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OPINION

ON THE CONSTITUTIONAL AMENDMENTS CONCERNING LEGISLATIVE ELECTIONS IN THE REPUBLIC OF SLOVENIA

adopted by the Venice Commission at its 44th Plenary Meeting (13-14 October 2000)

on the basis of the opinion of the Rapporteurs:

Mr Antonio LA PERGOLA (President)
Mr Pieter VAN DIJK (Member, Netherlands)
Mr Sergio BARTOLE (Substitute Member, Italy)

By letters of 21 July and 7 September 2000, the Prime Minister of the Republic of Slovenia, Dr Andrej Bajuk, addressed to the European Commission for Democracy through Law the question whether amendments introduced to the Constitution of Slovenia concerning provisions on Parliamentary elections, by which a proportional electoral system with a threshold of 4% for access to the distribution of seats in the National Assembly is established, is compatible with European democratic traditions and standards. The request indicated in this respect that these amendments conflict with the decision of the people as expressed in a referendum and decisions of the Constitutional Court.

The Commission examined the factual and legal background of the request for an opinion (see the summary of facts in Doc CDL (2000) 61 and the Prime Minister's letter of 7 September 2000) on the basis of the report by Messrs Antonio LA PERGOLA, Pieter VAN DIJK, Sergio BARTOLE, Rapporteurs at its 44th Plenary Meeting, 13-14 October 2000, in the presence of: Mrs Barbara BREZIGAR, Minister of Justice, Mr Jelko KACIN, Chairman of the Foreign Affairs Committee of the National Assembly, Mrs Tina BITENC PENGOV, Deputy Director and Acting Head of the Secretariat of Legislation and Legal Affairs of the National Assembly, Mr Miro CERAR, Constitutional Adviser to the National Assembly and Mr Klemen JAKLIC, Legal Councillor to the Prime Minister.

The Commission notes that the question raised by the Prime Minister concerns the relationship between the people's power, exercised in accordance with the Constitution (Article 90), and the National Assembly's power to amend the Constitution.

By its decision of 8 October 1998 the Constitutional Court found that the proposal for a majoritarian electoral system submitted to referendum on 8 December 1996 had been approved. Its also concluded that the National Assembly was bound to adopt, within a reasonable time, a law regulating the electoral system in accordance with the results of the referendum. The Constitutional Court further stated that this obligation is not only political and ethical but also legal. In this respect the Constitutional Court clearly recalled that despite its character as "preliminary" (because no specific norms were adopted but only a "legislative concept"), the referendum was clearly binding. The National Assembly should not therefore either adopt a law whose contents would be incompatible with the said concept or unduly delay the adoption of a law. Otherwise, the citizens' constitutional right as enshrined in Article 90 of the Constitution would be theoretical or illusory.

Despite the clear indication to the legislator by the Constitutional Court, the National Assembly did not pass the electoral law.

Undoubtedly, the situation as described above amounts to a constitutional impasse that may hinder the effective operation of democratic institutions. On 25 July 2000, in reaction to this situation, the National Assembly passed a constitutional amendment establishing a proportional electoral system with a threshold of 4% for access to the distribution of seats in the National Assembly.

The Commission finds that it is the duty of both the legislator, representing the sovereign people, and the Constitutional Court, the guardian of the Constitution, to ensure that constitutional institutions of the State are able to perform their duties and are not exposed to a risk of paralysis. It understands, on the basis of the second letter by the Prime Minister of Slovenia, that it is not required to suggest alternative solutions, if there were any, to the impasse described above, but rather to consider whether the amendments to the Constitution adopted on 25 July 2000 represent a solution compatible with European democratic standards.

In this respect the Commission recalls that adopting a proportional electoral system even with a threshold is certainly not in conflict with European democratic standards. Moreover, the constitutionalisation of the choice of the electoral system, although not very frequent, is followed in several European countries (e.g. Austria) and cannot be said to be incompatible with these standards either.

The Commission further observes that the National Assembly enacted the Constitutional Act amending Article 80 of the Constitution pursuant to Article 169 of the Constitution. In doing so, the National Assembly acted as a constitution making power ("*constituant*"), in accordance with the procedure provided by the Constitution of the Republic of Slovenia for its own amendment, and not as common legislator. From this perspective, there is no conflict between the decision adopted by referendum and the constitutional amendments of 25 July, as the latter, being of constitutional value, obviously prevails and takes precedence over the decision of "preliminary" legislative character adopted by the referendum.

It can of course be argued that the referendum is the manifestation of popular sovereignty and that, therefore, the validity of decisions taken by referendum can never be challenged in a democratic society. However this approach is nowadays hardly tenable. Most European Constitutions, including the Constitution of Slovenia, lay down the procedure for the referendum and define its possible scope. Moreover, there is a clear tendency in Europe today to make more frequent use of referendum as an instrument of direct democracy for legislative purposes and in this respect the referendum is subject to a control as to its compatibility with the Constitution. Consequently, both the procedural and substantive aspects of the people's action designed to introduce new law or remove existing law are clearly subjected to constitutional scrutiny[1]. Definitely, and notwithstanding their undisputed political value, decisions taken by legislative referendum are not beyond the reach of the Constitution.

[1] In a recent judgment, the Portuguese Constitutional Tribunal emphasised this approach by clearly stating that the subject of the referendum should be constitutional. Ultimately, subjecting decisions taken by referendum to constitutional review amounts to reconciling the principle of majority with the principle of constitutionality (*Diàrio da Republica n° 91, 18.04.1998, 1714(2)-1714(35); Bulletin of Constitutional case law POR-1998-1-001*). The Venice Commission has on several occasions stressed the need to closely observe the constitutional provisions on amending the Constitution, even when it comes to constitutional referenda (cf. *Opinion on the Constitutional Referendum in Ukraine, of 31 March 2000, CDL-INF (2000) 11; cf. also the Commission's position concerning the constitutional referendum in Moldova*).

This is all the more so as the referendum cannot be regarded as an exercise of sovereign power by the people, but rather it is the expression of the will of the people by a means regulated within the framework of the Constitution. This is true also for constitutional systems that establish a co-habitation of popular and parliamentary sovereignty, as is the case of Slovenia where the people are not excluded from the process of constitutional revision (Article 170 of the Constitution of the Republic of Slovenia). The Commission finds that there is no common European standard according to which the results of any referendum of whatever nature are binding upon the constituent power even in the absence of a constitutional provision. Consequently, the results of the referendum of 8 December 1996 should not prevent the National Assembly from exercising its constitution making powers under the Constitution.

The Commission finally notes that the National Assembly is politically responsible to the people for deciding to amend the Constitution and constitutionalise the choice of the proportional electoral system. In this respect the fact that legislative elections are to be held in the near future and the sovereign people will have the opportunity to manifest its approval or disapproval of the National Assembly's stand is in itself a guarantee for democracy.

In view of the fact

-that there was a need to react urgently, in view of the forthcoming elections, to the risk of paralysis of the democratic functioning of the State,
-that the National Assembly acted as a constitution making body whereas the referendum of 8 December 1996 was of "preliminary" legislative character,
-that the Constitutional amendment was enacted in compliance with the Constitution, and
-that the National Assembly's responsibility is engaged at the forthcoming legislative elections,

The Commission finds that the National Assembly's reaction to the risk of a constitutional impasse, i.e. the adoption of amendments to the Constitution adopted on 25 July 2000, in strict compliance with the latter's relevant provisions, is not in conflict with European democratic standards.

The Commission would further suggest that the National Assembly considers in the near future which legislative and possibly constitutional amendments are required to avoid the risk that similar situations arise again in Slovenia. They recall in this respect that on several occasions constitutional bodies in other European countries have been confronted with a similar risk. In a judgment given on 18 January 1995 *(Gazetta Ufficiale, Prima Serie n° 3; Bulletin of Constitutional Case-law ITA-95-1-001*), the Constitutional Court of Italy, seized with the question of admissibility of a referendum to abrogate a set of electoral provisions, laid down some principles that should be followed when it comes to deciding by referendum issues affecting the functioning of constitutional institutions. The Italian Constitutional Court observed that it might be acknowledged that the Parliament has a constitutional duty to co-operate, in that if the outcome of the referendum is in favour of repealing the existing legislation, the Parliament has to introduce (on its own

initiative) legislation to comply where necessary with the wish of the people as expressed in the referendum. However, if after the referendum the legislator fails to introduce new legislation to fill the legal vacuum or amend the electoral provisions, there would be no effective remedy to oblige the Parliament to enact a law and the situation amounts to a crisis in the functioning of representative democracy. To avoid this, a referendum affecting the rules of functioning of constitutional bodies should only be admitted if the rules that remain in force after the referendum allow the constitutional body concerned to function without any further legislative action being required.

A P P E N D I C E S

In accordance with the Venice Commission's decision
at its 44th Plenary Meeting
the following contributions by Mr Peter Jambrek
in collaboration with Mr Klemen Jaklič,
and the contribution by MrsTina Bitenc Pengov,
on behalf of the National Assembly of the Republic of Slovenia,
are appended to the present Opinion

A P P E N D I X I

CONTRIBUTION TO THE OPINION OF THE VENICE COMMISSION ON THE CONSTITUTIONAL AMENDMENTS CONCERNING LEGISLATIVE ELECTIONS IN SLOVENIA[2]

By Peter Jambrek[3], Member of the Venice Commission, on behalf of Slovenia,
in collaboration with Klemen Jaklič[4]

[2] *Opinion 135/2000, Venice Commission, Strasbourg, 22 September 2000. Restricted document.*
[3] *Ph.D. (University of Chicago), former judge of the European Court of Human Rights, former President of the Slovenian Constitutional Court, Professor of Law.*
[4] *LL.M. (Harvard Law School), Legal Counselor to the Slovenian Prime Minister.*

CONSTITUTIONAL AMENDMENT AS THE SOLUTION TO THE IMPASSE

1. The Slovenian Prime Minister dr. Bajuk addressed to the Venice Commission the following question: »Is it consistent with the European constitutional standards and tradition to amend the constitutional provision on parliamentary elections in order to allow a new electoral law which would be, however, inconsistent with the one chosen by referendum whose results were upheld on two occasions by the Slovenian Constitutional Court?«[5]

It is our understanding that, as to the facts, that the case consists of the constitutional amendment contrary to the previously held referendum and contrary to two final and binding constitutional judgements. As to the law, the legal standards to be applied do not necessarily imply domestic constitutional provisions, but above all standards of the evolving European public order. It may in this respect be pointed to the European Human Rights' law, to common European constitutional principles, standards, and heritage, and, last but not least, to the basic Slovenian constitutional provisions related to the rule of law, democracy, and human rights and fundamental freedoms.

2. The Opinion notes at several occasions that Slovenian constitutional situation amounted, prior to the controversial constitutional amendment, to »a constitutional impasse«, »a risk of paralysis«, or »a crisis in the functioning of representative democracy.« There were clearly three alternative practical solutions to the constitutional impasse, i.e., (a) to enact the majority electoral law in compliance with the referendum and the two constitutional judgements, (b) to follow the Slovenian Government's proposal for a constitutional amendment allowing a new Swiss modelled legislative referendum, or (c) to enact amendments to the Constitution by which a proportional electoral system would be established. There was, of course, also a fourth possibility: that the National Assembly would abstain from action, and thus the old electoral law would remain in power. The Venice Commission did not feel required to either asses the four alternative solutions before the Parliament as a »constituent«, neither did they suggest other solutions. Such decision on the part of the Commission was, in our opinion, not a necessary one. It is, nevertheless, a prudent and practical one in view of the fact that one solution was already adopted, and »Herewith a new constitutional situation was created«[6]. The Opinion does not preclude, however, the Venice Commission to co-operate with the Slovenian authorities in considering »which legislative and possibly constitutional amendments are required to avoid the risk that similar situations arise again in Slovenia« [7]. Nor should it preclude a response, possibly incorporated in the forthcoming Venice Commission opinion, to Slovenian Prime Minister's quest for an opinion on ways to avoid future conflicts or delays[8]. We welcome such future cooperation.

3. The Opinion recalls that neither adopting a proportional electoral system, nor to constitutionalise such system is »in conflict with European democratic standards«. They also note that the constitutional amendment was adopted according to the valid procedure. We agree entirely with the assessment, which nevertheless represents obiter dictum which is not directly related to the case.

4. The Opinion also recalls on several occasions, that both constitutionalisation of the referendum, and its subsequent constitutional control, are in line with the European constitutional

[5] *Prime Minister's letters of 21 July 2000 and of 7 September 2000.*
[6] *Prime Minister's letter of 7 September 2000.*
[7] *Opinion 135/2000 of 22 September 2000.*
[8] *Prime Minister's letter of 7 September 2000, in fine.*

practice.[9] We also agree on this point. The respective assessment in the Opinion also has status of obiter dictum to the main case[10].

5. The place where the Opinion gets to the core of the matter, represents the following statement: »...there is no conflict between the decision adopted by referendum and the constitutional amendments of 25 July, as the latter, being of constitutional value, obviously prevails and takes precedence over the decision of 'preliminary' legislative character adopted by the referendum.« We are in agreement with the above assessment in so far as it refers to the legality sensu strictiori of the newly enacted proportional electoral law and given that the Slovenian Constitutional Court did not apply the doctrine of unconstitutional constitutional amendment to the case at hand[11].

From a legal technical and legal positivist point of view, constitutional amendment prevails over the decision adopted by the referendum. In thi respect, the Slovenian parliamentary elections may be considered legally correct. They cannot be subjected to constitutional scrutiny in Slovenia as long as the Slovenian Constitutional Court does not choose to apply the German doctrine of unconstitutional constitutional amendment.

This point, again, was not directly disputed by the question raised by the Slovenian Prime Minister, who referred to »the European constitutional standards and tradition.«

6. The Opinion also addresses the latter issue. It states that »there is no common European standard according to which the results of any referendum of whatever nature are binding upon the constituent power.«[12], and concludes that »the adoption of amendments to the Constitution adopted on 25 of July 2000..., is not in conflict with European democratic standards.«[13] .

As to the reasoning on this point the Opinion refers (a) to the political responsibility of the National Assembly in constitutionalising the choice of the proportional electoral system, (b) to the need to react rapidly to the risk of paralysis of the democratic functioning of the state, and (c) to the fact that legislative elections are to be held in the near future (where the people will have the opportunity to manifest its approval or disapproval of the National Assembly's stand).

7. As to the first two arguments we refer to the list of four alternative solutions indicated supra under 2. We suggest the following rank-order of the four solutions relative to the standards of constitutional democracy: First, compliance with the referendum and constitutional judgements, implying the adoption of the majority electoral system; second, adoption of a constitutional amendment allowing a »genuine« (and not »a preliminary«) legislative referendum, followed by the new electoral referendum; third, which is the present situation, constitutionalisation of the proportional electoral system; and fourth, continuing constitutional impasse due to the legislative non-action. It is in our view difficult to argue that »parliamentary political responsibility« or »the need to react rapidly to the risked paralysis« imply »European democratic standards« without considering the choice among the four available ways of exerting political responsibility to avoid paralysis of institutions of the state.

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[9] *C.f., paras. 3, 4 on page 3, para. 1 on the page 4, passim.*

[10] *Rapporteurs note that »...people's actions...are clearly subjected to constitutional scrutiny«, and quote the respective judgement of the Portugese Constitutional Tribunal (see para. 4, and ft. 1 on page 3 of the Opinion). The point is clearly undisputed. Rapporteurs could maybe more relevantly refer to a number of Slovenian constitutional provisions and judgements which were supplied to the Venice Commission and are directly applicable to the case at hand.*

[11] *For more on this doctrine see infra, last section of the present draft.*

[12] *Para. 1 on page 4.*

[13] *Para. 4, same page.*

8. The argument of the forthcoming parliamentary elections as an implied standard of European democratic society in the specific context could be used to argue for both sides. It was prevailing aim of the aborted referendum to change the electoral rules, which presumably have effect on electoral outcome. The argument, that elections, regulated by rules contrary to the referendum outcome, could imply European democratic standards, seems almost self-refuting.

COMMON EUROPEAN CONSTITUTIONAL HERITAGE
AND THE RESPECTIVE STANDARDS

9. May we instead respectfully suggest, to consider common European constitutional standards that seem to have been violated by the Amendment to the Slovenian Constitution adopted on 25 July, 2000. For this purpose it is necessary to clearly distinguish the purpose and the nature of the said constitution maker's action.

First, the immediate aim of the newly introduced constitutional norm was to suppress, and not to regulate. Its teleological intent and effect was to set aside and to nullify ex tunc the referendum and the Constitutional Court's decisions.

Secondly, the constitutional amendment exerted retroactive effect upon acquired rights of those persons, who already got the chance to enjoy their constitutional right to direct democracy via legislative referendum.

Thirdly, the constitutional amendment made null and void a binding decision of the Court of last instance, and thereby deprived ex tunc the victims of the constitutional amendment of their right to a court, protected both by the Slovenian Constitution and by the European Convention on Human Rights.

We in addition suggest that the constitutional amendment at issue exerted a prevailingly suppressive function and therefore prima facie departs from a »normal« constitutional provision. The constitution-maker could have avoided the suppressive function of the norm by explicitly limiting its effect to the future situations. Retroactivity would in this way be avoided.

10. The intent, the method, and the effect of the disputed constitutional amendment, therefore, in our view interferes with the generally accepted constitutional principles of the forseeability of law and of the confidence in law inherent in the European conception of the rule of law and the Rechtsstaat doctrine. That doctrine is also part and parcel of the Slovenian Constitutional Court case-law from 1991 on.

11. As to the last reference in the Opinion made to the influential Italian judgement,[14] we respectfully point that it has limited relevance to the case at hand. The Slovenian referendum did not aim at repealing any provisions of the existing law. Its constitutional character approximated the model of the legislative referendum of the Bavarian kind.

The Italian judgement on the other hand, referred to acts containing electoral provisions concerning constitutional institutions or those that are of constitutional importance and are made subject to a referendum concerning their repeal. In that case, the judgement holds, inter alia, that if the vote is in favour of repeal, the remaining legislation must be immediately enforceable so as to guarantee that the institution concerned is in a position to function anyway, without further

[14] *Gazetta Ufficiale, Prima Serie no. 3; Bullettin of Constitutional Case Law ITA-95-1-001.*

legislation being needed. All the further reasoning applies to the said specific legal situation, which cannot be compared to the Slovenian one even by way of legal analogy.

UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT

12. We will inspect below the German doctrine of the unconstitutional constitutional amendment and its applicability to the Slovenian case at hand.

In its first major decision in 1951 (the Southwest State case)[15] - many compare this decision with that of Marbury v. Madison of the U.S. Supreme Court - the Federal Constitutional Court of Germany underscored the internal coherence and structural unity of the Basic Law as a whole. »No single constitutional provision may be taken out of its context and interpreted by itself«, declared the Court. »Every constitutional provision must always be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution and the intentions of its authors.«[16] Justice Gerhard Leibholz, commenting on Southwest, elaborated: »The Court holds that each constitutional clause is in a definite relationship with all other clauses, and that together they form an entity. It considers certain constitutional principles and basic concepts to have emerged from the whole of the Basic Law to which other constitutional regulations are subordinate.«[17] In one important case the Court alluded to the »unity of the Constitution as a logical-teleological entity«, a concept traceable to Rudolf Smend's »integration« theory of the Constitution.[18] Smend regarded the Constitution as a living reality founded on and unified by the communal values embodied in a German nation. In Smend's theory, the Constitution not only represent a unity of values, it also functions to further integrate and unify the nation around these values.[19]

An important doctrine that has emerged from viewing the Constitution as a structural unity and a hierarchical system of values is the concept of the unconstitutional constitutional amendment.[20] The Federal Constitutional Court first explained the concept of the unconstitutional constitutional amendment in the Southwest State case (1951) and later accepted it as valid doctrine in the so-called Article 117 case (1953).[21] It has figured more recently in the Klass case (1970), in which

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[15] I BvervGE 14 (1951), the so-called Southwest State case (Südweststaat-Streit).
[16] Id.
[17] See Leibholz, Politics and Law, (Leiden: A. W. Sythoff (1965), at 289.
[18] Rudolf Smend, Verfassung und Verfassungsrecht (1928), 188-89.
[19] Smend's theory has influenced numerous constitutional theorists. See, for example, Ekkehart Stein, Staatsrecht, 8th ed. (Tübingen: J.C.B. Mohr, 1982), 250-53. For a critical assessment of the theory as applied by the Federal Constitutional Court, see Friedrich Müller, Juristische Methodik, 3rd ed. (Berlin: Duncker and Humboldt, 1989), 217-19.
[20] The notion of an unconstitutional amendment first surfaced in an obiter dictum in the Southwest State case, 1 BVerfGE 14, 32 (1951). It appears to have originated with the Bavarian Constitutional Court, which noted in its decision of April 24, 1950: »It is not conceptually impossible to regard a constitutional provision as void even though it is part of the Constitution. Some constitutional principles are so basic and so mush the expression of a legal principle which antedates the Constitution that they bind the constitutional framers himself. Other constitutional provisions which are not of equal rank may be void if they contravene them« (quoted in an advisory opinion prepared for the Federal Constitutional Court by the First Civil Senate of the Federal High Court of Justice, 6 Entscheidungen des Bayerischen Verfassungsgerichtshofes 47). The best critical treatment of this principle is Otto Bachof, »Verfassungswidrige Verfassungsnormen,« in Bachof, Wege zum Rechtsstaat (Königstein: Athenäum Verlag, 1979), 1-48.
[21] 3 BVerfGE 225, 230-236 (1953).

justices seemed to be prepared to invalidate an amendment to Article 10 of the Basic Law limiting the »inviolable« right of »privacy of posts and telecomunications.«[22]

In the Southwest State case the Court explained: »…An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate. Article 79 (3) makes it clear that the Basic Law makes this assumption. Thus this court agrees with the statement of the Bavarian Constitutional Court: 'That a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the Constitution. There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.' From this rule of interpretation, it follows that any constitutional provision must be interpreted in such a way that it is compatible with those elementary principles and with the basic decisions of the framers of the Constitution…«[23]

The doctrine of the unconstitutional constitutional amendment is, therefore, one of several unwritten constitutional principles the Court has deducted from the overall structure of the Basic Law. It holds that even a particular constitutional provision or constitutional amendment may be unconstitutional if it conflicts with the »overarching principles and fundamental decisions.« Democracy and federalism, for example - said the Court in the Southwest State case – are among these overarching principles. Besides the argument of structural unity of the Basic Law as the rationale for the doctrine of unconstitutional constitutional amendment, the justices, in this case, also acknowledged the existence of a higher law (übergesetzliches Recht), transcending positive law, that binds constitution makers and legislators. In the end the court made it very clear that any constitutional provision or amendment in conflict with higher law or the fundamental principles of the Basic Law would be judged unconstitutional.[24]

13. Two years after the Southwest State case the Court accepted the concept of unconstitutional constitutional amendment (in its higher-law rationale) as valid doctrine in the so-called Article 117 case (1953).[25] The Court explained that in case one concluded that there were no limits to what might be put into a constitution would be to revert to a value-free positivism long repudiated both in scholarship and in practice. In the improbable event that a provision of the Basic Law exceeded the outer limits of the higher-law ('übergesetzliche') principle of justice ('die äußersten Grenzen der Gerechtigkeit'), it would be the Court's duty to strike it down.[26]

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[22] *30 BVerfGE I, 33-47 (1970).*
[23] *See supra note 1, I BvervGE 14, 32 (1951).*
[24] *»…Germany might be sad to have three Constitutions. The first is the unamendable constitution, the one that Article 79 (3) of the Basic Law establishes in perpetuity. Indeed, as declared by the Federal Constitutional Court, any amendment to the Basic Law that would undermine or corrode any one of its core values would be an unconstitutional constitutional amendment. The second is an amendable constitution, namely, those parts of the written text that can be altered without affecting the Basic Law's core values. Finally, there are the unwritten, or suprapositive, principles implicit in such terms as 'justice', 'dignity', and 'moral code'. These governing principles, like that hierarchical value order that the Constitutional Court has extracted from the text of the Basic Law, are an important part of Germany's constitutional order. Germany's real constitution, then, includes more than the written text of the Basic Law itself.« (Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, Duke University Press, London and Durham (1997), 38.*
[25] *3 BVerfGE 225, 230-236 (1953).*
[26] *Id. at 234. See also David P. Currie, The Constitution of the Federal Republic of Germany (1994), 219,*

14. The doctrine was reiterated (this time in its »constitution as structural unity« rationale) again in the well-known Communist Party case (1956).[27] In an important section of the opinion the Court dealt with the meaning of the Art. 21(2) of the Basic Law.[28] This section of the opinion begins with the question whether Art 21(2) is contrary to »a fundamental principle of the Constitution« – namely freedom of expression – and thus unconstitutional.[29] The Court's rationale was that the Constitution explicitly or implicitly contains a hierarchy of provisions in which those of subordinate rank must be tested for conformity to its more basic principles. In its scrutiny of the Art. 21(2), however, the Court found no conflict between the challenged provision and allegedly higher constitutional values: Article 21(2) reflected the deliberate decision of the framers that the fundamental principles of constitutional democracy could be preserved only by limiting the freedom of those who would destroy them. The Court's conclusion was, therefore, that the constituent's intent was clearly a legitimate one - to preserve fundamental principles of constitutional democracy. What we argue, however, about the case of Slovenian constituent's action, is precisely the contrary - the lack of a legitimate intent. We argue that history of the Slovenian Parliament's unconstitutional efforts to suppress the referendum on the majority electoral system, the followed Parliament's disobedience of the two Constitutional Court's judgements concerning binding effect of the referendum results, as well as the final action of the constituent (the two thirds of the members of the Parliament) who acted exclusively with a self-acquiring goal, make clear that the intent of the enacted constitutional Act was an arbitrary and illegitimate one.

15. An important role the doctrine played also in the Klass case (1970)[30] in which the justices seemed to be prepared to invalidate an amendment to Article 10 of the Basic Law. In certain aspects the Klass case is similar to the Slovenian situation which is now being reviewed by the Venice Commission. The rule of law (Rechtsstaat) aspect of this case - in which the constituent body's effort to preclude judicial review in certain type of cases was scrutinized by the Court - is especially relevant to the Slovenian situation where, in individual case, judicial protection of direct democracy (and corresponding constitutional rights) as guaranteed by the Constitution was precluded as well.[31]

In the aftermath of the radical activities of the late 1960s Article 10 of the Basic Law was amended to permit the preclusion of judicial review of the legality of postal and electronic surveillance measures in certain national security cases. The Federal Constitutional Court in a controversial split decision managed to uphold this amendment against the argument that it offended Article 79(3) by impairing fundamental principles of human dignity, the separation of

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note 201. See also Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (1997), 48.

[27] 5 BverfGE 85, (1956).

[28] Art. 21(2) of the Basic Law: »Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic Of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.«

[29] 5 BVerfGE at 137.

[30] 30 BverfGE I, (1970).

[31] In the Slovenian case, we argue, the constituent's preclusion (suppression) had no legitimate goal, but rather clearly an arbitrary and suppressive intent. We agree that in case the constituent acted with a legitimate intent (e.g. if members of the constituent body were of the opinion that proportionate system is more suitable in Slovenian circumstances than the majority system which won the referendum etc.) and were such intent not just simulated or feigned, the constituent's preclusion of judicial review in individual case would not be controversial at all. (See infra, the end of the 17th section)

powers, and the rule of law, but only after insisting that the case was exceptional and that the alternative tribunal to which the reviewing function was entrusted be as independent as the courts themselves. It seems that if the opposite were the case (i.e. if the alternative tribunal was not as independent as the courts themselves) the justices would annul the amendment on the basis of human dignity, separation of powers and the rule of law. Moreover, there in fact were three vigorous dissents which - irrespective of the claimed degree of independency of the alternative tribunal - nevertheless declared the amendment as unconstitutional.

The majority decision has been criticized by Wassermann[32] and also by Schmidt-Aßmann[33], who stated: »Judicial protection of individual rights against acts of public authority basically cannot be excluded even by constitutional amendment«. Recently Hesse[34] has also argued that in upholding the exclusion of judicial review this decision »sacrifices a fundamental principle of the rule of law«.

16. If a certain constitutional democracy decides to adopt the doctrine of unconstitutional constitutional amendment, then the following becomes a pivotal question: which is that substance that, within the boundaries of specific society, binds even a constituent body in a way that its amendment must be in accord with the fundamental principles and basic orientations of the constitution? This is the question of what are those values and political ideals that certain society or state considers so fundamental that it determines them as preconditions of its own legitimate functioning. Indeed, answers to the question about what those values and ideals are, might differ with respect to different historical, cultural, political etc. contexts of different types of societies. However, the fact is that each modern democratic government under law by definition rests on the premises of democracy (popular sovereignty) and the rule of law. No doubt, these two are among those fundamental principles which are – by a constitution of the democratic state – determined as preconditions to the existence and functioning of such a state (state as »democratic« and as regulated by »rule of law«).

That these two principles – democracy and the rule of law – are among those fundamentals which limit even the latitude of the democratic (but not for example a totalitarian) constituent body in its amending capacity is very much clear in the German constitutional democracy. Germans have even formally put this rationale into Art. 79(3) of the Basic Law which states: »Amendments of this Constitution affecting the division of the Federation into States, the participation on principle of the States in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible.« In its Art. 1 the Basic Law explicitly declares that a long list of fundamental rights cannot constitutionally be revised, regardless of the extent to which a majority of Germans support repeal. Given this self-conscious act of entrenchment, it would be absolutely right for the German constitutional court to issue an opinion striking down an amendment blatantly violating one of the fundamental rights. Under this foundationalist constitution, judges would be within their rights to continue resisting: if the dominant political majority insisted on repeal, it would be obliged to replace the entire constitution with a new one in its grim determination to destroy fundamental rights.[35]

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[32] Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (1984): 1 AK-GG, Art. 19, Abs. 4, Rdnr. 62.
[33] 2 Maunz/Dürig, Art. 19(4), Rdnr. 30.
[34] Grundzüge des Verfas-sungsrechts der Bundesrepublik Deutschland (1991, 18nd ed.), Rdnr. 377.
[35] For a good comparative (U.S. – Germany) treatment of this issue see Bruce Ackerman, We The People, Foundations, (sixth printing, 1999), 10-16.

As mentioned, according to Art. 79(2), the same entrenchment as for Art. 1 would also apply to the substance of Art. 20. Art. 1 in its section 1 provides that »The Federal Republic of Germany is a democratic and social federal state« Section 2 speaks of popular sovereignty, democracy and the separation of powers: »All state authority emanates from the people. It is being exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary.« Section 3 speaks of rule of law: »Legislation is subject to the constitutional order; the executive and the judiciary are bound by law and justice.«[36]

GERMAN DOCTRINE APPLIED: THE CASE OF THE SLOVENIAN CONSTITUTIONAL AMENDMENT

17. German doctrine, therefore, clearly shows that in certain circumstances even a constitutional amendment can be declared unconstitutional and that one cannot a priori and ad absolutum refuse the amendment-reviewing competence of a constitutional court. The question, of course, is whether constitutional court of a specific country will decide to adopt the doctrine, and if, in which kind of cases. This would probably depend on specific historical and cultural context, constitutional tradition of the country, its susceptivity for comparative constitutional solutions[37], the level of its legal culture etc. Study of these and other factors would exceed the scope and purpose of this part of the brief which only is to warn that we should not a priori exclude the possibility that the Slovenian Constitutional court could or should decide to apply the German doctrine and thus declare the Constitutional Act as unconstitutional. This seems to be all the more so since the Slovenian constitutional thought and practice are - due to the lack of experience in and knowledge about democratic constitutional tradition - hardly, if at all, familiar with this doctrine. Before making a claim that a constitutional amendment is a priory and ad absolutum out of the Slovenian Constitutional court's scrutiny one should see this thoroughly explained (for example by the Court itself).[38]

18. According to the doctrine of unconstitutional constitutional amendment the Constitutional Act as enacted by the Slovenian constituent body could be declared as unconstitutional in case it infringed on fundamental principles declared by the Constitution. The principle of democracy - which according to the Slovenian Constitution explicitly consists of direct as well as indirect democracy[39] - as well as the principle of rule of law (Rechsstaat)[40] are definitely among such fundamental principles.

19. The key question, therefore, should be the following: In which kind of situations can it be argued that a constituent body infringes on the fundamental principles of democracy and rule of law and in which kind of cases such infringement - by definition - is not possible to argue. We suggest to see the answer to this question as a difference between at least somewhat legitimate

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[36] There is also Section 4 which provides: »All Germans have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible.«

[37] Slovenian constitutional jurisprudence has been especially susceptive for constitutional practice of the Federal Constitutional Court.

[38] The Constitutional Court in its decision, U-I-32/93, from 13. 7. 1993 (OdlUS II, 68) stated: »The Constitutional Court is not competent to scrutinize legal norms of constitutional nature…« (See also decision U-I-214/00). However, the Court has not at all explained this rationale. The fact that there is no argumentation confirms that the Court simply took the rationale as granted.

[39] Art. 3 Sec. 2 of Slovenian Constitution provides: »In Slovenia, supreme power is vested in the people. Citizens exercise that power directly, and at elections, consistently with the principle of the separation of legislative, executive and judicial powers.

[40] Art. 2 of Slovenian Constitution provides: »Slovenia is a state governed by the rule of law and is a social state.«

intent and action of a constituent body on one hand, and its absolutely arbitrary intent and action on the other. A particular amendment of a constituent body which in a blatantly arbitrary way infringed on fundamental constitutional principles would not be legitimate and might not even be constitutional. The core of the doctrine of unconstitutional constitutional amendment, after all, is to preserve legitimacy by defending those values and principles that the constitution considers as fundamental. It does so by defending them from particular constitutional amendments the substances of which are not fundamental. The doctrine of unconstitutional constitutional amendment is where the concepts of fundamental legitimacy and constitutionality meet in one. We suggest that the constitutional amendment which exerts a prevailingly suppressive function and in the same time arbitrary (out of no legitimate reason or intent) interferes with fundamental constitutional principles prima facie departs from a »normal« constitutional provision.

CONCLUDING REMARKS

20. According to the above reasoning, the Constitutional Amendment which has been enacted **solely out of arbitrary intent and reasons** - to supersede the referendum results and to override the two final judgements of the Constitutional Court - could be declared as unconstitutional. In the mentioned German Klass case,[41] for example, the justices were prepared to annul an amendment which would preclude judicial review in certain type of cases on the ground of the Rechtsstaat principle in connection with the human dignity and separation of powers principles. The arbitrary preclusion of judicial review, which Slovenian constituent body has established for the individual case by enacting the Constitutional Amednment, can similarly be characterized as infringement of the rule of law (Rechtsstaat) principle in connection with the principle of democracy and thus judged unconstitutional.

We again do not claim hat the Slovenian Constitutional Court should have acted according to the German doctrine of the unconstitutional constitutional amendment. We simply point to the fact there exists a European constitutional doctrine and practice which would have allowed for that.

21. We agree that in case the Constitutional Amendment were enacted out of non-arbitrary legitimate reasons and intentions (if the constituent body, for example, were of opinion - this opinion should not be just feigned or simulated - that the referendum decision for the majority electoral system was harmful, disadvantageous or improper for the Slovenian context) there would not be a single doubt about its constitutionality. Such an amendment would be constitutional by definition - as a normal political expression of the supreme constitution-making power. What we argue, however, about the case of Slovenian constituent's action, is precisely the contrary - the lack of a legitimate intent. We argue that history of the Slovenian Parliament's unconstitutional efforts to suppress the referendum on the majority electoral system, the followed Parliament's disobedience of the two Constitutional Court's judgements concerning binding effect of the referendum results, as well as the final action of the constituent (the two thirds of the members of the Parliament), make clear that the intent of enacting this Constitutional Amendment was an arbitrary and illegitimate one.

22. The disputed Slovenian constitutional amendment and the respective electoral system may, in our view, be defended only from a legalistic point of view and only within the framework of a national constitutional legal system. This approach is nowadays hardly tenable as an exclusive one and may only represent one aspect of legitimacy of a particular legal action. European legal

[41] *See supra, sec. 15.*

evolution is forcefully driven into the perspective of domestic and international supervision of national legal action on grounds of common cross-national legal standards and principles.

We point in this respect to the commonplace that Constitution and judicial-control of constitutionality set increasingly clear margins of appreciation to the legislative action.

23. Furthermore, a parallel development of margins set also to the domestic (national) constitution-maker by common legal-constitutional standards recognised by a community of nations, such as the Council of Europe, or the European Union are, is gaining widespread recognition.

The possibility of domestic control of abuse of constitution-making power also gains respect. Mechanisms are being developed to overrule the respective fraudulent constitutional actions, especially if they interfere with human rights and fundamental freedoms.

24. The salience of the issues discussed requires in our view a balanced approach based upon domestic and trans-national, legal-technical and the principled standards of European constitutional traditions. We do no hide our disappointment that the discussed Opinion of the Venice Commission remained largely uninformed of the respective developments in the evolving trans-national and the domestic constitutional law.

A P P E N D I X II

COMMENTS BY THE NATIONAL ASSEMBLY OF THE REPUBLIC OF SLOVENIA

By Mrs Tina Bitenc Pengov,
Deputy Director
and Acting Head of the Secretariat of Legislation and Legal Affairs
of the National Assembly

The President of the National Assembly has informed the Secretariat for Legislation and Legal Affairs of the National Assembly about his correspondence with your esteemed Commission and in respect to the issue you were asked to consider by the President of the Government of the Republic of Slovenia he requested the Secretariat to formulate an opinion, which would summarise the stance of the National Assembly and throw light on the most important substantial circumstances in which the National Assembly deliberated and decided to incorporate the electoral system principles into the Constitution of the Republic of Slovenia.

In view of the above we believe that the following needs to be underlined.

Over the last one year and half the National Assembly as the body which passes laws and constitution has particularly focused its efforts on providing Slovenia with an undisputable electoral system in due time, before this year's parliamentary elections. As you may know, in December 1996 a referendum on electoral system was held in Slovenia. Voters were deciding among three referendum questions, containing basic features of combined, two-round majority and proportional electoral system. In December 1996 the National Electoral Commission declared referendum results, on the basis of which it established that 1,537,529 citizens were entitled to vote, that 583,380 of them cast their vote at the referendum and that of all valid votes cast 14.4% were for the combined system, 44.5% for the two-round majority system and 26.2% for the proportional system. The Constitution of the Republic of Slovenia in its Article 90, paragraph 4 stipulates that a referendum proposal is approved if a simple majority of the voters voting at the referendum vote in favour. The official results clearly indicated that none of the questions i.e. proposals at the referendum won the necessary majority and none was binding on the National Assembly pursuant to Article 90, paragraph 1 of the Constitution. The realisation of a referendum with multiple proposals had been preceded by a rather comprehensive process of harmonisation of views between the Constitutional Court and the then National Assembly regarding vote split. In this framework the National Assembly eventually in October 1996 passed a special law for establishing the results of the referendum in question, which however did not entirely prevent the effect of vote split. On the basis of this law the National Electoral Commission established and declared the above mentioned referendum results.

In October 1998 the Constitutional Court of the Republic of Slovenia with five votes in favour and three against (with one of the judges not voting) passed a decision (U-I-12/97), which established and interpreted the electoral system referendum results differently from the National Electoral Commission. According to this decision at the referendum in question the two-round majority electoral system was approved. Pursuant to the Constitutional Court Act, Article 1, decisions of the Constitutional Court are binding.

Following this decision the National Assembly four times deliberated and voted on the two-round majority electoral system, as required in the findings of the Constitutional Court's decision. However, in each attempt less than two-thirds of its members voted in favour, which did not constitute absolute two-thirds majority required by the Constitution for amending or passing a law regulating parliamentary elections and thus the two-round majority electoral system was not enacted. During these deliberations it became obvious that the proposal, which was approved according to the Constitutional Court's decision, contained only the basic principles of the two-round majority electoral system, whilst many other important issues that needed to be regulated in

this context had to be decided by the members of the parliament. For example the referendum proposal required the formation of 88 constituencies, but it did not give any guidelines on how to form them. In the framework of the attempts to enact the two-round majority electoral system it was the issue of constituencies which acquired importance and, at a certain point, became the crux on which the necessary consensus could not be reached among the National Assembly as well as professional and non-governmental community (especially local authorities).

It needs to be stressed that the Constitutional Court's decisions requiring positive legislative action from the National Assembly are the most difficult ones to be adhered to, because ultimately they depend on the ability of reaching political consensus and on the quality of concrete solutions put forward. This problem became particularly evident in the case of the said Constitutional Court's decision, as partly explained above, since on top of all it triggered very contradicting legal and political opinions. This has to be considered taking into account the fact that at the referendum on electoral systems in 1996 only 16.9% of electorate in Slovenia voted in favour of the two-round majority system.

Due to the fact that in the period before the elections were called the issue of legitimacy of the existing electoral system was politically inflamed, the National Assembly in the first half of July 2000 began discussing the proposal for constitutional amendment aimed at enacting proportional representation and obligatory electoral personalisation in the Constitution. This proposal was moved for already in late January 2000 and the special committee in charge started discussing it in February this year. During these discussions a group of independent experts and the Secretariat I am in head of explicitly answered the question put by the special committee members as to what legal consequences a constitutional amendment has on the outcome of the referendum in question and the pertaining decision of the Constitutional Court (U-I-12/97). The answer was that the National Assembly is legally bound by the outcome of a referendum only regarding issues which need to be regulated by a law and that this does not apply to constitutional amendments. In May this year the special committee in charge continued its discussions and unanimously agreed to amend the Constitution, so as to incorporate into it basic electoral system principles regarding parliamentary elections. Moreover, it passed a resolution according to which the National Assembly was to conduct a referendum on the adopted constitutional amendment.

Thus on 25 July, 2000 the National Assembly, in line with the procedure prescribed in the Constitution, with 70 votes in favour and 1 vote against passed a constitutional law amending (i.e. supplementing) Article 80 of the Constitution. In view of the fact that the National Assembly of the Republic of Slovenia has 90 members and that absolute two-thirds majority is required for amending the Constitution, the extent of the reached agreement is great, which indisputably provides for the legitimacy of the constitutional amendment. Pursuant to the Constitution, Article 170, the National Assembly must organise a referendum on a constitutional amendment if this is required by at least 30 of its members, which did not happen and consequently the National Assembly on the same date promulgated the said constitutional amendment.

Let me draw your attention to the fact that the Constitutional Court of the Republic of Slovenia in September this year already considered the proposed constitutional review of Articles 1 and 2 of the constitutional law amending Article 80 of the Constitution, the ordinance on calling parliamentary elections and certain articles of the Electoral Act, due to the alleged inconsistency of the latter with the results of the referendum on electoral system. The Constitutional Court unanimously rejected or dismissed the proposed constitutional review with its decisions (U-I-214/00-4 and U-I-204/00-6), thereby confirming that the said pieces of legislation are constitutional and that it is not in its jurisdiction to decide on constitutional amendments, of

which to our knowledge you have already been informed. The exposition of the decision no. U-I-204/00-6 explicitly states that "The decision of the Constitutional Court concerning the establishment of referendum results is binding on the parliament only in its capacity of the legislative body which passes laws, but not in its capacity of the legislative body which passes and amends the constitution […] With the passing of the constitutional law amending Article 80 of the constitution the National Assembly is no longer bound by the Constitutional Court's decision."

Should any additional questions arise during your deliberations on this issue, we will be happy to answer them and provide any information required.

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