



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-354/96
9 March 2000

DECISION

At a session held on 9 March 2000 in the proceedings to review constitutionality and legality instituted by the petition of the Liberal Democracy of Slovenia, the Constitutional Court

d e c i d e d:

Paragraphs 1 and 4 of Art. 92 of the National Assembly Elections Act (Official Gazette RS, No. 44/92) are not inconsistent with the Constitution.

R e a s o n s

A.

1. The petitioners challenged Paras. 1 and 4 of Art. 92 of the National Assembly Elections Act (hereinafter: ZVZD), which determine that, with regard to National Assembly elections, mandates which are not distributed in electoral units on the basis of the electoral quotient are distributed on the State level on the basis of a sum of remaining votes given to the same lists. They asserted that the challenged provisions were inconsistent with the principle of the equality of the right to vote (Art. 43 of the Constitution), since they allegedly entailed the different strength of the votes of voters when election results are established. They stated that the distribution of mandates on the basis of remaining votes made an impact such that the mandates were not distributed to the same lists in proportion to the share of votes they obtained. They cited theoretical and practical examples, which allegedly supported their assertions. For example, at the 1996 National Assembly elections for obtaining one mandate, the Liberal Democracy of Slovenia needed 11,543 votes, whereas the Slovenian People's Party 10,987 votes, the Social-Democratic Party 10,279 votes, the Slovenian Christian Democrats 10,728 votes, the Associated List of Social Democrats 10,728, the Democratic Party of the Retired 9,218 votes, and the Slovenian National Party 8,600 votes. According to the petitioners, there were 12,377 votes needed for one mandate within the framework of the first phase of distribution, and 8,441 votes for a mandate within the framework of the second phase of distribution.

2. In the petitioners' opinion, the fact that there were more votes needed for a mandate for one political party than for a mandate for another political party entailed that the vote of the voter who voted for the second political party valued more than the vote of the voter who voted for the list of the first political party. They asserted that the challenged provisions were inconsistent with Arts. 2, 3 and 43 of the Constitution.

They suggested that the Constitutional Court annul the word "remains" in Paras. 1 and 4 of Art. 92 of ZDVZ, or (subsidiarily) annul Paras. 1 and 4 of Art. 92 of ZDVZ entirely.

3. In its reply to the petition, the National Assembly Secretariat for Legislation and Legal Affairs stated that the effects of the challenged ZVDZ provisions were the same as asserted by the petitioners, which could allegedly be confirmed by the results of the 1992 and 1996 elections. The Secretariat further stated that such a regulation was, however, not discriminatory since it was applicable to all political parties. Differences emerged later, when the proportion between the votes obtained and candidates elected of individual lists are taken into account. Furthermore, the Secretariat stated that the National Assembly had already viewed, with a high degree of consensus, such unproportionality as unappropriated. To this effect, a bill was submitted to remedy the challenged regulation, which was approved in the first discussion. The Secretariat referred to Art. 301.2 of the National Assembly Rules of Procedure and stated that, in view of the fact that the bill to change the disputed statutory regulation

had been submitted for parliamentary discussions and debates, there was no need for it to explain this regulation.

B. - I.

4. The Constitutional Court adopted the said petition by Ruling No. U-I-354/96, dated 14 November 1996, however it dismissed a proposal for temporary suspending the challenged ZVDZ provision.

5. The challenged provisions of Art. 92 of ZVDZ regulate the so-called second distribution of mandates concerning National Assembly elections. The first distribution of mandates is carried out in a manner such that in electoral units individual lists obtain one mandate per a certain number of votes, which is equal to the electoral quotient; provided that the electoral quotient is calculated by way of the whole number of votes cast for all lists in an electoral unit divided by the number of Deputies to be elected in the electoral unit, i.e. by eleven.

How many times the list reaches this number that number of mandates it obtains on the basis of the first distribution.

Since, on account of remaining votes, all mandates cannot be distributed in such a manner. Therefore, the remaining (undistributed) votes are distributed on the State level on the basis of a sum of remaining votes to the same lists in all electoral units. What is applied to such distribution is d'Hondt's system, according to which the sums of remaining votes are divided by the numbers from one to the number of undistributed mandates; such mandates are distributed to lists by an order of precedence of the highest quotients.

6. Mandates which are not distributed in electoral units on the basis of the electoral quotient are divided in proportion to the sums of remaining votes given to individual lists. Thus, the second distribution of mandates is regulated in a manner such that only remaining mandates (the ones which were not distributed at the first distribution) are distributed, on the basis of the sums of remaining votes. This entails that possible unproportionalities developed at the first distribution of mandates (i.e. the distribution on the basis of electoral quotients) are preserved and, furthermore, certain unproportionality created in particular to benefit those lists which obtained less mandates on the basis of the first distribution. The development of the second phenomenon particularly results from the fact that in the case of the distribution on the basis of remaining votes also those mandates are distributed, which would be given to lists which did not reach the electoral threshold \dot{S} in order to enter the National Assembly \dot{C} . In distributing these mandates, what is important is only remaining votes, not the whole number of votes obtained by the same lists. Accordingly, such distribution is not fully proportional.

7. The challenged regulation, pursuant to which in the case of the second distribution only the mandates which were not distributed at the first distribution are proportionally distributed, concerning only the sums of remaining votes, may entail deviation from the principle of the proportionality between the share of votes and the share of mandates given to the same lists. The distribution on the basis of remaining votes may cause that the number of mandates may depend on chance and that the whole number of mandates obtained on the basis of the electoral quotient in electoral units and on the basis of the second distribution is not fully proportionate to the overall success of individual lists at elections. Individual political parties (or other proposers) thus need a different number of votes to obtain mandates for their lists.

B. - II.

8. In Art. 43.1, the Constitution provides that the right to vote is universal and equal. In Decision No. U-I-44/96, dated 13 June 1996 (Official Gazette RS, No. 36/96 and DecCC V,98), the Constitutional Court adopted the following view: "The equality of the right to vote entails that every voter has the same number of votes and that the votes of all voters have the same value. In a proportional electoral system this is ensured in a manner such that Deputy mandates are distributed in proportion to the number of votes for each list of candidates, what means that every vote has the equal weight (i.e. for the election of every Deputy the approximately equal number of votes is needed, given that every

single valid vote cast is taken into consideration). Any deviation from the principle of proportionality developed in this electoral system may entail an encroachment on the right to vote."

9. A consistent application of the view embodied in Decision No. U-I-44/96 would entail that only such electoral system is in conformity with the principle of the equality of the right to vote which ensures the full proportionality (insofar as it is possible to be achieved in terms of mathematics) between the share of votes and the share of mandates. However, given consistent respect for this view, only such exemptions from full proportionality would be allowed which protect some other constitutional value, are necessary for achieving it, and proportional to the benefit they bring (as, e.g., the electoral threshold). Any other deviation of the manner of the distribution of mandates from the proportionality between the share of votes and the share of mandates would be unconstitutional. The view that equates the principle of the equality of the right to vote with the principle of the proportional distribution of mandates, thus restricts the legislature's discretion in selecting an electoral system consistent with the principle of the equality of the right to vote to the proportional system with the highest possible proportionality ensured between the share of votes and the share of mandates obtained.

10. Such an interpretation of the principle of the equality of the right to vote is too narrow; the view embodied in Decision No. U-I-44/96 entails too strict evaluation of this constitutional principle. The Constitution does not restrict to such extent the legislature's own political judgement. The principle of the equality of the right to vote determined in Art. 43 of the Constitution requires that all voters have the same number of votes and that all votes have the possibility ensured in advance to be considered when election results are considered (and mandates distributed). It is not, however, necessary that the votes of all voters make in fact the same impact on the election results or that the electoral system ensure the full proportionality between the share of votes and the share of mandates obtained. Moreover, the principle of the equality of the right to vote does not require that all political parties need to obtain the same number of votes in order to acquire one mandate; it is enough that political parties (more precisely: candidates or candidate lists) have the same possibilities ensured in advance for obtaining a mandate or mandates.

11. The principle of the equality of the right to vote thus requires that every voter bring to the polls the same number of votes having the same value, although it occurs, when the mandates are distributed, that the votes of some voters are not respected or that they make a lesser impact on the election results. If all voters have the same number of votes and if their votes have the same possibility determined in advance for making an impact on the election results (and on the distribution of mandates), they are considered equal by law at the time of voting; however, it may occur to any voter, with an equal degree of probability, that their vote is considered to a greater or smaller extent at the distribution of mandates. The rules governing the distribution of mandates equally apply to all voters and none of them is discriminated against. However, the equality of the right to vote would be encroached on, for example, when, due to the essential inequality of the size of electoral units (measured by the number of qualified voters), it is evident even before a voting or at the time of the voting that the vote of one voter (i.e. the voter from the first electoral unit) is worth less than the vote of another voter (i.e. the voter from the second electoral unit).

12. Accordingly, it follows that the conformity of the electoral system with the constitutional principle of the equality of the right to vote is reviewed in view of the equality of voters at a voting, not at the distribution of representative mandates.

13. The challenged provisions regulate the manner of the distribution of mandates and make no impact on the equality of the votes of voters at a voting. Truly, they represent deviation from the principle of proportionality. However, the deviation from the proportionality between the share of votes and the share of mandates does not entail an unequal position of voters at a voting. It may occur to any voter, with an equal degree of probability, that their vote would be worth more or less at the distribution of mandates, that it would have a greater or smaller weight. The deviation from proportionality, caused by the distribution of part of Deputy mandates on the basis of the sums of remaining votes given to the same lists in the electoral units, and the fact that the final impact of a vote depends on the list for which the voter voted, therefore do not entail a violation of the principle of the equality of the right to vote.

14. The deviation from the view embodied in Decision No. U-I- 44/96 does not entail that the Constitutional Court considers incorrect the decision made in the said case. The disposition of the decision (finding conformity with the Constitution) would have been namely the same also in case the view of the Constitutional Court had already then been such as taken in this case. What would have differed is only the reasoning.

15. The petitioners also asserted the inconsistency of the challenged regulation with Arts. 2 and 3 of the Constitution.

They had not substantiated the inconsistency with Art. 2 (the principle of a State governed by the rule of law) of the Constitution, thus the Constitutional Court did not enter the review of this assertion. In Art. 3.2 of the Constitution, it is determined that in Slovenia, supreme power is held by the People and that citizens exercise this power directly and through elections. This provision requires that the statutory regulation of elections to the National Assembly conforms with the principles of democratic elections (in particular with the principle of the universality and equality of the right to vote, the freedom and secrecy of voting and the directness of elections). Concerning the fact that the petitioners expressly asserted only the violation of the principle of the equality of the right to vote, the Constitutional Court reviewed the conformity of the challenged regulation only in this light, not also in the light of other principles of democratic elections.

C.

16. The Constitutional Court reached this Decision on the basis of Art. 21 of the Constitutional Court Act (Official Gazette RS, No. 15/94 - ZUstS), composed of: Franc Testen, President, and Judges: Dr. Janez Čebulj, Dr. Zvonko Fišer, dr. Miroslava Geč- Korošec, Lojze Janko, Milojka Modrijan, Dr. Mirjam Škrk, Dr. Lojze Ude and Dr. Dragica Wedam-Lukić. The Decision was reached by seven votes in favor to two against. Judges Čebulj in Testen, who voted against, gave dissenting opinions. Judge Ude gave the concurring opinion.

P r e s i d e n t
Franc Testen