

DECISION

At a session held on 7 November 1996 in proceedings to review constitutionality and legality, instituted by the petition of submitters of a request for the referendum on electoral system, the Constitutional Court

d e c i d e d :

Items 3 and 4 of the Decree on the Call of a Statutory Referendum as Regards the National Assembly Elections (Off. Gaz. RS, Nos. 44/96 and 53/96) are inconsistent with statute.

R e a s o n i n g :

A.

1. Petitioners' representative suggested that the Constitutional Court should abrogate ab initio Items 3 and 4 of the Decree on the Call of a Statutory Referendum as Regards the National Assembly Elections (hereinafter: OdRZRV). He alleged that on 19 September 1996 the National Assembly adopted the Decree on Amendments to the OdRZRV (hereinafter: amendment to the OdRZRV), by which it chose 8 November 1996 as the day of the calling of a referendum and 8 December 1996 as the day of the holding of the referendum (Items 3 and 4 of the OdRZRV). Petitioner asserted that Items 3 and 4 of the OdRZRV are inconsistent with Art. 30 in conjunction with Arts. 19 and 33 of the Referendum and People's Initiative Act (Off. Gaz. RS, Nos. 15/94, 33/96 and 43/96 - dec.CC.; hereinafter: ZRLI). To support his claims he also referred to Court decision No. U-I-279/96. Besides the abrogation ab initio of the disputable items of the OdRZRV, he also proposed that the Court should determine 10 October 1996 as the day of the calling of referenda and Sunday, 10 November 1996, as the voting day. In his words, only such a decision "could prevent further irreparable consequences of the challenged OdRZRV". He opined that "due to political and personal interests pursued by the majority of Deputies human rights of citizens of the Republic of Slovenia were in peril".

2. In its reply to the petition, the National Assembly Secretariat for Legislation and Legal Affairs summarized the reasons, from the parliamentary debate at the time of adoption of the OdRZRV, which led to the challenged Decree. These reasons were the following:

- To hold a referendum on the electoral system and the elections of Deputies on the same day it would mean that the voting on the two important elements of a democratic parliamentary system is inadmissibly mixed up, which would be to the detriment of both; it would mean a threat to the constitutional institution of the voting right.

- Should the voting and the referendum campaign be conducted simultaneously (intertwining them) it would allegedly entail disturbances and detrimental consequences on both sides. - A longer time to be elapsed until the day of the calling of a referendum is allegedly also necessary to fill in the legal loophole in the ZRLI as regards the manner of voting and establishing the results, when more competing proposals are at stake.

- The postponement of the day of calling is allegedly grounded in the reasons of instrumental nature, as defined by the Constitutional Court in decision No. U-I-279/96, and is said not to be excessively long.

The Secretariat also emphasized that there was no legal basis for the Court to find for petitioners and to determine by itself the day of the calling and the day of the holding of a referendum. It said that the OdRZRV was needed to take effect in order that a citizens' possibility is realized to choose by themselves on referendum the electoral system they prefer.

B.

3. After the Court had rendered a decision on the constitutionality of the contents of requests for calling the referendum on electoral system (case No. U-I-265/96 dated 31 July 1996), the National Assembly called the referendum on four questions. It determined the ninetieth day after the new Parliament is assembled as the day of the calling, from which on the time limits begin to run for activities needed to carry out the referendum. As the day of holding of the referendum a first Sunday was determined after thirty days lapse from the day of calling of the referendum.

4. Upon the petition entered by submitters of the request for the call of a referendum, the Court, rendering a decision No. U- I-279/96 dated 10 September 1996, abrogated Item 3 of the OdrZRV, for being inconsistent with statute. In the reasoning, the Court stressed that the analysis of the time limits provided for the carrying out of certain activities from the day the request for the call of a referendum is entered (or from a possible Court decision on the constitutionality of the contents of such a request) until the day of the voting, prescribed by the ZRLI, has proved that the provisions on the "day of the calling of a referendum" cannot be interpreted in a manner allowing the National Assembly to use its own discretion to postpone the day of the calling of a referendum for an excessively long period of time. The Court found that provisions on the day of the calling of a referendum take similar effect as *vacatio legis* (time of respite given to submitters of the requests and organs empowered to carry out referenda a possibility to learn of the contents of an act on the calling) and that they have besides this intention only a technical or instrumental meaning. If there are no reasons of technical or instrumental nature (what is indeed according to the span of other time limits - the time limit for the call of a referendum and the time limit from the day of the calling until the day of holding of the referendum - most unlikely), from the day when the act on the calling a referendum is promulgated until the day when this calling is actually taking place not more than 15 days should elapse, which is also the length of *vacatio legis* provided in the Constitution. On the other hand, with a different interpretation of the statute the National Assembly would have an opportunity to postpone the carrying out of a referendum for any period of time.

In the said decision, the Court ordered that the National Assembly must determine a new day for the calling of a referendum in seven days after it received the decision. The Court also found, and put it down in the reasoning, that it was impossible to remove the illegality of the OdrZRV with retrospective effect.

5. On 19 September 1996, the National Assembly adopted a new Item 3 and amended Item 4 of the OdrZRV. Thus it fixed a new date, 8 November 1996, for the calling of the referendum and also a new voting day, i.e. 8 December 1996.

6. Once again the Court emphasized that by systematic interpretation (taking into account all the ZRLI provisions as a coherent whole) and teleological interpretation (considering the purpose of the statutory provisions on time limits and the "day of the calling of a referendum") of Arts. 30, 31 and 33 of the ZRLI, it was impossible to derive that the ZRLI could eventually permit the postponement of the carrying out of a referendum for an excessively long period of time. For activities to be performed between the day when the request was entered until the voting day relatively short time limits were determined in the ZRLI; it would be useless to fix these time limits if Arts. 30 and 33 of the ZRLI could be interpreted as being an authorization conferred upon the National Assembly to postpone the carrying out of a referendum. From the day the act on the calling of a referendum was promulgated until the day which is determined as the day of the calling of the referendum, not more than 15 days should elapse (save in the said extraordinary cases).

7. The arguments brought up by the National Assembly to justify its proceeding were not well founded.

To assert that to carry out the referendum and the elections simultaneously it would jeopardize the right to vote is to assume that voters are unable to responsibly cast their vote at both elections and a referendum. However, in view of Arts. 3, 44 and 90 of the Constitution this presumption is not legally grounded. It is technically possible to carry out both referendum and elections at the same time, creating no obstacles which would prevent the voters to take part in either kind where one's political will can be democratically expressed. Legal arguments put forward by the National Assembly to support its decision are thus not founded. For to opt for the carrying out of both the elections and the

referendum on the same day, it is a matter of political estimation. Possible merely political consequences (influence on the results of the elections and the referendum) of the carrying out of the referendum on the election day cannot be a reason for disrespect of the ZRLI adopted by a two-thirds majority of those National Assembly Deputies present and voting.

From the National Assembly's proceeding when the original text of the OdRZRV was adopted (then the National Assembly was trying to ground a six months postponement of the carrying out of a referendum in threat that it might happen that a different electoral system would be voted for at the referendum than would at the same time govern the elections, what could certainly question their legitimacy) as well as when the amendments were adopted, it follows that because of political goals the National Assembly deliberately violated the statute. This also comes up from the fact that in the Decree on the Call of a Statutory Referendum as Regards the National Assembly Elections (Official Gazette RS, No. 25/96), by which it called only the referendum requested by 35 Deputies thus having discriminated against other submitters of the requests for referendum, the National Assembly did not have any scruples about the possibility that the referendum might affect the legitimacy of the elections, so it fixed the day of the call of a referendum pursuant to the ZRLI.

In the said case, the Deputies entered their request on 17 April 1996, the National Assembly adopted the Decree on 14 May 1996 which was promulgated on 16 May 1996. And, as the day of the calling of a referendum the National Assembly determined 23 May 1996, what meant nine days after the act on the call of a referendum was adopted and seven days after it promulgation in the Official Gazette RS.

8. The reasons the National Assembly gave, in the first place, to explain why did it postpone the day of the calling of a referendum are not the reasons of technical or instrumental nature. These are only extraordinarily considered - in case a decision on the day of the calling, falling within a fifteen-day time limit running from the promulgation of the act on the call on, would lead into a situation in which the carrying out of the referendum occurs on the day when a large number of voters is prevented or hindered from taking part in the referendum. In case No. U-I-279/96, the Court considered vacation (e.g. in August) to be such a reason. Still a simultaneous carrying out of both the elections and the referendum cannot be viewed as a such or a similar reason, for the fact that the elections and the referendum coincide on the same date does not aggravate the voting at the referendum.

9. The arguments defending the postponement of the carrying out of the referendum to such a long time that exceeds the statutory prescribed time limits, explaining that the election and the referendum campaigns are thus made impossible to mix, are also grounded in a political estimation in view of a suitable solution, for the mixing of the referendum and election campaigns does in no way threaten the right to vote.

10. The reasoning saying that before a referendum is held a longer time is needed to fill in the gaps in the law as regards the manner of voting and the establishing of results is unfounded. That is so because the Court in case No. U-I-201/96 already established what kind of interpretation of the ZRLI provisions on the manner of voting, establishing of results, and binding effect of these results on the National Assembly, is needed to pass the constitutional muster, where more than only one referendum with competing questions is at stake. Besides, at a session held on 1 October 1996, the National Assembly passed the Act on the Manner of Voting and the Establishing of Results at the Referendum on Electoral System (Official Gazette RS, No. 57/96), which regulated exactly the above-mentioned questions.

11. In this case the Court was asked to find whether the ZRLI provisions on the day of the calling of a referendum contain the authorization to postpone the holding of the referendum, from the reasons as asserted by the National Assembly (mixing of the referendum and the election campaign, mixing of results).

Having employed both teleological and systematical interpretation of the statute, the Court found that the ZRLI does not contain such an authorization.

12. Therefore, Items 3 and 4 of the OdRZRV are from the said reasons inconsistent with Art. 30 in conjunction with Arts. 19 and 33 of the ZRLI.

13. According to Art. 45, Para. 1 of the ZUstS, the Court can either abrogate or abrogate ab initio an unlawful regulation.

In this case that would mean the abrogation or the abrogation ab initio of Items 3 and 4 of the OdRZRV. Yet by abrogation or abrogation ab initio legal situation would not be created but the situation where the day of the calling of a referendum is not determined at all, what would mean an even greater violation of the statute than the existing one. In spite of being unlawful, the current OdRZRV still ensures that the referendum is going to be held yet this year.

Even though the Court, having received a reply from the National Assembly to the petition, decided the case finding for itself to be authorized, pursuant to Art. 40, Para. 2 of the Constitutional Court Act (Official Gazette RS, No. 15/94 - hereinafter: ZUstS), to determine alone the day of the calling of a referendum, the holding of the referendum would be shifted to an earlier time yet not more than four weeks. However, for the implementation of Arts. 3, 44 and 90 of the Constitution such a shift, at the time when it has been for a while quite clear that the referendum cannot influence the amendments of the National Assembly Elections Act prior to the calling of these elections, would have no meaning.

From the said reasons, the Court in this case employed the institution of declaratory decision under Art. 44 of the ZUstS.

Thus in spite of being unlawful, Items 3 and 4 of the OdRZRV remain entirely in force.

14. Pursuant to Art. 48, Para. 2 of the ZUstS, in case of declaratory decision the Court is authorized to order the organ which passed such an unlawful act to remove so established unconstitutionality or illegality within a specified period of time.

Yet in the case at hand the so established illegality cannot be removed at all. Because of the moves the National Assembly has made and concerning the fact that unlawful OdRZRV provisions cannot be removed with retrospective effect, it is not possible anymore to fix the day of the calling of a referendum that would be consistent with statute. Namely, the ZRLI time limits began to run from the day on when the National Assembly was served Court decision No. U-I-265/96. The time limit up to which it was still possible consistently with statute to determine the day of the calling of a referendum has already expired. A notion that this time limit begins to run anew after every possible abrogation of the decree on the call of a referendum is a mistaken one. Because if the contrary is true, it would mean that by repeating the violations of a statute the National Assembly can achieve that in the end it will "legally" determine the day of the call of a referendum, being remote as far as the Assembly pleases from the day when it received the request for the call of a referendum or the Court decision on the constitutionality of a referendum question.

Thus, in this case it would make no sense to impose on the National Assembly the obligation to remove the established illegality. Even if the Court decided upon the petition right after it received a reply of the National Assembly and determined for the removal of illegality of the OdRZRV the shortest time limit possible (considering that this time limit must be reasonable) and even though the National Assembly completely followed the Court decision and immediately amended the OdRZRV, in which it chose a day within fifteen days after the promulgation of the OdRZRV as the day of the calling of a referendum, that would not mean that the illegality was removed, and the referendum would be held at most from two to four weeks earlier, what would have for the implementation of Arts. 3, 44 and 90 of the Constitution merely a trivial meaning. As for the day when this decision was made (7 November 1996), the use of the authorization under Art. 48, Para. 2 of the ZUstS would be still more senseless. Therefore the Court did not use this authorization.

15. Slovenia is a state governed by the rule of law. Its constitutional system is based on the separation of powers.

Organs of the legislative, executive and judicial branch rule the State within the framework of their competencies, being governed by the system of mutual checks and balances. In this separation of powers scheme, the Constitutional Court has a role of the guardian of constitutionality and legality in

relation to all other government bodies, local government bodies and statutory authorities. Art. 1, Para. 3 of the ZUstS provides that Constitutional Court decision have binding effect.

In the first proceedings to review the legality of the OdRZRIV the Court abrogated an unlawful provision of that act and explained in the reasoning of its decision which was the right interpretation of the ZRLI provisions on the day of the calling of a referendum. Yet it could not alone fix the day of the call. However, the National Assembly amended the OdRZRIV contrary to the position taken by the Court in the said decision, thus violating not only ZRLI provisions but also Art. 1, Para. 3 of the ZUstS. The Constitutional Court therefore holds that by disrespecting the contents of its decision the National Assembly threatened the balance of power in the constitutional system which is based on respect for mutual relations, provided by the Constitution and statutes, among governmental bodies.

C.

16. The Constitutional Court, composed of Justices: dr. Tone Jerovšek, President, and dr. Peter Jambreč, mag. Matevž Krivic, mag. Janez Snoj, dr. Janez Šinkovec, dr. Lovro Šturm, Franc Testen, dr. Lojze Ude and dr. Boštjan M. Zupančič, made this decision on the basis of Article 48, Para. 1 of the Constitutional Court Act. The decision was reached by six votes against three. Justices Krivic, Šinkovec and Ude dissented. Justices Jambreč, Jerovšek and Testen wrote their concurring opinions and Justices Ude and Krivic their dissenting opinions.

President of the Constitutional Court:
dr. Tone Jerovšek