis of my concerns and the first paragraph of Article 21 of the RPIA are so directly interconnected that a completely different statutory regulation would be required. Therefore, these questions can only be posed in relation to the future but they cannot change the “game” in the middle of which we have found ourselves. It started with the request of the proposers of the referendum and continued with the request of the National Assembly of the Republic of Slovenia for the evaluation of unconstitutional consequences, and according to the applicable law it needs to actually end with the decision of the Constitutional Court adopted on the basis of the first paragraph of Article 21 of the RPIA. However, there are two reasons for writing this opinion. The first relates to my concerns regarding the regulation of the constitutional review of the admissibility of legislative referendums, whereas the second relates to the issues that were the focus of this case.

I.

2. At the time of the entry into force of the RPIA (Official Gazette RS, No. 15/94) Article 10 stipulated that a legislative referendum cannot be called if it concerns acts passed by the shortened procedure, when such is required by an emergency, the defence of the state, or natural disasters, acts adopted on direct execution of the state budget,[1] or acts adopted to implement ratified treaties. In addition, the first paragraph of Article 16 determined the jurisdiction of the Constitutional Court to review, upon the request of the National Assembly, whether the content of a call for a referendum is contrary to the Constitution. By Decision No. U-I-47/94, dated 19 January 1995 (Official Gazette RS, No. 13/95, and OdlUS IV, 4), the Constitutional Court abrogated Article 10 and established the unconstitutionality of Article 15 since it did not provide any jurisdictional protection against a decision of the National Assembly to not call a referendum. In the reasoning of the Decision the Constitutional Court stated: “In view of the fact that Article 90 entails the constitutional implementation of the constitutional right to direct decision-making of citizens determined by Article 44 of the Constitution, and also because the right of 40,000 voters to require a referendum, which is encompassed in Article 90, it can be considered a "human right" under the legal regime referred to in Article 15 of the

Constitution, the provisions of the second and third paragraphs of Article 15 of the Constitution also apply for potential statutory interferences with the provisions of Article 90 (insofar as they refer to this constitutional right).” On these grounds it decided that the statutory exclusion of certain legislative referendums is a measure that is not necessary since a less restrictive measure could be used in order to grant protection to an objective allowed by the Constitution – i.e. either the right of others or the public interest.[2] A less restrictive measure was seen in the fact that the Constitutional Court could in each individual case review "whether the suspension of the implementation of this law due to a referendum or its non-implementation would truly affect such an important constitutional right that, due to this – upon weighing the affected constitutional values – it would be permissible to interfere with the constitutional right to decision-making in a referendum". The big question is whether today with all the experience gained through the review of the admissibility of previous as well as subsequent legislative referendums, the same decision would be made concerning the legislature being denied the possibility to evaluate in advance the inadmissibility of certain legislative referendums (the abrogated Article 10) as well as whether the right to referendum decision-making – therefore, the right to vote in a referendum required by eligible legislative referendum proposers determined in the second paragraph of Article 90 of the Constitution – is actually a human right, as the Constitutional Court has repeated and continues to repeat in numerous decisions.

3. First it needs to be established that in Decision No. U-I-47/94 not even the Constitutional Court itself declared the right to referendum decision-making a human right. It linked this right to Article 44 of the Constitution and characterised it as a human right considering that a call for a legislative referendum can be required by 40,000 voters and even in this decision the words human right are in inverted commas. In a way, it assigned 40,000 voters, as one of the eligible legislative referendum proposers, the role of exercising a human right.[3] Therefore, we are dealing with two aspects of this human right – the right to require a referendum and the right to vote in a referendum as an expression of direct participation in the management of public affairs. It should be noted, however, that the right to vote in a referendum is actually the primary right. Only if this right exists as a human right can the first right mentioned also be recognized as being of the same nature. Since in that Decision the Constitutional Court linked Article 90 of the Constitution to the right determined by Article 44 of the Constitution, the question arises what the content of this right actually is.[4] Even if there was no such provision in the Constitution, a legislative referendum would entail an implementation of the constitutional right to direct decision-making power of the citizens arising from the second paragraph of Article 3 of the Constitution ["In Slovenia power is vested in the people. Citizens exercise this power directly and through elections

(…)"]. In the Commentary on the Constitution, Prof. Čebulj states that the right determined by Article 44 of the Constitution entails "a general constitutional right (…) [that] has no separate statutory regulation, but is exercised within the legislation concerning local self-government, the referendum and public initiative, and elections."[5] The same definition is provided by Prof. Grad,[6] who states that it is a "general constitutional right exercised through other constitutional rights that in a more concrete manner regulate the participation of citizens in the management of public affairs, in particular, for example, local self-government, the referendum and public initiative, and elections."[7] Local self-government is a constitutional right that the Constitution explicitly grants in Article 9 (among the general provisions) and regulates in Chapter V in more detail. It is therefore a constitutional right but not a human right. Similarly as with self-government, the Constitution also regulates a referendum or direct implementation (in this case legislative) of the power referred to in the second paragraph of Article 3 (thus among the general provisions) and in Article 90 (in Chapter IV a), where it regulates the National Assembly). Therefore, in terms of systemic-technical considerations, this is the same regulation. Yet, for referendum decision-making the Constitutional Court established the criteria of review arising from the second and the third paragraphs of Article 15 of the Constitution i.e. such review that only applies to human rights but not to other constitutional rights lacking this legal nature, while in the case of local self-government this was not the case. As we have seen, both local self-government and the referendum are related in the same way to Article 44 of the Constitution.

4. Was the reason for the application of the criteria that apply to the manner of exercising or restricting human rights the similarity between the right to vote and the right to decision-making in a referendum? The right to vote is undoubtedly a human right. The Constitution regulates it as such in Article 43, although its relevant elements – in this discussion the principle of periodicity is of particular importance for its exercise – are also regulated in other provisions of the Constitution (the first paragraph of Article 81, the second paragraph of Article 98, and the third paragraph of Article 103). And it is the principle of periodicity and thus the periodic exercise of the right to vote that in my opinion makes the right to vote significantly different from the right to vote in a referendum. This principle attributes the right to vote its universal character, for at the end of certain a period (i.e. a term of office) its exercise does not depend on whether a definite number of citizens or politicians will want it to be exercised since the periodicity regarding its exercise is ordered; however, an early election can trigger the exercise of this right outside of the intervals planned, but surely and always upon the expiry of the term of office. This content of the voting right as a human right is without a doubt explicitly stated in Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No.

7/94 – hereinafter: ECHR).[8]As regards the right to vote in a referendum, the situation is essentially different. In addition to the fact that, on the basis of the second paragraph of Article 90 of the Constitution, every citizen (being a voter) has the right to require, together with 39,999 other citizens (being voters), that a referendum be called (and in Decision no. U-I-47/94 the Constitutional Court in particular exposed this aspect, but as I have already pointed out, this right is, in my opinion, secondary), it is characteristic of the right to vote in a legislative referendum that as citizens (being also voters) we can only exercise it when the politicians we have elected (i.e. the National Assembly, one third of the deputies of the National Assembly, or the National Council) so decide. And this can be several times a year, every ten years, or *ad absurdum* never. Unusual for a human right. Although as regards the manner of its exercise, the right to vote in a referendum is exercised similarly as the right to vote, namely it also reflects the declaration of the will of a citizen entailing decision-making, this is nevertheless not a decision on who to vest with the legislative power, but rather a decision on the content of the matter to be approved (or not) in a referendum[9], and based on this the right to vote in a referendum differs significantly from the right to vote. Thus the question arises whether the decision of the Constitutional Court on the basis of which the right to vote in a referendum is considered a human right (since then the two words have been written without inverted commas) was the right one. It is true that the development of human rights can lead to an individual right being proclaimed a human right earlier in certain countries, and due to its proclamation as such there is no need to wait for its general recognition in the international community. Still, the question arises whether, in accordance with the nature of human rights, the same really applies to the right to vote in a referendum.

5. In modern countries, the direct exercise of authority has mainly been replaced by so-called representative democracy. This superseded "self-governance",[10] historically already established in the ancient Greek Athenian democratic state.[11] All citizens over 18 years of age could vote in the People's Assembly, which met four times a month in order to decide on the most important domestic and foreign issues.[12] The policy was proposed by a council consisting of 500 citizens, who were chosen by lot for a period of two years.[13] However, this kind of direct democracy was only possible in a small state where the number of free citizens with full rights (and male, of course) that could take part in the exercise of authority was very low. Then centuries passed before the idea of the sovereignty of the people started to appear, the idea that authority belongs to the people.[14] And that people can exercise it either by directly performing all or some of the offices or by electing representatives through which to exercise authority indirectly.[15] It became increasingly obvious that the direct exercise of authority or "self-governance" was only preserved to a minor degree and thus from the time that a middle class arose, "political (elected) representation as the basis of the democratic political

form of government" was accepted.[16] It has also been established in the modern state, where there are simply more tasks of governance than can be performed by the people themselves.[17] If this is the case, does this not concern more the question of who is called to exercise authority than the exercise of a human right? Does this not concern the constitutional-political decision to establish when a legislative decision is to be taken by voters directly and when it is to be made by those entrusted by the voters to make these decisions during their term of office? And as we are already discussing the comparison with the right to vote, is it not more of, for example, an electoral system in its narrow meaning (its choice is subject to a political decision) than the periodic exercise of a right that results in entrusting power to govern to representatives of the people so elected? And if so, the question whether in terms of decision-making in a referendum we would like to resemble Switzerland (a country of numerous referendums) or France (where referendums are rare) is probably a matter of a constitutional-political decision determined by the Constitution or an act and not a matter of a human right and its (in)admissible restriction. In individual cases it is more of a political decision on whether the elected representatives of the people, by having been elected, already have the power to make decisions on a certain important issue or if they again require legitimising their decision-making.[18]

6. If it is a matter of a constitutional-political decision on whether we want to be a country of referendums or not and not a matter of the restriction of a human right, then the question of the need for competence determined by the first paragraph of Article 21 of the RPIA must be raised, although it was practically "ordered" by the Constitutional Court in Decision No. U-I-47/94; it definitely "ordered" it since the basis used was the criteria applying to a human right, which in accordance with the fourth paragraph of Article 15 of the Constitution *inter alia* needs to be ensured legal protection (this is the reason for the logical establishment of unconstitutionality under Article 15 of the RPIA). This question is posed *a fortiori* since the Constitutional Court later explicitly noted that it has the same competence to review the constitutionality of acts passed by the legislature as well as acts adopted (i.e. approved) by voters in a referendum.[19] If that is the case, then the first and the latter can give rise to the same unconstitutional consequences and the same applies to the omission of their adoption. In the event of an omission of the required statutory regulation, therefore either when no act has been adopted (after years have passed, as in this specific case) by the National Assembly, or in the event the act is rejected in a referendum. What is then actually the role of the Constitutional Court when it needs to review the [possible] occurrence of unconstitutional consequences which make the right to vote on a specific issue in a referendum yield to other constitutional values?

7. Due to the facts already mentioned in the introduction, namely that in the

middle of a "game" the rules cannot be modified, and due to the necessary connection between the starting-point, which I have serious reservations about, and the jurisdiction determined in the first paragraph of Article 21 of the RPIA, I am aware that the questions that I have and which I have emphasised can be taken into account *de lege ferenda* and therefore cannot influence the decision in this case. Probably this is something requiring serious reconsideration by the legislature. For this reason I have written them down. My final position on these issues is not urgently required since it cannot influence the decision-making with regard to this case, although what direction I favour can be deciphered. In the decision-making in this matter the Constitutional Court remains a "prisoner" of the first paragraph of Article 21 of the RPIA, which by determining the jurisdiction of the Constitutional Court also determines its tasks. In its decision-making, the Constitutional Court is bound by this provision with its constitutional basis in the eleventh indent of the first paragraph of Article 160 of the Constitution. Therefore, I was of the opinion that the decision-making in this matter should consider this provision and follow the explanation provided by the Constitutional Court in its previous decisions. On the basis of the second paragraph of Article 14 of the Constitution, also the Constitutional Court is bound to ensure equality before (the Constitution and) the law. By the first paragraph of Article 21 of the RPIA, the legislature ordered the Constitutional Court to establish, upon request, whether "unconstitutional consequences could occur due to the suspension of the implementation of the law or due to a law not being adopted".

8. In the past four years[20] the Constitutional Court has been tasked with deciding on the constitutional admissibility of a legislative referendum four times. At the request of the National Assembly it established, based on what was then the first paragraph of Article 16 of the RPIA (the text of which was not very different from the first paragraph of Article 21 of the RPIA), in Decision No. U-II-1/06 (in the case of a preliminary referendum) that the suspension of the adoption and implementation of the amendment to the Health Care and Health Insurance Act could result in unconstitutional consequences, and in the reasoning (Para. 17) it expressly stated that the Constitutional Court was only required to establish whether the alleged unconstitutional consequences could arise. The latter were determined by the Constitutional Court to lie in the fact that, short of a law regulating property relationships between the Vzajemna insurance company and the HIIS (the Health Insurance Institute of Slovenia) in relation to the former's transformation into a public limited company, an interference with the property and financial standing of the HIIS might occur contrary to Article 50 of the Constitution, and consequently, this would entail an interference with the position of the insured persons paying compulsory health insurance. The reasoning of Decision No. U-II-1/06 does not indicate that the Constitutional Court weighed different constitutional values. It is obvious that it considered the mentioned reason to be

sufficient to establish the occurrence of unconstitutional consequences. In Decision No. U-II-1/09, dated 5 May 2009 (Official Gazette RS, No. 35/09) it established that unconstitutional consequences would have arisen if the amendment to the Attorneys Act had been suspended or rejected based on the finding of the unconstitutionality of the applicable Attorneys Act and the Attorney Fee Tariff Act, whose unconstitutionality was, in the opinion of the Constitutional Court, remedied by the amendment. The reasoning of this Decision also does not indicate that the Constitutional Court weighed [between different constitutional values], but it shows which were the constitutional values (the right to judicial protection, the right to defence in criminal proceedings, and the right of the Bar Association of Slovenia to take part in the adoption of lawyers' fees, based on which the Constitutional Court established that unconstitutional consequences would occur. In Decision No. U-II-2/09, dated 9 November 2009 (Official Gazette RS, No. 91/09), it established that if the amended regulations on judges' salaries had been rejected at the referendum, unconstitutional consequences would have occurred. The last Decision differs from the previous ones mainly in the fact that its reasoning shows that the Constitutional Court returned to the original reasons given in Decision No. U-I-47/94, which indicate that the Constitutional Court must weigh the right to a referendum against the constitutional values that would be affected if the act was rejected at the referendum. In Decision No. U-II-2/09, the constitutional values whose protection would be ensured by the implementation of the act, including the right to judicial protection, the independence of the judiciary, and compliance with the Constitutional Court's decision, prevailed over the right to a referendum.

9. The first paragraph of Article 21 of the RPIA has been designed so that it contains an inherent assumption based on which the Constitutional Court must assume that the act would be rejected at the referendum (if the first part of the provision referring to the suspension of the implementation is ignored), even though it is completely clear that the opposite could be the case. The deprivation of the right to vote in the referendum may therefore lead to the finding that unconstitutional consequences have occurred which would not have occurred if the citizens had voted for the act in the referendum. However, it is not up to the Constitutional Court to guess what would happen at the referendum (it is perfectly clear that it cannot do so), but it must evaluate the possibility of unconstitutional consequences occurring based on the mentioned assumption – i.e. that the act would be rejected at the referendum. Therefore, the possibility that the act might even be approved in the referendum in a specific case cannot influence the review in any way.

10. The interpretation of the first paragraph of Article 21 of the RPIA also has to take into consideration the purpose of this provision. This purpose is indicated specifically in Constitutional Court Decision No. U-I-47/94. The

Constitutional Court should assess if the right to a referendum is opposed by the constitutional values that have to be given priority over the right to vote in a referendum. The latter right cannot automatically be assigned greater weight merely because it is (can be) exercised by all persons eligible to vote (and is therefore enjoyed by more eligible persons), even if it is opposed by constitutional values, including human rights, which are, given the circumstances of a specific case, provided to only a limited number of eligible persons. If this factor (the number of eligible persons) were the criterion of review, the Constitutional Court would no longer be needed to make decisions, as the number of eligible persons on the opposing side is seldom equal. Furthermore, it is necessary to take into account that the decision of the Constitutional Court on the [potential] occurrence of unconstitutional consequences does entail a limitation of the right to a referendum, but in itself does not entail that the reasons (i.e. the constitutional values) causing this limitation should be reviewed as restrictedly as possible. If on the other side of the scales there are also human rights and also other constitutional values, including such as are actually the mechanism of the state of law, ensuring the protection of human rights and fundamental freedoms (e.g. the authority of the judiciary or the authority of the Constitutional Court[21]), then these values cannot be from the very start assigned a lesser weight than the right to a referendum. For this reason and pursuant to the second paragraph of Article 14 of the Constitution, I believe that as long as we have the authority referred to in the first paragraph of Article 21 of the RPIA, the approach to assessing the constitutionality of the consequences that can be expected if the act is rejected at the referendum should remain based on the position which the Constitutional Court explicitly emphasised already in Decision No. U-II-2/09. In order to abandon this position there would have to be, in my opinion, serious and well-founded reasons, which I do not see at this moment, because the interpretation of the legal text is restricted by the respective possible linguistic interpretation.[22]

11. The RPIA requires that we determine whether the rejection of an act in a referendum would result in unconstitutional consequences. The text of the first paragraph of Article 21 of the RPIA was interpreted in the latest decision as if it contained an inherent weighing of the right to a referendum against other constitutional values in view of the purpose of this statutory provision. Thus far I perceive no argument allowing anything more than that without crossing the boundary of linguistic interpretation and ascribing it contents it cannot have. Of course, this position leads to questions that are essential: 1) which constitutional values are identified that stand against the right to vote in a referendum, 2) what weight are they attributed, and 3) what are the reasons that some are attributed greater weight than others? In this respect, my review differs from that of some of my colleagues, and this in itself is the area that relates to the circumstances of this specific case, namely the decision on

whether the rejection of the ARSCOSS-B at the referendum would give rise to unconstitutional consequences within the meaning of the first paragraph of Article 21 of the RPIA.
II.

12. When assessing the circumstances of this case, several important questions arose. The final outcome of the review greatly depends on the answers to these questions. This is undoubtedly a case when the legislature has not responded to the decision of the Constitutional Court for several years, in spite of the fact that since the expiry of the response deadline established in Decision No. U-I-246/02, the Constitutional Court has a number of times reiterated its warning regarding the response in its subsequent decisions and rulings on issues directly related to this matter, as well as in the annual reports on the past year's work.[23] Ever since the 2003 Annual Report, the Constitutional Court has continued to repeat in these reports that the deadline for the legislature's response had expired, while the unconstitutionality had not yet been remedied, and pointed out a grave violation of Article 2 and the second sentence of the second paragraph of Article 3 of the Constitution. Therefore, we have before us a case entailing an already established unconstitutionality, as indicated in the decision of the Constitutional Court. But this finding in itself is not sufficient for assessing the [potential] occurrence of unconstitutional consequences. It had to be determined whether the act with which the legislature responded remedied the unconstitutionality in a manner consistent with the Constitution. That does not mean that the Constitutional Court reviewed whether the ARSCOSS-B is consistent with Decision No. U-I-246/02, as an act can only be reviewed based on the Constitution and not a decision of the Constitutional Court; it does mean, however, that precisely because of compliance with the principle of equality, the adopted statutory regulation was reviewed in the light of those constitutional provisions on the basis of which the Constitutional Court had already reviewed the constitutionality of the statutory regulation in force. That is, from the aspect of Article 2 and the second paragraph of Article 14 of the Constitution. Moreover, in Paragraphs 21 and 24 it added additional reasons in the light of Article 34 as well as Articles 22 and 25 and the first paragraph of Article 23 of the Constitution, which could have been noted by the Constitutional Court already during the previous review, since these constitutional reasons were there to be invoked. I fully agree with this approach.

13. I also agree that the Constitutional Court had to first clarify the meaning of its two main decisions whereby it decided on the constitutionality of statutory regulation regarding the erasure from the register of permanent residents. First, Decision No. U-I-284/94, dated 4 February 1999 (Official Gazette RS, No. 14/99, and OdlUS VIII, 22), to which the legislature very quickly responded, which has perhaps not been stressed clearly enough by the domestic and

international publics, and which for the most part finally regulated the status of these persons. This was extremely important, because on this basis the violations of human rights ceased for the most part, with the right referred to in Article 34 of the Constitution having the central role, in my opinion. Then it had to clarify the meaning of Decision No. U-I-246/02, whereby the Constitutional Court established an unconstitutionality, as the legislature failed to regulate the status of these persons retroactively. At first glance it is not clear what exactly the Constitutional Court had in mind, even though in its subsequent decisions it often reiterated that the legislature may remedy the unconstitutionality only in one manner consistent with the Constitution. The legal status by its very nature cannot be regulated retroactively. And even though the legislature, in regulating this issue, practically literally followed the two decisions of the Constitutional Court issued in the constitutional complaint cases, the question arose what that actually means and what is actually meant by the ARSCOSS-B stating that "it is deemed that a person has a permanent residence permit and registered permanent residence at the address at which permanent residence was registered at the time of the erasure from the register of permanent residents". I agree with the answer given in this respect by the Constitutional Court in its decision. This does not in fact involve the regulation of legal status retrospectively, but the determination of the status that has existed throughout (if a person indeed resided in Slovenia throughout this time), and in the case of persons who were forcibly removed from the country as aliens or who left the country for reasons directly related to the erasure, it involves the creation of a legal fiction with a very specific legal purpose and meaning, and therefore in itself cannot give rise to any other legal consequences, which is explained in detail in the Decision. Of greatest importance, in my view, is the definition of either the declaration of the actual status or the legal fiction, which the Constitutional Court explicitly pointed out in Paragraph 43 of the reasoning – the definition of immaterial satisfaction in the sense of the elimination of the consequences of human rights violations, as prescribed by the fourth paragraph of Article 15 of the Constitution, which in individual cases apparently occurred.

14. I am convinced that the competent authorities deciding in individual procedures in accordance with the ARSCOSS-B, which upon entry into force will supplement the provisions of the ARSCOSS, will carry out the tasks stipulated by this Act in accordance with the Constitution and these legal provisions. While doing so, they will be able to rely on the explanation of the mentioned act which the Constitutional Court had to provide in order to review the constitutionality of its provisions. I am also certain that they will not accept the speculations that the proposers of the call for a referendum fear and state as the reasons against the adoption of this act. In a state governed by the rule of law, the competent authorities have all the authority to prevent the abuse of law and the rights stipulated therein.

15. It was not possible to weigh which constitutional values should be given priority in this case until the Constitutional Court found that the legislature responded to its decision by an act that cannot be said to be unconstitutional and it cannot be claimed that by this act the legislature regulated issues that are not directly related to the subject matter of regulation (meaning that abuse could be at play); on the contrary, omitting the regulation of some issues might even give rise to new unconstitutionalities.

16. I agree with the reasons given with reference to this in Parts B. – IV. and B. – V. of the reasoning of the Decision. What reaffirms my opinion that in this case other constitutional values should be given priority over the right to vote in the referendum is in a way related to my starting point in this opinion, even though I expressly stated that the issues I highlighted should in fact be considered for the future and not for this case. The decision whether to allow a referendum or not – which could be the simple interpretation of the provision of the first paragraph of Article 21 of the RPIA – is in fact a decision about whether this act should be adopted by the National Assembly (namely the representatives of the people in whom the citizens of this country vested the legislative power) or whether the legislative function should in this case be performed by the people themselves (after it has been performed by their representatives, as we are referring to a subsequent legislative referendum). If the decisions of the Constitutional Court clearly state that the Constitution is binding on both the National Assembly and the people when it makes direct decisions, the decisions of the Constitutional Court are binding also on the voters in the referendum, in which case there occurs an equal unconstitutionality if either of them fails to perform the task stipulated by the Constitution. Just as we can claim that the National Assembly grossly violated Article 2 and the second sentence of the second paragraph of Article 3 of the Constitution by failing to comply with the decision of the Constitutional Court, the same could be claimed of the voters who would ("take back" the legislative function and) in the referendum reject the act which constitutionally puts an end to this violation of the Constitution. Let me again point out the standpoint of the Constitutional Court, i.e. that it may repeal as unconstitutional also an act approved by the people in a referendum. Therefore, the purpose of the first paragraph of Article 21 of the RPIA is to prevent further unconstitutionality after the National Assembly has once and for all (after many years in this case) finally remedied this violation of the Constitution. That is why it is also important in this case that the unconstitutionality has lasted for (too) many years and that regarding it the Constitutional Court (more often than with regard to any of its decisions, especially subsequent decisions on the same matter) clearly stated that unconstitutional consequences occurred (which it even classified in the meaning of the first paragraph of Article 21 of the RPIA), owing to the legislature's failure to respond and the consequential non-

compliance with the Decision of the Constitutional Court, and that by the adoption of this act the legislature remedies this unconstitutionality. The Constitutional Court clearly stated that statutory regulation was necessary to remedy the unconstitutionality and expressly highlighted this finding in its Decision. These are additional reasons why I voted for the Decision.

Jadranka Sovdat, LL.M.
J u d g e

Endnotes:
[1] It is interesting that the pension and health care “funds” were not taken into consideration by the legislature.
[2] Already in decisions reached prior to this decision, as well as in some subsequent decisions, the Constitutional Court stated that the public interest is a constitutionally admissible objective, on the basis of which a human right can be restricted in accordance with the third paragraph of Article 15 of the Constitution (see F. Testen in: L. Šturm (ed.), Komentar Ustave Republike Slovenije, Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 200).
[3] This position is difficult to attribute to other eligible proposers.
[4] The Constitutional Court states that Article 90 is "a derivation of the constitutional right to the direct decision-making power of the citizens determined by Article 44 of the Constitution.”
[5] J. Čebulj in: L. Šturm (ed.), ibid., p. 490.
[6] F. Grad, Dissenting Opinion in Decision No. Up-3486/07, Up-3503/07, Up-3768/07, dated 17 January 2008 (Official Gazette RS No. 19/08, and OdlUS XVII, 23), Paragraph 6.
[7] Grad criticises the review of the Constitutional Court according to which the right to vote in elections to the National Council is reviewed under Article 44 of the Constitution instead of Article 43, which would be more appropriate in his opinion. It increasingly seems to me he is right.
[8] Article 3 of the Protocol No. 1 to the ECHR stipulates: "The High Contracting Parties undertake to hold free elections at reasonable intervals (stressed by J.S), by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." There is probably no need to draw attention to the fifth paragraph of Article 15 of the Constitution, since the interpretation of other provisions of the Constitution leads us to the same conclusion.
[9] More in F. Grad, Volitve in volilni sistem, Inštitut za javno upravo pri Pravni fakulteti, Ljubljana 1996, pp. 26-29.
[10] "A free person is, within the constraints of their capacities – physical, mental, social, and economic – a self-governing person.", B. Watt, UK Election Law: A Critical Examination, Cavendish Pub. Ltd., Oregon 1996, p. 10.
[11] On the origin of elections in Athens, see T. Karakamiševa, Elections and

Electoral Systems, Kultura, Skopje 2004, pp. 31–34.
[12] J. Harvey and L. Bather, The British Constitution, Third Edition, Macmillan – St. Martin's Press, London 1972, p. 546.
[13] Ibid.
[14] For more on this subject, see I. Kaučič in: F. Grad and others, Državna ureditev Slovenije, First edition, ČZ Uradni list Republike Slovenije, Ljubljana 1996, pp. 21–23.
[15] Ibid., p. 24. Cf. Gicquel on direct democracy (gouvernement du peuple par lui-meme) and representative democracy (le gouvernement du peuple par ses élus ou ses représentants), J. Gicquel, Droit constitutionnel et institutions politiques, 14 éme édition, Montchrestien, Paris 1991, p. 116.
[16] I. Kaučič, Ibid., p. 27.
[17] This is what Watt says: "In a large modern state there is simply too much governing to be done to leave it in the hands of the people; they must choose representatives to do the work for them.", Watt, ibid., p. 11.
[18] Prof. Jambrek states: "The powers and tasks of regulatory bodies have to be given legitimacy since they stem from the people and in an identifiable manner they are the expression of the people's will. Therefore, there should be a continuous chain of democratic legitimacy running from the people to the regulatory body and from the latter back to its source." P. Jambrek in: L. Šturm (ed.), ibid., p. 48. Cf. F. Grad, ibid., pp. 23-24, and B. Watt, ibid., p. 11.
[19] This is explicitly stated in Decision No. U-II-3/03, dated 22 December 2003 (OdlUS XII, 101). The conseil constitutionnel, in Decision No. 92-313 DC, dated 23 September 1992, stated differently that it was not competent (since this competence is not explicitly determined in either the Constitution or the organic act on the Constitutional Court) to rule on the constitutionality of an act adopted by the French people in a referendum; it referred to (the second review of) the act approving the ratification of the European Union Treaty.
[20] An overview of some decisions over a longer period is also provided in the dissenting opinion of Judge Prof. Ribičič in Decision No. U-II-1/06, dated 27 February 2006 (Official Gazette RS, No. 28/06, and OdlUS XV, 17).
[21] These values, if measured in terms of the number of eligible persons, even exceed the number of persons eligible to vote, as they pertain to all persons in the state as well as foreigners within the state.
[22] As the academic Prof. Pavčnik states, linguistic interpretation is "also the level setting the outer boundary that the interpreter cannot cross." M. Pavčnik, Teorija prava, Prispevek k razumevanju prava, Cankarjeva založba, Ljubljana 1997, p. 356.
[23] Annual reports are published on the website of the Constitutional Court <http://www.us-rs.si/o-sodiscu/letna-porocila/>.

Concurring opinion of Judge Jasna Pogačar

1. The reasoning [in Decision No. U-II-1/10] states that the Constitutional Court already in Decision No. U-I-47/94, dated 19 January 1995, proclaimed the right to decide in a referendum a human right. However, my view of the positions presented in the mentioned Decision is somewhat different.

2. In the matter at issue in Decision No. U-I-47/94, the Constitutional Court reviewed the admissibility of a legal regulation which at the abstract level excluded a referendum on specific types of acts (adopted by the shortened legislative procedure or referring to the implementation of ratified international agreements or the direct implementation of the budget). The decision is based on the finding that the Constitution does not explicitly impose restrictions on the issues that may be decided in a legislative referendum. The Constitutional Court explained that Article 90 of the Constitution allows the exercise of the substantive provision of Article 44 of the Constitution on citizens' right to participate in the management of public affairs. In view of the fact that Article 90 of the Constitution represents the implementation of the right determined in Article 44 of the Constitution and because the right of 40,000 voters to require a legislative referendum which it encompasses may be considered a human right under the legal regime referred to in Article 15 of the Constitution, it decided that the second and the third paragraphs of Article 15 of the Constitution also apply to potential legal interferences with its provisions (if referring to this constitutional right). The adopted positions are therefore intended for reviewing the admissibility of restricting the rights referred to in Article 90 of the Constitution, for which the Constitutional Court has established a legal protection regime equivalent to the one that applies for relative human rights and freedoms.

3. What is relevant for decision-making in accordance with the first paragraph of Article 21 of the RPIA is the position according to which the National Assembly may require the Constitutional Court to determine whether the content of a call for a legislative referendum is not in conformity with the Constitution. In each specific case the Constitutional Court will have to review whether a decision made in a referendum to suspend the enforcement of an act or to reject it would affect such important constitutional rights that it would be admissible – weighing the constitutional values at issue – to interfere with the constitutional right of decision-making in a referendum.

4. The Constitutional Court characterized the right to decision-making in a referendum as the right referred to in Articles 44 and 90 of the Constitution, but it did not proclaim it a human right with universal import. It also did not explain its content, nevertheless it may be deduced from Article 90 of the Constitution that it entails rights enabling the implementation of a legislative referendum. Namely, it entails the right to request that a legislative referendum

be called and the right to vote in a legislative referendum. The right arising from Article 44 of the Constitution is a general political right, which cannot be directly exercised, so the Constitution regulates its realisation in several places. A legislative referendum is a form of direct participation in the management of public affairs, expressly regulated by Article 90 of the Constitution, which also specifies the entitlements that ensure the implementation of a legislative referendum.

5. Even though in my opinion the Constitutional Court in Decision No. U-II-1/10 proclaimed the right to request a call for a legislative referendum and the right to vote in a legislative referendum to be human rights, this did not influence my decision, as I agree with the review and the result of the weighing of the constitutional values at issue.

Jasna Pogačar
J u d g e

Concurring opinion of Judge Jan Zobec, joined by Judge Dr. Ernest Petrič

I.

1. I will begin my considerations on the request for the prohibition of the referendum at the point where they should in fact end, namely by balancing the right to a referendum with the consequences that would result from the rejection of the Act in the referendum. Namely, a decision permitting or refusing a referendum depends on the answer to the following question: which of the conflicting constitutional values should be given priority. The first step in the search for the answer to this question is the definition of the "weight" of the competing values.[1]

2. First of all, I would like to discuss the right to a referendum, which has been defined by the Constitutional Court as a "human right". It defined this right for the first time in Decision No. U-I-47/94, dated 19 January 1995, as follows: "In view of the fact that Article 90 represents a constitutional derivation of the constitutional right to the direct decision-making power of the citizens determined by Article 44 of the Constitution and also because the right of 40,000 voters to require that a referendum be called, which is encompassed in the article, can be considered a 'human right' under the legal regime referred to in Article 15 of the Constitution, the provisions of the second and third paragraphs of Article 15 of the Constitution shall also apply to potential legal interferences with these provisions (when referring to this constitutional right)." In my opinion, a referendum is not so much a human right as it is an important tool in the system of checks and balances with different roles and

effects – depending on who the proposer of the referendum is. When a referendum is required by voters it has a different role than the one called by the National Assembly on its own initiative. The role of a referendum called by the National Assembly is different from the role of a referendum required by at least thirty elected deputies. In view of the various proposers, it is difficult to equate the different types of referendum and say that the weight of the underlying right to a referendum is always 'the same', irrespective of who initiates the referendum. There is undoubtedly a difference that must be considered between a referendum required by at least 40,000 voters directly exercising their right to a referendum and to direct participation in the management of public affairs, and a referendum required by a parliamentary minority. A petition filed by at least thirty elected deputies entails 'only' an indirect type of participation in the management of public affairs. Namely, this constitutes a request which is generated within a representative democracy to correct, supervise, or check the speed of such democracy and which remedies its flaws and deviations by returning to its source – the people. The people (using the referendum as a tool) participate in the creation of a referendum [required by thirty deputies] to a similar extent as they participate in any voting in the National Assembly – only indirectly, through their elected representatives.

3. Therefore, the request for a referendum submitted by thirty elected deputies cannot be regarded in any other way. Whether such a request which gives rise to the exercise of the human right to a referendum, occurs or not depends entirely on two coincidences which cannot be directly influenced by the voters – the first coincidence is the situation when at least thirty elected deputies are in a minority position when an act is being adopted, and the second coincidence is the autonomous decision of these deputies to place the decision on an act on which they have been outvoted in the process of adoption, in the hands of the people in a referendum. As a human right which is not at all placed in the hands of the people (such as the right to periodical elections to the National Assembly), such a referendum, while it is still in the request phase, is in my opinion relatively distant from the people (precisely as distant as every decision made by the representatives of the people in the legislature) and is therefore less important than a referendum which is required by at least 40,000 voters – and can therefore be subject to more restrictions.

4. On the other hand, a referendum is an extremely powerful tool for protecting the weaker participants in the political process (and their voters) against an undemocratic parliamentary majority which disregards parliamentary dialogue and political discourse. By protecting the minority from the 'tyranny' of the majority (this term refers to those situations when the argument of power is used instead of the power of argument, situations beyond constitutional tolerance when the parliamentary majority only pursues its own interests), by

promoting tolerant and democratic dialogue and a search for joint solutions, and by facilitating the development of constitutional pluralism “in which the constitutional players limit each other to adopting the fewest possible unilateral decisions and focus on decisions which benefit as many people as possible and pursue the supreme value of human dignity”, [2] [a referendum required by 30 deputies] gains importance. Even though the referendum is intended for the people, in order to protect their rights and interests, even though it is a ‘veto point of the weaker in the political process’[3] and even though it forces those who, supported by the majority of the votes in the parliament, pursue only their own coalition interests, to seek compromises, [4] it has its limitations. When there is no room for compromise (already) in the parliament, there is no referendum either. When and where this limit is, is a matter of balancing in every single case, namely the Constitutional Court (in the legal discourse and based on argumentation) must balance the ‘veto point of the weaker’ with the price to be paid for this (the possibility that due to the referendum unconstitutional consequences may occur).

5. And what is on the other side of the scales? Is there perhaps something that can completely annihilate the right to a referendum or even make it non-existent in a specific (in this case, even essential) area?

II.

6. Historical experience teaches us that democracy contains within itself the germs of self-destruction. To survive (to protect it from itself) it is necessary that democracy features an immune subsystem, namely one whose tool is the referendum request of a parliamentary minority “by which constitutional pluralism and constructive political-interest discourse is guaranteed”,[5] and one which prevents (even within constitutional pluralism or particularly for this reason) (constitutional) democracy from being abolished in the name of democracy.[6] An important part of this subsystem is a release valve consisting of the constitutional prohibition on a referendum – and even more so when a referendum petition aims at disregarding a decision of the Constitutional Court. Therefore the idea that the people, functioning as the last instance, should decide on the ‘validity’ of a decision of the Constitutional Court is fundamentally constitutionally wrong.[7] Even more so if it is accompanied by the overt intention of the proposers of the referendum to manipulate the legislature’s obligation arising from a decision of the Constitutional Court. Namely, it is not their intention to submit the ARSCOSS-B for legitimate consideration and supervision by the people in a referendum, but to achieve that this act is rejected by the will of the people and that, consequently, the unconstitutional situation established by Decision No. U-I-246/02, which has lasted for over seven years, continues.[8] The referendum proposers' premise that compliance with the decisions of the Constitutional Court is a matter of majority decision-making is constitutionally inadmissible. In Decision No. U-I-

111/04, dated 8 July 2004, the Constitutional Court stated that “The Constitution […] is also binding on citizens when they exercise power directly (the second paragraph of Article 3) by deciding on a certain law in a referendum” and that “[in] the Republic of Slovenia […] a so-called constitutional democracy was established, the essence of which is that the values protected by the Constitution, including in particular human rights and freedoms (Preamble to the Constitution), can prevail over the democratically adopted decisions of the majority.” When the Constitutional Court has already pronounced itself on these values and imposed on the legislature the obligation to remedy the unconstitutionality established, namely a referendum on a law which implements a decision of the Constitutional Court in a manner consistent with the Constitution and limits itself to remediation of the established unconstitutionality which can be remedied in only one manner (and additionally regulates only incidental and technical issues, those issues which are considered ‘accessory’ and those which are vital for the absolute protection of human rights and which can be rectified in only one way), the institute of the Constitutional Court prohibiting a referendum carries particular weight and importance. In my opinion, this weight is such that in this part (the part where the Act entails only the fulfilment of a clear-cut obligation imposed by the Constitutional Court Decision) it not only prevails over the ‘human right’ to a referendum but completely annihilates it – the right to a referendum simply does not extend that far. Therefore, in this part, no collision of constitutionally protected values is possible.[9] There is only one constitutional value, or stated more correctly, order: the legislature’s obligation to implement the decisions of the Constitutional Court.

7. It is irrelevant whether I concur with Decision No. U-I-246/02 or not and whether I have or would have serious second thoughts about it – now, when it is only a matter of its implementation all these second thoughts, doubts, or even opposition are completely irrelevant if only for the fact that this is a decision of the highest body of judicial power for the protection of human rights and that its decisions are binding[10]. This Decision is absolutely and unconditionally binding – on the National Assembly, on its deputies, on the people (the electorate), and on constitutional judges when deciding on permitting the referendum. As there exists the constitutional obligation of the legislature to remedy any unconstitutionality established in a decision of the Constitutional Court (Article 2 and the second paragraph of Article 3 of the Constitution; compare with Decision No. U-I-114/95, dated 7 December 1995, Official Gazette of the RS, No. 8/96, and OdlUS IV, 120), any obstacles used by the legislature (even if in its original role of the people) to hinder or prevent the achievement of this constitutional goal are considered unconstitutional, even though they might be highly ‘democratic’.

8. In such circumstances a decision of the Constitutional Court has different

force, effects, and obligations than when it plays ‘only’ the role of precedent and involves only a (relative) reference to the standards, doctrines, and viewpoints which the Court has developed in its jurisprudence (throughout the development of the Constitutional Court review, these are subject to constant verification, upgrading, supplementing, and also disintegration). I ask myself what permission to hold a referendum would mean from this point of view. I believe it would not only undermine the existence of the above-mentioned Decision but eventually, through continuous prolongation and generalisation, it would threaten the very existence of the Constitutional Court. What would be left of this institution if its decisions could simply be disregarded – if nothing else works, then also by means of the mechanisms of democratic decision-making, in order to achieve this goal. And what would remain of the Constitutional Court today if it permitted this to happen by granting permission for the referendum – would this not *in futuro* entail the gradual (self-)abolishment of the highest defender of human rights.

III.

9. If I put the right to a referendum on one side of the scales, considering that voters can only decide on some unessential, incidental, and more or less technical issues, all of which brings the specific weight of this right closer to ‘voidness’ (at the referendum, the voters could not vote on whether permits for permanent residence should be issued to the children of the citizens of other republics of former Yugoslavia who were born in the Republic of Slovenia after 25 June 1991, because these children would be in a worse position than their parents, because this issue involves the human rights of children; likewise, they could not vote on issues concerning those Slovenian citizens who had been removed from the register of permanent residents and had acquired citizenship without having first acquired a permit for permanent residence), and all the rest on the other side of the scales – that is, not only human rights, the observance and protection of which are provided for in the ARSCOSS-B (dignity, equality before the law, safety)[11] with which the National Assembly attempted to remedy the unconstitutionalities established in points 1, 2, and 3 of the reasoning of Decision No. U-I-246/02, but also the fact that the failure to abide by a decision of the Constitutional Court constitutes a violation of Article 2 and the second paragraph of Article 3 of the Constitution and that more than seven years have elapsed since Decision No. U-I-246/02 was issued, I am convinced that the constitutional values guaranteed by the ARSCOSS-B should be given priority – irrespective of the fact that it is not known how many persons cannot regulate their legal status without the ARSCOSS-B (these are individuals who were not actually present in the Republic of Slovenia at the time the ARSCOSS was enforced – either due to the measure of the forcible removal of an alien from the country or because they had left the Republic of Slovenia for reasons directly related to their removal from the register of permanent residents). The prohibition of a referendum can indeed be based

only on actual, concrete, and proven (not only theoretical, but also tangible) unconstitutional consequences which would occur due to the rejection of an act in a referendum, which means that the National Assembly in requesting this prohibition must by means of definitions factually and concretely state (and prove) that the rejection of the act at the referendum would give rise to such consequences. However, the case at issue is special in this regard. I believe that the burden of the claim and the burden of proof are shifted here. Shifted because the meaning and the purpose of the ARSCOSS-B are completely clear and undisputable: to remedy the unconstitutionalities established in Constitutional Court Decision No. U-I-246/02. In such cases the National Assembly need not separately allege and prove that the postponement of the enforcement of an act or the rejection of an act in the referendum would give rise to unconstitutional consequences. One unconstitutional consequence is already the very fact that the Decision of the Constitutional Court has still not been implemented. The Decision of the Constitutional Court by which the Constitutional Court established an unconstitutionality (the Constitutional Court would not have established that if it had not been convinced of the existence of unconstitutionality)[12] and the finding that by this regulation the National Assembly eliminates the unconstitutionalities established in the Decision are already enough. If the referendum proposers are of the opinion that the rejection of the Act at the referendum would not give rise to unconstitutional consequences or that these would be so negligible or of such little importance that the right to referendum decision-making should be given priority (or as I see it, that it is still possible to talk about the existence of the human right to a referendum), then the burden of proof is on them. The lack of reliable data on how many people who had been removed from the register of permanent residents could be considered entitled persons pursuant to the ARSCOSS-B because without this Act they cannot regulate their status (in other words, the number of people who, for reasons directly associated with the removal from the register, were not actually present in the Republic of Slovenia upon the enforcement of the ARSCOSS and thus could not regulate their legal status) cannot serve as an excuse for the failure to abide by the decision of the Constitutional Court.

10. To conclude: the encroachment on the right to a referendum is in this case shallow, superficial, and therefore negligible (this right only exists for the purpose of regulating some incidental, more or less technical issues which due to their organic relation to the subject matter of the retroactive recognition of permanent residence could not be, in the nature of things, regulated separately by some other act; as regards the essential issue, namely the question of whether the unconstitutionalities established in points 1, 2, and 3 of the operative provisions of Decision No. U-I-246/02 should be remedied, there is no right to a referendum). On the other hand, the rejection of the Act at the referendum would deeply interfere with a constitutional value, i.e. compliance

with the decisions of the Constitutional Court, and with the very essence of the rights which are (for now only on paper) protected by the Decision of the Constitutional Court.

Jan Zobec
Judge

Dr. Ernest Petrič
Judge

Endnotes:
[1] The weighing (and balancing) of the competing values is a difficult and dangerous task (it can easily overstep intuition and become arbitrary). It is impossible to compare colours and smells, length and weight; likewise, individual constitutional goods are beyond metrical comparison. Balancing (in law, this concept should be understood only metaphorically – cf. Tsakyrakis, Proportionality: An Assault on Human Rights?, International Journal of Constitutional Law, Vol. 7, Issue 3 (2009), p. 473) does not mean quantifying but establishing relations between the competing values and requires argumentative skills. What weighs heavily and prevails in the end, what is decisive, is the argument, the rational justification of the decision underpinned by the law of balancing, according to which the permitted degree of non-fulfilment of one value depends on the importance of the recognition of the competing value (cf. R. Alexy, A Theory of Constitutional Rights – trans. J. Rivers, Oxford University Press, Oxford. 2002, p. 101 et seq. In an individual case it is not the value with greater weight that prevails but the value which is supported by stronger arguments in the concrete circumstances.
[2] See M. Avbelj, Ustavni monizem in krčenje referendumskega odločanja – kritična analiza doktrine zlorabe referenduma, Revus, Issue 4 (2005), p. 87.
[3] Ibid.
[4] Ibid., p. 86.
[5] Ibid., p. 93.
[6] This threat is well illustrated by an interesting and topical consideration of B. M. Zupančič, namely that "[t]oday […] under the influence of manipulative media, it is particularly easy to mislead a democratic majority into electing an undemocratic tyrant", followed by "[s]topping a widely supported Milošević or for this part even a Haider, Kučma, Hitler, Mussolini, etc. […] is only possible on the basis of the constitution, which functions as an agreement subjecting the carriers of executive power to a Constitutional Court review" (European Convention on the Protection of Human Rights and Fundamental Freedoms; on its 50th anniversary, Information and Documentation Centre of the Council of Europe at NUK, Ljubljana 2000, p. 1).
[7] North American constitutional history features a well known case concerning the Constitution of the State of Colorado, which in 1912 (supported

by the zealous endeavours of T. Roosevelt) introduced through constitutional amendments the institute of the recall of judicial decisions, according to which the people had the right to recall in a referendum a decision of the Supreme Court of the State of Colorado which had declared a law or a city statute unconstitutional, and thus the unconstitutional legal act remained valid. Later the Supreme Court [of the United States] declared this constitutional amendment to be contrary to the Constitution of the United States. For more see S. Stagner, The Recall of Judicial Decisions and the Due Process Debate, American Journal of Legal History, Vol. 24, Issue 3 (1980), pp. 257-272.

[8] It is evident at first sight that the referendum would be burdened by a democratic deficit – and that instead of having a legitimising, legislative, and supervisory character, it would have a political one (cf. A. Teršek, Z referendumom nad demokratičnost in legitimnost, Pravna praksa, Issue 7 (2004), p. 37). This intention of the referendum proposers (which somewhat reduces the 'weight' of the right in the case at issue) is evident from their reproaches against Constitutional Court Decision No. U-I-246/02, on which the ARSCOSS-B is based; the above-mentioned reproaches are stated in point 43 of the reasoning of the Decision.

[9] And therefore the test of proportionality should not be used, whereby the court ponders what price must be paid for interfering with a right and which, in the allegory of J. Rivers, means that a nutcracker should be used to crack nuts and not a mallet – the latter only in the case the nutcracker is ineffective. In this case the use of a mallet and a nutcracker is of no relevance – it is the responsibility of the court to preserve the nut intact (cf. S. Tsakyrakis, cited work, pp. 492-493).

[10] It is true that 'only' a law can stipulate that the decisions of the Constitutional Court are binding. But this would also apply if the law did not stipulate that – such an effect follows already from the constitutional status and the jurisdiction of the Constitutional Court (Articles 160 and 161 of the Constitution).

[11] One question is whether those persons who had been removed from the register of permanent residents can perhaps become a group pushed to the margins of society due to strong social stigmatisation and therefore have to be considered a specific (definable) social minority. In such case of a direct conflict (between the social majority and minority) this should give sufficient reason to narrow the scope of the right to direct participation in the management of public affairs and the right to decide at a referendum, particularly because restrictive interference with the rights of one group of people cannot be justified by the protection of the rights of another group (cf. A. Teršek, Ustavnopravne meje referendumske demokracije – ob odločbi US RS št. U-I-111/04-21 in "Primer džamija", Revus, Issue 5 (2005), p. 85). This circumstance could thus represent additional 'weight' in favour of the prohibition of the referendum (the protection of a civilised individual against the violence of others has always been the function of everything legal – see B.

M. Zupančič, ibid.) – but not when such a group enjoys very strong support from the majority exerting influence in terms of politics and the media.
[12] Last but not least, it follows from point 27 of the reasoning of Decision No. U-I-246/02 that the number of persons to which it refers is not high. Namely, the Constitutional Court stated that "… it does not exclude the possibility that some citizens of other republics left the Republic of Slovenia also for fear of the pronouncement of the measure of the forcible removal of an alien pursuant to Article 28 of the AA, even if such measures had rarely been pronounced and the unregulated residence status of the citizens of other republics had generally been tolerated."

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