



CONSTITUTION AND THE CLASH OF CULTURES: IS THERE A CONSTITUTIONAL RIGHT TO ERECT A MOSQUE?

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I. INTRODUCTION: HISTORY AND CIRCUMSTANCES OF “THE MOSQUE CASE”¹

With roughly 2,032,000 inhabitants, Slovenia is among smaller European countries. When it comes to religious diversity, it is quite variegated.² According to official statistics, more than half of inhabitants are allegedly of Roman-Catholic confession. By number of followers, Islamic Religious Community is on the second place. It is closely followed by Orthodox Church and Evangelical Church.³

Muslims have inhabited Slovenia for a long time.⁴ Thus, they are important part of religious and cultural image of the country. It seems their adjustment to peculiarities of the environment in which they live is quite good. The same goes for its liberal modernity. It could be said that they have actually adjusted. One can rarely meet men and women in public who stand out because of their external signs of their religious faith. Perhaps in the last few years the number of veiled women in public has risen slightly, but no more as to occasionally draw attention or curiosity of passers-by. Especially for younger people it seems they have identified themselves with customs of prevailing EU lifestyle. There are no serious religious conflicts between Muslims and the religious majority in the country. The same goes for the relationships between Muslims and followers of other religious creeds. There are no reports in the media on such conflicts and there are no concerns expressed by the followers of Islamic religion.

Islamic Religious Community has been endeavouring for more than 30 years for the erection of their primary religious building. Notwithstanding aforementioned positive

¹ I would like to thank Dean Zagorac and Andrej Kristan for their assistance with finishing the article.

² According to the Statistical Office of the Republic of Slovenia, there are 43 registered religious communities. http://www.uvs.gov.si/si/podatki_o_registriranih_cerkvah_in_drugih_verskih_skupnostih/.

³ In the last couple of years, the number of Catholics has been estimated by opinion polls to be between 55 and 67 per cent of those who have declared their religion. Number of followers of the Islamic Religious Community is estimated to be 48,000 or just below 2 per cent. For the statistics of the Office for Religious Communities see <http://www.uvs.gov.si/index.php?id=486>.

⁴ The Islamic Religious Community explains on its webpage that the first phase of settlement of Muslims in the Slovenian territory occurred in 16th century, the second during the reign of the Austro-Hungarian occupation of Bosnia and Herzegovina in 1878, and the third in the time of Yugoslavia with the occasional breaks between 1918 and 1991. The fourth phase has started after the Slovenian declaration of independence. <http://www.islamska-skupnost.si/islamska-skupnost-v-rs-mainmenu-2?tmpl=component&print=1&page=>.

features of cohabitation, such efforts have been unavailing. Consequently, Muslims have been forced to fulfilling their religious interests and needs in a very adjusted, limited, patient and pragmatic manner. Muslims in Slovenia do not have their genuine religious building. For mass religious gatherings and prayers they rent sports centres, industrial plants and other larger mixed-use premises. For such purposes, many of them also use larger garages and cellars and some of them even gather in larger private apartments.

For Islamic religious followers the year of 2003 was breaking. Finally they brokered a deal with Ljubljana's (the country's capital) municipal authorities - which were represented by the coalition of the left-winged parties - for a permit to erect a Mosque as a central religious building and, after all, also a religious, cultural, educational and partially political centre. In 2004, the municipal authorities passed a decree, which technically and by its substance gave permit for erecting such a religious building. Thus, it was a legal basis for erecting a mosque and it was clear that it had been passed for that same purpose. But again, the efforts ran into obstacles. Many politicians and inhabitants of Ljubljana vigorously resisted the idea, largely out of personal - emotional, cultural and political - reasons. Leading members of a smaller political party who were at the same time members of the city council with the support of a large number of inhabitants and clear support of right-winged and right-to-centre-winged political parties, which at the time held power in the country, have launched a campaign for a referendum and soon they filed an official request for one. Such efforts were undertaken to forestall the enforcement of the abovementioned decree.

By a sufficient number of voters' signatures and support of majority of the city council, the latter passed an official decree for the calling of a referendum. The then mayor of Ljubljana had consulted with some legal professionals on the issue whether the referendum request was unconstitutional or if a realization of the referendum would have meant unconstitutional decision-making on the religious freedom of followers of the Islamic Religious Community. Some invited legal professionals, most of them being law professors, gave a neutral retained opinions and some did not recognize unconstitutional elements in the referendum at all. The mayor decided to follow an opinion that the request for a referendum was by its very substance unconstitutional, because the clearly stated goal of the referendum was unconstitutional: to prevent the erection of a mosque on the religious, cultural, political and ideological grounds. The mayor filed that opinion as a motion for a constitutional review on the constitutionality of the decree for the calling of a referendum. So, is there a constitutional right of Muslims to erect a Mosque in Ljubljana, the capital city of the Republic of Slovenia?

The constitutional law characteristics of the aforementioned call of a referendum will be presented in greater detail below. They will be followed by the constitutional law framework of religious freedom in the Republic of Slovenia as a fundamental constitutional and a human right. The core of the Constitutional Court's ruling in the "Mosque Case" (Ruling No. U-I-111/04) will also be presented. The article is concluded by a legal epilogue, which the story on Slovenian mosque gained in this year.

II. THE FACTS AND THE CIRCUMSTANCES OF THE REFERENDUM CAMPAIGN

The Constitutional Court was asked whether the actions of the initiators of the

referendum and signatures for the referendum initiative, which had been collected properly and within the legal deadline, were “contaminated with unconstitutionality”. In media, in the streets, on the billboards in front of the administrative units, on written appeals in the support of the referendum initiative etc., the initiators of the referendum and their supporters clearly stated that it was about “the referendum against the mosque”. The whole referendum campaign was based on that very tag line. At the same time television reports exposed unambiguous conviction of the citizens that it was about the referendum against the erection of a mosque in Ljubljana.⁵ The public debate was focused primarily on the basic question whether a mosque and Muslims should have their place in the Slovenian cultural milieu. The initiators of the referendum used the same way to attract the signatories via internet. Moreover, the first signatory of the referendum initiative explained in a televised statement that the organizers had decided to collect signatures in such a manner and with such a tag line as to collect enough of them.⁶ Reasons which were at the time topical for raising fear against Muslims, such as the problems of terrorism and Osama bin Laden, were used as arguments for the referendum. Among more general reasons against the erection of a mosque, the references to historical invasions of Turks into the Slovenian territory were made, as well as the characteristics of the history in the Slovenian territory, the way of life of Slovenians, the deviation of Islamic religious buildings compared to the “Slovenian cultural milieu”, Muslim religious rituals as a “troubling factor”, conservatism of the Slovenian traditional milieu, the power of stereotypes, general unaccustomedness of people to such buildings in Slovenia, general mistrust and xenophobia of Slovenians etc. Even many politicians, educated people and intellectuals who appeared on public discussion panels grounded their convictions against the mosque in similar arguments.⁷ In the referendum initiative, the issue of location and logistics on erecting a mosque on the site designated by the city council decree was mentioned only marginally and secondarily. Such argument started to appear in public only in the last stage of the whole process when the referendum initiators thought they might have had (incautiously) overemphasized the real goal of their initiative.⁸

The actions of the referendum initiators clearly demonstrated that it was about opposing the erection of the mosque as such.⁹ The referendum initiative was equally

⁵ Many supporters of the referendum emphasized that it is about the people’s revolt against the erection of a mosque anywhere in Slovenia.

⁶ That is evident from the news archive of the television station POP TV, broadcast “24 ur”, 20 February 2004 and 4 March 2004.

⁷ The discussion was nowhere near such a scientific, professional and historical discourse as it is offered by Cardini 1999. His book was translated into Slovenian (Cardini 2003). The attention should be drawn also to Norman 1997.

⁸ Comp eg Dunn 2001, explaining how the negative constructions of Islam had varying utility for mosque opponents in Sydney (Australia) during the 1980s and 1990s. Constructions of Islam, such as fanaticism and intolerance, and of Muslims as being alien and ultimately “out of place”, were used to influence planning determinations and political decisions within local authorities. The charges of militancy and misogyny were used to heighten public unease and widen opposition against the erection of a mosque. Comp Gale 2004, explaining how applications to develop buildings such as a mosque have frequently given rise to forms of aesthetic contestation that are embedded in processes of identity construction amongst non-Muslims. He assesses the extent to which urban planning processes condense and mediate the relations between social groups. For similar analysis see Naylor and Ryan 2002, or Gale and Naylor 2002. For interesting examination of the role of urban planning procedure in regulating the location, architectural form and use by Muslims of mosques and religious education establishments in Britain see Gale 2005.

⁹ Similar issues (Muslim’s aspirations for mosques and protests of national majorities) have also emerged in some other parts of Europe, for example (already mentioned above) Great Britain (Johnston 2006),

understood by the citizens who voiced their opinions in the media. Politicians' understanding of the campaign was the same. The written explanation of the referendum initiative expressly stated that "there was no need for the erection of a mosque and big religious centre, because Muslims can satisfy their religious needs in a simpler manner." And that the whole religious care for the followers of the Islamic way of life can be better provided by more oratories scattered around Ljubljana. "Islamic religious cultural centre is not just any kind of building... It is the religious-cultural house of God of nearly ten thousand people, the followers of the Islamic way of life," alleged the referendum initiators as a warning.¹⁰

It became clear that the Constitutional Court had to answer the two basic questions: did the referendum initiators clearly demonstrate their real intention; was their real intention relevant to the constitutional review of a decree for the calling of a referendum which was as such and appeared to be just a technical decree for the calling of a referendum, therefore, was it about the referendum on the city council decree or a referendum on the mosque; was the real intention of the referendum initiators unconstitutional; and last but not least, can the majority of voters decide upon the way of exercising the religious freedom of the followers of some religious creed, in this case Islamic?¹¹

III. FREEDOM OF RELIGION IN SLOVENIAN CONSTITUTIONAL ORDER

Arising from the provisions of the Constitution of the Republic of Slovenia and the

France, Germany (Heneghan 2007) or Italy. Especially in Italy the ideas to give the final word to local residents via referendum or to enact a bill to block mosque building have emerged in political and other public discussions on the issue (Turkish Daily News).

¹⁰ Initiators of the referendum and especially right-winged politicians were also pointing out the role of women in Islamic culture and religion, as an example of undemocratic and humiliating subordination. Interestingly, at the time one could not detect similar reproaches from the women side. Once again, there was no constructive debate over the connection between the religious fundamentalism and women's freedom, in a sense of a genuine political, social or constitutional concern. It seems like this could be understood as a paradox. Namely, it is worthy of mentioning the sociological analyses about the general connection between right-winged nationalism and religious fundamentalism as far as the women's freedom of choice and action is concerned. See eg Cohen and Kennedy 2000: 314-315.

¹¹ First, the Constitutional Court had to answer the question whether it could review the substance of the decree for the calling of a referendum or whether it was only a technical decree, which did not allow the substantial constitutional review of the referendum. In their public appearances, the majority of law professors believed that it was only a technical decree, which could not be a subject of a constitutional review on the eve of the referendum. The Constitutional Court accepted the argument from the application for a constitutional review of the referendum that such a review was appropriate and needed, because the legislation that was in force at the time (Local Self-Government Act) did not provide for an option for the mayor to achieve in any other way the constitutional review of the referendum initiative. On the one hand, the Local Self-Government Act prescribes the responsibility of a municipality's mayor for the constitutionality and legality of legal acts, of which as a municipality's representative he is the signatory. On the other hand, a mayor does not have an appropriate option for a constitutional review. If the majority of the city council does not agree with the mayor's opinion that the referendum's initiative is unconstitutional, the only option for substantive constitutional review of the referendum before its execution is the very application for a substantive constitutional review of the decree for the calling of a referendum. The Constitutional Court agreed that a mayor must have at least one such possibility for a constitutional review. We could talk about the abuse of a form only in a case when a mayor had such a legal option, but he would not have used it in a timely manner. Furthermore, the Constitutional Court emphasized that a component of the decree for the calling of a referendum is also the substance of a referendum's question. That is why such a decree is a subject to a constitutional review, if the constitutionality of the substance is questioned.

case-law of the Slovenian Constitutional Court, it is possible to determine clear constitutional framework of religious freedom. Article 7 of the Constitution of the Republic of Slovenia states: “Religious communities shall enjoy equal rights; they shall pursue their activities freely.” Article 14 guarantees general equality before the law and prohibits discrimination in the exercise of human rights and fundamental freedoms in accordance with the constitutional order and laws irrespective of religion, political or other conviction, national origin, or any other personal circumstance (Šturm 2002: 124 § 8, 9).

With regard to these constitutional grounds (including aforementioned general principle of democracy), equality of religious communities and their equality before the law do not appear to be provided solely by allowing only some religious communities (e.g. Roman-Catholic, Evangelical, or Orthodox) to erect their own religious facilities for exercising their constitutional rights and fulfilling their worship interests. We can talk about equality only when all followers of all religious communities exercise the same constitutional rights in the same manner or equivalently (Šturm 2002: 125 § 9), including the followers of the Islamic Religious Community.¹² If a religious community (which can be determined in national and religious terms) is prevented from realizing its desire to exercise religious freedom, freedom of consciousness and freedom of confession in a manner comparable or equivalent to manners of other religious communities, this can not be in accordance with the constitutional provisions on the free activities of religious communities, equality before the law and the constitutional right to freedom of consciousness and religion.¹³ All religious communities have to be ensured, within the constitutional order, to freely decide upon the manner of their religious activities or to freely manage their activities. “The state recognizes their right to internally organize according to their own rules and to independently and autonomously carry out their mission” (Šturm 2002: 123 § 2). Without the protection of the organizational aspect of life in a religious community, no other aspect of individual freedom of religion can be protected.¹⁴

From the principle of separation of state and religious communities (Article 7 of the Constitution of the Republic of Slovenia)¹⁵ and the case-law of the European Court of Human Rights arises the so called positive obligation of the state to ensure religious equality in its territory. The principle of separation of state and religious communities, strictly followed by the Constitutional Court, means, *inter alia*, that the state shall neither privilege nor discriminate against one or more religions (Šturm 2002: 124 § 5). The same principle applies even if a religious community comes from a different milieu with different traditions and history. The principle of secular state which in the

¹² Compare Weiler 2006, Chs. III. and IV., especially at 62; Siedentop 2000, Ch. 10 and especially at 214: “If the connection between moral equality and the claim of equal liberty is not understood or accepted then the moral foundation for a democratic society and representative government remains incomplete... When the connection between moral equality and equal liberty is denied, it is not possible to distinguish clearly between mere conformity of behaviour and truly moral conduct. That confusion, in turn, plants the seed of tyranny.” For a comprehensive understanding of the topic see also Talal 2002.

¹³ The latter is guaranteed by Article 41 of the *Constitution of the Republic of Slovenia*: “Religious and other beliefs may be freely professed in private and public life.”

¹⁴ This was emphasized by the ECHR in the case *Hasan and Chaush v. Bulgaria* (2000), Appl. No. 30985/96.

¹⁵ For the general overview of the historical origins and the core of the (constitutional) principle of separation of state and religious communities and for the comparative overview of the legal regulation of the relation between State and Church see Šturm (ed.) 2000 (in Slovenian). For the analysis of religious liberty in Western thought see eg Reynolds, Durham and Durham Jr. 1996.

Republic of Slovenia has a constitutional status means (ideological) neutrality of the state toward all religions and convictions (Šturm 2002: 123 § 4, 124 § 5). The Constitutional Court upheld this principle in its rulings (Šturm 2002: 124 § 5, 129 § 26).¹⁶ Thus, the state has the obligation to actively create conditions for the exercise of that constitutional right, not only privately, but also in the public sphere (Šturm 2002: 125 § 8, 11, 12). Last but not least, the Constitutional Court rulings demonstrate a principal conviction of the Court that the religiously motivated decisions of individuals shall be prejudiced only when that is needed for ensuring coexistence of individuals and for the preservation of foundations of the social order.¹⁷

IV. ARGUMENTS OF THE CONSTITUTIONAL COURT

1. Constitutional restraints of direct democracy

It was expected from the Constitutional Court to specially emphasize constitutional restraints of a referendum decision-making as a form of a direct democracy in its statement of grounds for the Ruling. There is no need to reference to a vast constitutional law literature on the fact that direct democracy and legislative will of the people have their constitutional restraints. Also in Slovenian constitutional order and constitutional case-law this fact is not disputed. When citizens undertake the role of a referendum legislature the same rules apply to them as they do to the regular legislature. This is corroborated by the Ruling of the Slovenian Constitutional Court No. U-II-3/03-15 (§ 21)

If after constitutional review it was manifested that by dismissal of the law unconstitutional consequences would arise, the request to call a subsequent legislative referendum would be in breach of the Constitution and the National Assembly could not have called such a referendum. [...] The Constitution and rulings of the Constitutional Court do not bind solely the National Assembly as the legislature but citizens, as well, when they exercise their power directly (Article 3(2)) by deciding on a particular law by referendum (Article 90 of the Constitution).

The Ruling of the Constitutional Court No. U-I-68/98 leaves no doubt as to whether the Constitution prescribes the limits to the exercise of power through a referendum and the principle of democracy from Article 1 of the Constitution. These two principles, in the terms of their values, are determined principally by fundamental rights and freedoms. Finally, the freedom of religious communities' activities is directly linked with the general constitutional principle of democracy.¹⁸ In the cases of a direct

¹⁶ The same principled conviction was established by the Federal Constitutional Court of Germany in the case *93 BverfGE I* (1995).

¹⁷ See rulings of the Constitutional Court of the Republic of Slovenia No. U-I-25/92, U-I-107/96, U-I-121/97, U-I-326/98 and U-I-68/98. They are available at <http://odlocitve.us-rs.si>. See also Šturm 2002: 130 § 27. In principle, the approach of the Slovenian Constitutional Court is very similar to the approach of the Federal Constitutional Court of Germany. See eg Kommers 1997, Ch. 9. Slovenian Constitutional Court often seeks arguments for its rulings in the German constitutional case-law.

¹⁸ In her dissenting opinion to the Ruling No. U-I-3/03, the former president of the Court Wedam Lučić wrote: "When reviewing whether unconstitutional consequences would arise because of enactment or rejection of a law in a referendum, the Constitutional Court has to consider, doubtlessly, that the right to decide in a referendum, as enshrined in Article 90 of the Constitution, is derived from the right to direct participation of citizens in the management of public affairs, as enshrined in Article 44 of the

conflict between a societal majority and religious, ethnic or national societal minority, the scope of the right to direct participation in the governance over public matters and referendum decision-making narrows, if interference with the fundamental rights of one group of people could not be persuasively grounded in the protection of fundamental rights of another group of people.¹⁹

As expected, the Constitutional Court in the respective ruling emphasized that

The Constitution also limits citizens when they exercise power directly (Article 3.2) by deciding on a certain statute at a referendum (Article 90 of the Constitution). The same should apply to cases of direct deciding in a local referendum. 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 (the preamble to the Constitution), can prevail over the democratically adopted decisions of the majority.

The final conclusion of the Court in that regard was categorical: “Decisions which would be inconsistent with the Constitution may not be put to a referendum.”

2. The real intent or motivation of the initiators as a key constitutional question

Professional debates during the referendum campaign were focused on the question of the real intent or the motivation of the referendum initiators and its meaning for the constitutional review of the referendum. The question of a real intent (also goal) is an important issue in the constitutional law theory,²⁰ even more so when adoption of decisions which with the power of law interfere with the rights and freedoms. Especially attractive in that regard is American constitutional law doctrine.²¹ The real intent or goal is a normal criterion of a constitutional review when the interference with constitutional rights and freedoms is at stake and when the strict constitutional review test is used. The same applies to the European Court of Human Rights.²² The European

Constitution, and that therefore the restraints of that right ‘are subject to regime of Article 15 of the Constitution (strict test of proportionality)’.” Article 15 of the Constitution provides, *inter alia*, that the manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom and that human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by the Constitution.

¹⁹ Compare Tribe 1988: 1095-97. The Constitutional Court of the Republic of Slovenia clearly stated that a referendum decision-making on a ruling of the Constitutional Court and its substance is unconstitutional. See especially the Ruling No. U-II-1/04. Before that the Court opined in its Ruling No. U-II-2/03 that the referendum initiatives would be proclaimed unconstitutional only if referendum questions will be “unconstitutional by themselves” or “clearly unconstitutional”.

²⁰ On constitutional importance of the purpose see especially discussion Aleksander and Prakash 2003.

²¹ It is important to differentiate between the rationality test and the test of strict constitutional review. The first identifies only the articulated or alleged intent or goal and the latter identifies the real one. See *FCC v. Beach Communications Inc.*, 508 U.S.307, 315 (1993), *Rogers v. Lodge*, 458 U.S. 613 (1982), *Griffin v. County School Board*, 377 U.S. 218 (1964). See generally Nowak and Rotunda 1995, especially at 600-06 and Ch. 16; Tribe 1988: 1502-14 *et al.* With a special regard to purpose of a referendum decision-making see Cronin 1989: 93-4. For the constitutional fundamentals of the free exercise of religion in the United States see Garvey and Schauer 1996, ch. VII.

²² Review of the intent or aim is usually accompanied by a review of “the legitimacy of the aim” and “proportionality of the measure” when restrictive measures of the state in the field of fundamental human rights and freedoms are constitutionally reviewed. This Court also uses the criterion of “necessity

Convention on Human Rights, for example, in Article 17 expressly prohibits interpretation of the provisions of the Convention

[A]s implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The ECHR thus also prohibits application or exercise of the fundamental rights in a manner or for a purpose of the prejudice or limitation of the exercise of the fundamental rights of other individuals or groups or that the exercise of the Convention rights would be contrary to the democratic principles and values.²³ Taking into consideration the real intent as a decisive criterion is known from some famous rulings of the Federal Constitutional Court of Germany.²⁴ In some of its rulings, the Constitutional Court of the Republic of Slovenia has already emphasized a “goal” or a “motivation” as an element of the constitutional review. However, it did not develop a special doctrine with that regard or expressly reference to such a doctrine of some other court.²⁵ In Ruling No. U-II-3/03, the Constitutional Court emphasized the significance of the intent in connection with a referendum. The Court opined that a referendum can be unconstitutional “when it is evident that the intention of a referendum is to delay or postpone the implementation of a Constitutional Court decision.” Some Constitutional Court judges wrote about intent as a criterion of the constitutionality in their separate opinions.²⁶ The former president of the Court Testen - who left especially positive mark on the Slovenian constitutional judiciary - wrote in his dissenting opinion to the Ruling No. U-I-163/99:

The Constitutional Court has frequently said that also the motivation (in terms of civil law, defined as cause, such is not only an inclination, but the real basis) of the legislature can affect the unconstitutionality of a statute. If motivation is unconstitutional also a regulation thereby adopted is replete with unconstitutionality. [...] The Constitutional Court must review if the legislature alleged the real motives for its decision and rule on the constitutionality of the law in the light of real and perhaps unconstitutional

in a democratic society” which resembles the strict review standard. See generally Macdonald, Matscher and Petzold 1993; Mowbray 2001, especially at 518.

²³ See for example two notable ECHR decisions in the cases *Refah Partisi (The Prosperity Party) and Others v. Turkey* (2001), Appl. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (The Welfare Party) and Others v. Turkey* (2003), Appl. nos. 41340/98, 41342/98, 41343/98 and 41344/98, and *Gorzelik and Others v. Poland* (2004), Appl. no. 44158/98. The ECHR unequivocally defined substantive criteria of democracy and the rule of law. It especially emphasized the differentiation between an articulated political program of a political party in writing and its real aims, which are demonstrated through the dealings of its leadership.

²⁴ The same goes for the German “doctrine on unconstitutional constitutional amendment” by which the Constitutional Court may review the constitutionality of legal norms at the constitutional level. Namely, the German Constitutional Court opines that a modification of the Constitution by a constitutional amendment might be unconstitutional, if, for example, the legislature passes the constitutional amendment with a sole purpose of avoiding the respect of an important ruling of the Constitutional Court. See rulings of the Federal Constitutional Court of Germany *1 BverfGE 14* (1951); *5 BverfGE 85* (1956); *56 BverfGE 247* (1981). See generally Kommers 1997: 48-9.

²⁵ See rulings of the Constitutional Court No. U-I-30/95, U-I-167/96, U-I-153/94, U-I-77/93.

²⁶ E.g. judge Krivic in separate opinion to the Ruling of the Constitutional Court No. U-I-77/96 or judge Zupančič, joined by judges Šturm and Šinkovec, in separate opinion to the Ruling No. Up-40/94.

*motives for its adoption.*²⁷

In the grounds of the ruling in the “Mosque Case”, the Constitutional Court first of all rejected the argument of the referendum initiators that human rights of the Islamic Religious Community would be violated only if the erection of the mosque was rejected by several successive referenda and if the religious community did not have other options for conducting their religious rites. The Court opined that in every single case the legal situation would be the same.

The Court also resolutely rejected the argument of the referendum initiators that the whole thing was only about the location of the mosque. Instead, it focused on the question of the real intent of the referendum initiators and regarded it as a fundamental criterion for the review of the substantial constitutionality of the referendum. The Court left no doubt that the real purpose of the referendum was to decide whether the Islamic Religious Community should be granted the right to profess their religion in a mosque or not. There was no need to speculate on that purpose. Also, according to the Court’s opinion, such purpose was clear from all aforementioned actions of the referendum initiators, the expectations of citizens, and public political debates. The central argument of the referendum initiators was written in their statement of reasons for the initiative: the conviction that for the followers of Islam several oratories were sufficient and therefore there was no need for a large building such as a mosque.²⁸ The Court opined that such real purpose of the referendum was unconstitutional.²⁹ Its findings were summed up with the following words:

The matter did not concern the locating of a building in the environment, but the prevention of the construction of a building that is traditional for the profession of the Islamic religion and to which its followers are entitled according to Article 41.1 of the Constitution. [...] The goal of the referendum is thus to prevent members of the Islamic Religious Community from professing their religion individually or in community in a building which is usual and generally accepted (traditional) for the profession of their religion and the performance of their religious rites. Accordingly, it is possible to conclude that the goal that the challenged regulation pursued is to limit the right determined by Article 41.1 of the Constitution. With regard to Article 15.3 of the Constitution, according to which human rights can only be limited by the rights of others (and in such cases as provided by the

²⁷ It seems as though prominent legal scholars who during the referendum campaign publicly commented the case the most and did not think the intent of the referendum initiators was a relevant question forgot about all of this.

²⁸ In one of its footnotes the Court wrote that the premises which were also inspected by the Council of Europe Commissioner for Human Rights which are by their nature garages and private apartments could not be regarded as oratories in the real sense.

²⁹ The Constitutional Court drew attention to the Ruling of the Federal Constitutional Court of Germany No. 1 BVQ 6/04 from 2004: “In that case the complainant, who had been denied a request to assemble with others, asserted that the assembly was not against the building of a synagogue as such, but against the spending of public funds for that purpose. The Federal Constitutional Court decided that the public interest in prohibiting such assembly and association prevailed over the complainant's right to a public gathering. It evaluated that the slogan of the public gathering pursued the goal of aggressively inciting the exclusion of Jewish citizens of Germany, and that that could not be changed even by the financial-political slogan subsequently submitted. According to the Court, the complainant merely tried to prevent the synagogue from being built. Although the new slogan did not in fact incite the masses to hatred, given the existence of the previous slogan, it did not change anything in the public perception.”

Constitution), such a goal is inadmissible as its intention is only to limit a right, and not at the same time to also protect the rights of others.³⁰

3. Freedom of religion includes the use of traditional religious buildings

The express referendum initiators' supposition was that suitability of buildings for the profession of religion was a matter for voters' decision-making. According to the Court's opinion, also that position is unconstitutional. After referencing to numerous international legal documents, the Court opined:

It is crucial for the exercise of the right to the free profession of religion that religious communities are allowed to build their own buildings, which correspond to their way of religious worship, religious rites, and customs.

The Court added that it is necessary to take into consideration:

That the profession of a certain religion is not necessarily only focused on religious worship and the performance of religious rites, but can also be connected with social, educational and cultural activities. Profession of a religion in a manner that is usual and generally accepted for the profession of the individual religion is a pre-condition for the exercise of the free individual and community profession of religion, and thereby enjoys constitutional protection. [...] [T]he right to freely profess a religion includes the right of individuals and religious communities to individually or in community profess a religion in buildings that are usual and generally accepted (traditional) for the profession of their religion and the performance of their religious rites. [...] [W]hat is erroneous is the conviction of the filers of the request to call a referendum that building places of worship in a manner which is traditional for the profession of an individual tradition is not a constitutive part of the right to freedom of religion.³¹

V. EPILOGUE: THE SOLE BIDDER AT THE PUBLIC AUCTION

The presented Constitutional Court's ruling resolutely and unequivocally established a high level of the constitutional protection of the religious freedom in Slovenia as a modern and liberal constitutional democracy which is at the same time a respected EU member state.³² It abides by a full and genuine equality of all religious communities.³³ At

³⁰ The Constitutional Court ruled with a 7-1 decision. Judge Škrk disqualified herself from the judicial decision-making in this case, most probably because she resides in the vicinity of the location where the mosque was to be erected. This does not seem to be a justifiable reason for a judicial disqualification, because it excessively lowers the point where a reasonable doubt could be cast on professional objectivity of the judicial decision-making. Only the president of the Court, judge Čebulj voted against the ruling. However, he did not explain his vote in a separate opinion, perhaps because he did not want to prejudice the legitimacy of the majority decision.

³¹ In footnote 23 of its ruling, the Constitutional Court references to Johan and White 1997. Interestingly, it does not provide a page number, and even more so, thereupon it references to a part of the same book as if it was a separate monograph, again without a reference to a page number: Durham 1997.

³² Some time ago, I endeavoured to substantiate that Slovenia has a mixed model of dualist democracy and democracy of fundamental rights, in which the latter prevails. See Teršek 2003. My starting point was Ackerman's substantiation of the three models of democracy. See Ackerman 1992. No one in

the same time, it confirms clearly stated constitutional restraints to direct democracy and pragmatic day-to-day political self-interest. The constitutional, political and religious conservatism, political populism, emotional heatedness of people, attempt of polarizations of voters, traditional cultural convictions and ideological narrow-mindedness – all are framed to rationally and professionally persuasive arguments of substantial unconstitutionality. Nevertheless, by clearly emphasizing the real motivation as a decisive criterion of the constitutionality, the ruling prevents the abuse of a plain and technical legal formalism, formalistic shamming and political ignorance.

And what was the legal epilogue? In 2008, the incumbent mayor and the municipality of Ljubljana kept their promise and enabled the Islamic Religious Community the purchase at a public auction of a real-estate where an Islamic cultural centre or a mosque could be erected. The Islamic Religious Community was the sole bidder and it offered 1 (one) Euro above the starting price for the real-estate. The bidding occurred without a great display of and with a calm feedback from the media and the Slovenian public. It seems as though emotional heatedness, which accompanied the referendum campaign and tagged the reaction to the Constitutional Court's ruling, calmed down. As if people and politics accepted the constitutional law instruction on religious freedom. It is still possible, however, that such situation will last only until the arrival of the first dredgers to the construction site...

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Slovenian legal theory has shared this opinion or responded on such argumentation for Slovenian constitutional democracy.

³³ On the fringes of this article it should be noted that the constitutional discourse on the role of a religion in social life and equality of religious beliefs should be corroborated by a discussion in the opposite direction, i.e. on the understanding of human rights and freedoms in the world religions. See especially Runzo, Martin and Sharma 2003.

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