U-I-265/96
31 July 1996

D E C I S I O N

At a session held on 31 July 1996 in proceedings to review the constitutionality of the questions included in the requests for the calling of a referendum, instituted by the request of the National Assembly, the Constitutional Court

d e c i d e d :

1. Subpara. 5 of the question raised in the request of a group of 43.710 voters for the calling of a referendum on the electoral system for elections to the National Assembly is not consistent with the Constitution.

2. The question included in the request of the National Council for the calling of a referendum on the electoral system for elections to the National Assembly is consistent with the Constitution.

3. The National Assembly must call a referendum on the remaining part of the question contained in the request from Item 1 of this holding, and the question contained in the request from Item 2 of this holding, within seven days after this decision is served; in Subpara. 1 of the question raised in the request from Item 1 of this holding number 86 is to be changed into number 88.

4. The request of the National Assembly is rejected, insofar as referring to the review of constitutionality of the carrying-out of a referendum on questions contained in the requests of the National Council and the group of 43.710 voters, in the time immediately prior to the holding of regular elections to the National Assembly.

R e a s o n i n g :

A.

1. Pursuant to Article 16 of the Referendum and Popular Initiative Act (Official Gazette of the RS, Nos. 15/94 and 38/96 - hereinafter: the ZRLI), the National Assembly requested a review of the constitutionality of the questions in the request by a group of 43,710 voters and the National Council for the calling of a referendum on the electoral system for elections to the National Assembly. The request was not explained; instead the reasons can be discerned from the proposed resolutions on the submission of a request for a review of constitutionality (the proposals were submitted by the deputy groups of the Slovene People's Party and the Associated List).

2. A proposal was put forward for a review of the

constitutionality of the Subpara. 5 of the question contained in the request made by the group of voters, which reads as follows: "Are you in favour of (...)

- Slovene citizens who live abroad and who do not have permanent residence in the Republic of Slovenia electing two deputies in two separate voting districts?"

A proposal was also put forward for a review of the constitutionality of Item 3 of the referendum question contained in the request by the National Council, which at the time the National Assembly adopted the decision to submit a request for a constitutional review, read as follows:

"Are you in favour of (...)

- 44 deputies being elected by proportional representation with a second vote cast for a list of candidates in a constituency, whereby the candidates from the list of candidates with the greater number of votes is elected and at the same the second vote is taken into account in a proportional division of 88 seats?"

In addition, the National Council proposed a review of the constitutionality of carrying out a referendum on the questions contained in the above-mentioned requests "at a time immediately before regular general elections to the National Assembly".

3. From the proposed resolution submitted by the deputy group of the Associated List it is allegedly clear that part of the question contained in the request made by group of voters is not in compliance with Article 43 of the Constitution (equality of voting rights) and Article 82 of the Constitution, which provides that deputies are the representatives of all the people and shall not submit to undue influence from any source.

4. The proposal submitted by the deputy group of the Slovene People's Party suggests that part of the question in the request made by the National Council is contrary to the provision contained in Article 80 of the Constitution, which provides that the National Assembly is composed of 90 deputies. The question is allegedly contrary to the Constitution due to an inherent contradiction.

5. The proposal made by the deputy group of the Associated List would suggest that the holding of a referendum on the questions contained in the requests by the group of voters and the National Council directly prior to the election is not in compliance with the Constitution. The proposal states that if one of these two proposals were adopted at a referendum the National Assembly would have to carry out a radical overhaul of the electoral statute and of the statute regulating electoral districts. In its proposed resolution the deputy group of the Associated List states that the electoral statute would have to be "prepared from scratch and, for the second reading, contrary to the standpoints adopted by the National Assembly during the first reading". It states that the adoption of the electoral statute is a demanding task as far as content and procedure are concerned (due to the constitutional demand for a two-thirds majority of all deputies for its adoption).

In the proposed resolution it is stated that general elections must be called by 8 October 1996 at the latest but may be called for any time from 9 August onwards. Therefore, if the contested referendum proposals were to succeed, the adoption of an electoral statute could coincide with the time by when the general elections to the National Assembly should already have been held or at least called. Given the demanding nature of the changes, it would be realistic to expect that the National Assembly would be unable to adopt a decision on an amendment to the statute on the basis of a referendum decision before the expiry of the final deadline for the calling of a referendum. If this were to happen, the citizens could see the referendum as a deception. In the proposed resolution it is stated that the holding of a referendum on fundamental changes to the electoral legislation at a time when general elections should already have been called, while there is no guarantee that the referendum results would be taken into account at the 1996 elections, is not in compliance with Articles 2, 80, 89 and 90 of the Constitution.

In the proposal the deputy group of the Associated List refers to the reasons explaining the Constitutional Court Resolution in case No. Up-62/96, where it is stated that "a referendum on fundamental changes to the electoral system immediately prior to an election could be constitutionally contestable".

6. On behalf of the signatories to the request for the calling of a referendum, Janez Janša and the Social Democrats of Slovenia (SDS) replied to the request by the National Assembly with a statement that the disputed part of the referendum question is not contrary to the constitutional principle of equality of voting rights as it does not guarantee a double voting right to Slovene citizens with permanent residence abroad. The reply also cited figures, supported by the Government's reply to a question put by Ivo Hvalica MP, according to which 60,465 people without permanent residence in Slovenia had "regulated their Slovene citizenship" as at 30 March 1996. And the Government's reply makes clear that this number does not include all Slovene citizens living abroad but only persons who, subsequent to the enactment of the Citizenship of the Republic of Slovenia Act, had regulated their citizenship status at the competent bodies or through consular offices. The reply by Janez Janša and the SDS states that the number of Slovene citizens who would cast their vote in special electoral districts is entirely comparable to the numbers in the voting districts in Slovenia and that these citizens

would be in a worse position than others. The purpose of the contested proposal was to facilitate the implementation of the right to vote of the affected category of voters.

As far as the constitutionally contentious nature of holding a referendum on a thorough overhaul of the electoral system immediately ahead of a general election is concerned, the reply states that the SDS lodged its first initiative for a referendum almost half a year ago. It claims that the National Assembly has had the text of the proposed statute, which elaborates on the referendum proposal (a majority electoral system) for several months. In the reply it is stated that there are no legal grounds that would justify the accusation that the holding of the proposed referendum is not permitted in this period.

7. In its reply, the National Council first states that the request applies to the original text of the referendum question, and not to the text that was modified upon an invitation by the National Assembly. The National Council claims that the question contained in the request for the calling of a referendum is not contrary to Article 80 of the Constitution since "the proportional division of all 88 seats available is carried out with a percentage calculation below 100 rather than above 100." With regard to the claim that holding a referendum on the proposed question immediately prior to the elections is unconstitutional, the National Council states that if the referendum proposal were to be adopted it would be possible to implement it at short notice by using the existing professional basis, i.e. "on the basis of the basic starting points or principles of the Elections to the National Assembly Act."

B.-I.

8. The National Assembly "requires that the Constitutional Court establish that because of the content of the request for the calling of a referendum (by the voters and the National Council), the holding of these referendums immediately prior to general elections to the National Assembly is contrary to the Constitution of the Republic of Slovenia."

The request does not refer to the constitutionality of the referendum question but to the constitutionality of the holding of a referendum on this question at a specific time. This request cannot be interpreted as a request made on the basis of Article 16 of the ZRLI. Pursuant to this provision, the Constitutional Court has the power to review the

constitutionality of the proposed referendum questions but not also to review the constitutionality of the holding of a referendum at a specific time.

In this part the application by the National Assembly can be interpreted at the most as a request for a review of the constitutionality of the ZRLI - in order to establish an unconstitutional legal void because the statute does not stipulate that at the time immediately before the elections a referendum on the electoral system cannot be carried out.

As the proposer of the request, with the Amendments and Supplements to the ZRLI Act (Official Gazette of the RS, No. 38/96) the National Assembly itself stipulated that for a period of one year before regular elections to the National Assembly, a referendum on the electoral system may not be carried out. In Article 6 of the Amendments and Supplements to the ZRLI Act it is stipulated that the amendment becomes valid on 1 January 1997. The National Assembly could have provided that the amendment became valid immediately if it believed (as the request in question would infer) that this were in compliance with the Constitution, or even necessary from the point of view of the constitutional provisions; but it did not. The reply to the initiative by the Secretariat for Legislation and Legal Affairs at the National Assembly in case No. U-I-266/96 makes clear that the enactment of the new Article 12a of the ZRLI "was explicitly deferred until 1 January 1997 with the explicit reasoning that such new solution should not affect requests of this nature that have already been lodged". From this statement it can be concluded that the National Assembly assessed that such provision would not be constitutionally permissible or at least that it would be inappropriate.

The National Assembly may not request of the Constitutional Court that it establish the conformity of a statute with the Constitution because of a legal void which it could fill itself. A decision on such a

request would represent a type of advisory opinion which the Constitutional Court has no jurisdiction to give.

B.-II.

9. The uncontested first four indents of the question in the voters' referendum request contain a proposal for the introduction of a majority two-round voting system.

The essence of the contested Subpara. 5 of the referendum question is that two separate voting districts would be established by statute in which persons eligible to vote (Slovene citizens with full capacity) without permanent residence in Slovenia would cast their votes. The aim of the proposal, according to the representative of the signatories, is to have the voting rights of Slovene citizens permanently residing abroad exercised in practice.

10. The Constitutional Court first assessed the compliance of the contested part of the question with Paragraph 1 of Article 82 of the Constitution ("Deputies are the elected

representatives of all the people and they shall not submit to undue influence from any source").

In a classical majority voting system one deputy is elected in each constituency. This manner of forming constituencies, casting votes and counting results does not mean that the elected deputy is accountable to the voters in his constituency. The elected deputy is a representative of all the people and may not submit to undue influence. The same applies for a deputy who, in accordance with the contested proposal by the proposers of the request for the calling of a referendum, would be elected in the two special constituencies. The majority electoral system does not introduce an unconstitutional accountability of a deputy to the electorate in his own constituency. The contested part of the referendum question is thus not contrary to Article 82 of the Constitution.

11. According to the claims made by the deputy group of the Associated List in the proposed resolution for the submitting of a request for an assessment of constitutionality, the contested part of the question in the request by the group of voters is allegedly not in compliance with the principle of equality of voting rights (Paragraph 1 of Article 43 and Paragraph 2 of Article 80 of the Constitution).

Equality of voting rights means that the vote of every voter is worth the same. A common form of infringement of the voting right in modern electoral systems is the formation of constituencies of different sizes (inadmissible electoral geometry). In order to achieve equality of voting rights in the formation of a constituency, the principle of roughly the same number people eligible to vote electing one deputy (or the same number of deputies) must be applied.

12. The assessment of the compliance of special voting districts with the principle of equality of voting rights depended on the number of persons eligible to vote (Slovene citizens with full capacity) who permanently reside abroad.

According to figures provided by the Ministry of Interior, on 30 June 1996 the total number of Slovene citizens was 2,039,578. As of the same date there were 1,539,035 persons of legal age, of whom 1,535,178 permanently resided in Slovenia, while the remaining 57,857 resided abroad.

The Ministry does not keep records on the permanent residence of Slovene citizens permanently residing abroad. The only information it has is on which countries Slovene citizens with permanent residence who requested and were granted Slovene passports lived. What is known is the country of permanent residence on the day a Slovene passport was acquired.

According to the proposal contained in the voters' request, 86 voting districts are to be formed in Slovenia. The average number of citizens of legal age in a voting district would therefore be 17,850 (the calculations were made using the information provided by the Ministry of Interior). The average number of citizens of legal age in the special voting districts for Slovene citizens living abroad would be 28,928. The disparity is 62 per cent, in favour of persons eligible to vote with permanent residence in Slovenia. This disparity could be described as considerable.

13. The figures on the number of voters entered in a special electoral register of citizens not permanently resident in the Republic of Slovenia, however, indicate that voter participation at past elections to the National Assembly was so low that a division of these voters into two voting districts would seriously infringe the equality of the voting right in their favour.

14. Both these measurements indicate that two special voting districts being formed would lead to a sizeable deviation from the principle of the vote of one voter equalling the vote of another voter. A significant departure from the equality of voting districts in terms of the number of persons eligible to vote is an infringement of the principle of equality of voting rights and is not in compliance with Paragraph 1 of Article 43 of the Constitution nor with Paragraph 2 of Article 80 of the Constitution.

15. An infringement of the equality of voting rights by departing from the principle of approximately the same number of people (or persons eligible to vote) electing one deputy is permissible under certain conditions - if justified by the protection of the rights of other legal subjects or the protection of other constitutional rights. In the case in question, there is no such reason. Even if facilitating the right to vote for Slovene citizens living abroad was a constitutionally permitted goal, the proposed arrangement is completely inappropriate for the attaining of that objective.

The voting right of Slovene citizens living abroad can be exercised in a majority electoral system by granting the right to vote in a voting district or constituency by applying the circumstance of the location of the most recent residence of the voter or any other connecting circumstance without this having any impact on the actual possibility of implementing the voting right of this category of voters. The valid Elections to the National Assembly Act (Official Gazette of the RS, Nos. 44/92 and 60/95 - hereinafter: the ZVDZ) specifies the connecting circumstance of the most recent residence of a voter or one of his or her parents. If this cannot be established, the voters decide for themselves in which constituency and voting district to exercise their voting right. As far as attaining the goal cited by the representative of the signatories of the request for the calling of a referendum as justification for the proposed solution is concerned, there are in reality important provisions concerning the manner of voting.

B.-III.

16. The non-compliance of Subpara. 5 of the question contained in the request for the calling of a referendum made by 43,710 voters raises the question of whether the National Assembly must call a referendum on the remaining part of the question. The answer to this question depends on whether it can be considered that Subpara. 5 is such an important composite part of the request that the request would no longer be the same in essence without it. It has to be assessed whether the voters who signed the request for the calling of a referendum would give their support to the request without Subpara. 5. This assessment must be based on the objective essential nature or otherwise of this part of the referendum question.

17. The referendum question without the contested part makes a whole that can be summarised in the following formulation: "Are you in favour of enacting a two-round majority electoral system with an amending act to the ZVDZ?" The first four subparagraphs form the essential part of the referendum question since this is where the basic proposal of the request takes shape, radically changing the electoral system from a proportional to a majority system. By not taking into account Subpara. 5, these four subparagraphs are not merely the "remains" or "truncated question" but an independent whole.

Subpara. 5 of the question in the voters' request is such that it may be removed from the whole question such that the remaining part forms a rational whole. This subpara. is not an essential part that would be inseparably linked to the whole.

18. Subpara. 5 of the question contained in the request by the group of voters is therefore not essential and is separable from the referendum question. The question would be essentially the same as the original (unabridged) even without the contested part. The unconstitutionality of the non-essential part of the question, which does not prejudice the whole, cannot be reason for a decision by the National Assembly not to call a referendum as requested by 43,710 voters.

19. The remaining part of the referendum question is an independent whole, but with a formal flaw. Subpara. 1 puts the question: "Are you in favour of (...) 86 voting districts with roughly the same number of voters being formed in Slovenia?" The number of voting districts under Subpara. 1 (86) assumes two additional voting districts under Subpara. 5. With Subpara. 5 established as being not in compliance with the Constitution, the figure 86 in the Subpara. 1 should be changed to 88. This change would be merely a logical, inevitable and formal correction to the referendum question. Establishing that Subpara. 5 is so non-essential that the signatories would support even the remaining, abridged but essential, part logically implies the conclusion that in this case the part of the question in Subpara. 1 should read as follows: "Are you in favour of (...) 88 voting districts with roughly the same number of voters being formed in Slovenia?" Therefore, the Constitutional Court ordered the National Assembly, pursuant to Paragraph 2 of Article 40 of the Constitutional Court Act (Official Gazette of the RS, No. 15/94 - hereinafter: the ZUstS), to make this logical amendment to Subpara. 1 of the question contained in the request by the group of voters when it calls the referendums.

B.-IV.

20. The text (amended) of the referendum question in the request by the National Council reads as follows:

"Are you in favour of the electoral statute being changed so that each voter has two votes:

with the first vote in a two-round, majority system a voter elects a deputy representing his voting district (44 in total), with the second vote under a proportional system the voter elects a deputy from a party or non-party list, whereby the second vote is counted in a proportional division of all 88 seats?"

Attention should be drawn to the fact that the National Assembly requested an assessment of the original third point of the referendum question which read as follows:

"Are you in favour of (...)

- 44 deputies being elected by proportional representation with a second vote for a list of candidates in the constituency, whereby the candidates from the lists of candidates with the greater number of votes are elected and, at the same time, that the second vote is counted in a proportional division of 88 seats?"

Despite the change, the essential part of the question remained the same and hence it could be considered that the request by the National Assembly applies to the modified question as well.

21. The allegation of unconstitutionality ensuing from the proposed resolution on the submission of a request for a review of constitutionality (proposal by the deputy group of the Slovene People's Party) is based on two claims:

- that the second part of the question from which it ensues that all 88 seats are divided in accordance with proportional representation is incompatible with the preceding part, from which it ensues that 44 deputies are elected in a majority system,

- that the electoral system embraced in the proposal (question) is not in compliance with the provision contained in Article 80 of the Constitution, according to which the National Assembly has 90 deputies. A more detailed argumentation of this assertion cannot be extracted from the proposed resolution nor from the transcript of the 46th extraordinary session of the National Assembly submitted with the National Assembly request.

22. The constitutionality of the question in the National Council request has to be assessed from the following two aspects:

- whether the electoral system can be implemented on the basis of the proposal so that any possibility of the number of National Assembly deputies increasing is excluded; - whether the proposal is

inherently contradictory and cannot be legally carried out and hence is not in compliance with the principles of a state governed by the rule of law.

23. The electoral system proposed by the National Council in its request for the calling of a referendum is known in theory as the personalised proportional voting system, and is established in the positive law of the Federal Republic of Germany and New Zealand. This system is based on each voter casting two votes.

With the first vote the voter elects his deputy in a uninominal voting district (a voting district in which one deputy is elected), where the number of voting districts equals half of all deputy seats. The second vote is cast by the voter for a list of candidates in a large constituency. The second vote counts towards a division of seats won by the list, with the seats first being allocated to the candidates who were elected in uninominal voting districts and the rest going to other candidates from the list under certain criteria.

In this type of electoral system, the phenomenon of so-called surplus seats may emerge. If the candidates from a certain list win more seats on the basis of the first votes than fall to the list on the basis of the second votes, or if on the basis of the first votes candidates who did not seek election on any of the lists (independent candidates) were elected, a complete proportional division of the seats on the basis of the second votes is not possible. In the German electoral system, for example, in such cases the number of deputies increases by the number of surplus seats.

24. The answer to the question as to whether the electoral system can be carried out so that the number of deputies is not increased above 90 is yes. The personalised proportional electoral system based on two votes can be regulated by statute so that the number of surplus seats is deducted from the number of seats to be distributed by the proportional principle and then a calculation is made (using the proportional representation principle) of how many of the remaining seats belong to each of the candidate lists.

This is the reply offered by, inter alia, the proposed Act on Amendments and Supplements to the Elections to the National Assembly Act, which is a result of the referendum proposal by the National Council and which the National Council submitted in its reply to a request from the National Assembly. Pursuant to this proposed statute, eleven constituencies are to be formed for the election of deputies to the National Assembly, and in each of the constituencies there will be four voting districts.

In these constituencies, lists of eight candidates are submitted. Four of the candidates on the list are also assigned as candidates in voting districts. A voter has two votes. He casts the first vote for a candidate in the voting district, and the second for the constituency list. In the end, one deputy is elected in a two-round majority electoral system. Based on the second votes and with the aid of an electoral quotient (the so- called Hare quotient) it is then established how many seats in a constituency go to an individual list (where the seats won by independent candidates are not counted). The seats won in a constituency first go to the candidates elected in the voting districts, and the remaining seats go to the list. If there are surplus seats in a constituency (if the candidates from a list win more seats in the electoral districts than the constituency list would get on the basis of the second votes) the calculation is repeated, this time not taking into account the seats of this list or the votes for it in the calculation of the electoral quotient. This prevents more than eight deputies being elected in a constituency.

The remaining seats (those not distributed at the constituency level) are divided at the national level by applying the d'Hondt calculation system, where the number of seats is not always established by dividing 88 seats but on the basis of the number of seats minus the surplus seats won in the constituencies and minus the seats won by independent candidates. In no case can the number of elected deputies exceed 88, or 90 including the deputies elected by the Italian and Hungarian ethnic minorities on the basis of their special voting right.

25. From Subpara. 1 of the referendum question contained in the request by the National Council it ensues that 44 deputies are elected on the basis of the first vote in uninominal electoral districts in accordance with the two-round majority principle, and from Subpara. 2 that the second vote is counted

towards a proportional division of all seats. Paragraph 1 therefore guarantees that seats won in the uninominal voting districts (in the "majority" part of the elections) shall count as final, and the second that the entire electoral system is proportional.

The second principle cannot be implemented consistently at all times.

Characteristic of the electoral system in the proposal by the National Council is that in principle it is proportional but can also have greater or lesser majority effects. The majority effects are created by the surplus seats - the situation where the candidates from a certain list receive more seats in the voting districts in a constituency than they are entitled to on the basis of the second votes, or where the seats in electoral districts are won by independent candidates. In such cases, not all the seats can be divided proportionally. In an extreme and only theoretically possible case (where there were 44 surplus seats), the effect of this electoral system would be half proportional, half majority. In any case, the actual ratio between the proportional and majority effects of this electoral system is only revealed at each election and is not something that is known for certain in advance.

26. We could conclude that the referendum question is contradictory because in an actual election it is possible that only the first part of the proposal could be carried out consistently (the election of 44 deputies by the majority principle); yet since only half of the 88 deputies would be elected using the majority principle, the possibility of surplus seats is quite low.

The available empirical evidence from the German elections in practice suggests that the majority deformations of the electoral system proposed by the National Council are minimal.

The figures show that the number of surplus seats fluctuates between 1 (in 1980 and 1987) and 5 (in 1961) out of 484 deputies.

A departure from the principle on which the referendum question in the request by the National Council is based is therefore theoretically possible (this cannot be avoided under the electoral statute regime), but it is inconsequential or negligible. Thus it cannot be said that the referendum question by the National Council is inherently contradictory and misleading and therefore not in compliance with the principles of a state governed by the rule of law.

C.

27. The Constitutional Court made this decision on the basis of Article 16 of the ZRLI, and Article 21 as well as Para. 2 of Article 40 of the ZUstS, composed of: dr. Tone Jerovšek, President, dr. Peter Jambrek, mag. Matevž Krivic, mag. Janez Snoj, dr. Janez Šinkovec, dr. Lovro Šturm, Franc Testen, dr. Lojze Ude and dr. Boštjan M. Zupančič, the Judges. Item 1 of the holding was adopted by eight votes against one (Judge Šturm voted against), Item 2 by seven votes against two (Judges Jambrek and Šturm voted against), Item 3 unanimously, and Item 4 by six votes against three (Judges Krivic, šinkovec and Ude voted against). Judge Krivic announced a concurring opinion concerning Item 1 and 3 and dissenting opinion regarding Item 4, Judges Jambrek and Šturm their dissenting opinions as to Item 1 and 3, and Judge Ude his concurring opinion about Item 1 and dissenting opinion about Item 4 of the holding.

President of the Constitutional Court:
dr. Tone Jerovšek