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# Concurring Opinion of Judge Dr Dunja Jadek Pensa regarding Decision No. U-I-32/15, dated 8 November 2018

In this concurring opinion, I will only focus on the decision contained in Point 1 of the operative provisions of the majority Decision.

I.

If I reduce the request of the National Council to its essence, the key allegation was that the National Assembly Elections Act (Official Gazette RS, Nos. 109/06 – official consolidated text, and 23/17 – hereinafter referred to as the NAEA) circumvents the rule that the majority of votes determines the allocation of seats to candidates. I have positioned it within the context of the challenged second paragraph of Article 91 of the NAEA.[1] This provision regulates the confrontation among candidates from the same list of candidates (i.e. one that has obtained one or more seats in a constituency) by comparing their relative success in their electoral districts (*cf.* paragraph 38 of the reasoning of the Decision) as a criterion for the allocation of seats to candidates. It is therefore evident that the allocation of seats to candidates is based neither on a comparison of their success according to the number of votes obtained nor on a comparison of their success in relation to the same group of voters. The electorate of a constituency is namely divided into electoral districts.

[1] I thus will not assess this allegation from the perspective of the applicant's evidently erroneous conclusion that only a statutory regulation that would enable every electoral district to have an elected deputy, thereby taking into account the number of votes obtained, could be consistent with the constitutional requirement under the fifth paragraph of Article 80 of the Constitution that "voters have a decisive influence on the allocation of seats to the candidates." Such could namely only be achieved within a majority electoral system, which is contrary to the requirement under the fifth paragraph of Article 80 of the Constitution that deputies are elected according to the principle of proportional representation (*cf.* paragraph 27 of the reasoning of the Decision).

The reply to the mentioned allegation depended on the interpretation of the constitutional requirement that “voters have a decisive influence on the allocation of seats to the candidates” in the context of the fifth paragraph of Article 80 of the Constitution. Such concerns the provision that was introduced by the Constitutional Act Amending Article 80 of the Constitution of the Republic of Slovenia (Official Gazette RS, No. 66/2000 – hereinafter referred to as the CA80), more specifically by Section I of the CA80. At the outset, I would like to underline two things. Firstly, that Section II of the CA80 determined the manner of implementation of Section I of the constitutional amendment, *which was subsequently incorporated into the NAEA*, and, secondly, that the Constitutional Court has already adopted the position that Section II of the CA80 has the character of provisions of constitutional law and therefore the Constitutional Court is not competent to review its consistency with the Constitution.[2]

II.

The mathematical formulae on the basis of which, *after* an election, the results of voting are translated into (1) the allocation of seats to the lists of candidates and (2) the allocation of seats to candidates from these lists in accordance with the challenged regulation effect that a seat is allocated to a candidate from a list of candidates that had been set up for a constituency despite the fact that not *all* of the voters from that constituency could have a say regarding this candidate and even if the constituency (*not* the electoral district) is one that guaranteed electoral success. What is more, not only did not all of the voters from the constituency have their say as regards the candidate, but *the great majority* of these voters did not have their say about him or her. A candidate can namely stand for election in a maximum of two out of the eleven electoral districts that constitute a constituency, and, within the electoral districts, only these candidates are voted on. All of the voters who did not cast their vote in the electoral district wherein a (by this time already) elected deputy stood for election were thus cut off from him or her in the electoral process. This entails that the great majority of the voters in the constituency wherein this candidate was elected could not cast their vote with regard to this candidate. The conclusion that the votes of these voters could not have been decisive in the allocation of a seat to this candidate seems to present itself.

This is enabled (*inter alia*) by the challenged provision, according to which “candidates from a list of candidates are elected according to their rank calculated on the basis of the share of their votes in the total number of votes cast in the electoral district or the total number of votes cast in the two electoral districts” (the second paragraph of Article 91 of the NAEA). Allow me, however, to stress that this provision, which is crucial for the personalisation of elections, is embedded within the regulation of the proportional

[2] *Cf.* Order of the Constitutional Court No. U-I-214/00, dated 14 September 2000, OdlUS IX, 201, paragraph 11 of the reasoning.

electoral system and is only activated once a "list of candidates" obtains (at least) one seat within a constituency and during the allocation of seats at the state level (*cf.* paragraph 37 of the reasoning of the Decision). The decision on the seats obtained and the number of such seats are determined on the basis of the Droop quotient and the d'Hondt formula in accordance with the number of voters who, when voting for a candidate, have also chosen his or her list of candidates, naturally also taking into account the constitutionally required electoral threshold. In order to understand the legal dimensions of the electoral system, which also shape voters' possibility of choosing within the challenged regulation, one must therefore also have in mind (at least) the following characteristic of the NAEA: a candidate's nomination is inextricably linked to a confirmed list of candidates. Such is expressed on the ballot paper by placing the name of the list of candidates next to the name of the candidate (*cf.* paragraph 37 of the reasoning of the Decision).[3] When voting, voters are therefore not only faced with the individual candidate, but unavoidably and directly also with the list on which he or she is standing for election. In such a manner, every voter is concurrently addressed by the candidate who is standing for election in the electoral district wherein the voter is casting his or her vote, as well as all other candidates who have co-created a specific list of candidates, but whom the proposer of the list has placed in other electoral districts wherein the voter is not voting.[4] In the domestic version of the proportional electoral system, the chance of each of these candidates obtaining a seat is increased by the voter's vote (*cf.* paragraph 37 of the reasoning of the Decision). Thus, voters express their support for the policies of those who have co-created a specific list of candidates (i.e. as a general rule, political parties) and who have also decided in which electoral district their candidates will stand for election.

The *share* of votes obtained by a candidate in the total number of votes cast in an electoral district is only decisive for the personalisation of seats obtained in such manner. In this framework, the relative success of a candidate in an electoral district and its subsequent comparison with the relative success of the remaining candidates from the same lists of candidates in other electoral districts are thus crucial for such personalisation. Irrespective of the outlined broader legal framework, I can conclude that personalisation according to the NAEA is characterised by partiality. Only votes that the candidate obtained in his or her electoral district can be taken into account (although the votes cast for his or her list of candidates in the constituency, which enabled that the list obtained the seat or seats in the first place, cannot be disregarded).

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[3] Rolls of confirmed lists of candidates are published no later than 15 days prior to the election day (*cf.* Article 61 of the NAEA); notices indicating the rolls of lists of candidates also have to be put up at the polling stations (*cf.* the fourth paragraph of Article 64 of the NAEA).

[4] The reply to the question of the extent to which, within the regulation of elections to the National Assembly, an individual candidate's virtues are intertwined with or highlighted by the complex of political preferences that are personified by all the candidates on the confirmed lists of candidates far exceeds the legal dimensions of the regulation of the electoral system.

In spite of the partiality underlying the challenged regulation of the personalisation of elections, I believe that the second paragraph of Article 91 of the NAEA is not inconsistent with the requirement under the fifth paragraph of Article 80 of the Constitution that "voters have a decisive influence on the allocation of seats to the candidates." Allow me to explain.

III.

With regard to the interpretation of the requirement stemming from the fifth paragraph of Article 80 of the Constitution that "voters have a decisive influence on the allocation of seats to the candidates" in the majority Decision (*cf.* paragraphs 27 through 33 of the majority Decision), I would like to add that I agree with the starting points of the interpretation of the key part of the text of the fifth paragraph of Article 80 of the Constitution,[5, 6] as well as with the meaning of this part of the text revealed by the Decision and which prevailed in the opinion of the majority.

In more general terms, it was important for the interpretation of the key part of the text of the fifth paragraph of Article 80 of the Constitution that the (constitutionally relevant) relations that co-define the meaning and therefore the scope of the constitutional requirement that voters have a decisive influence on the allocation of seats to the candidates be defined. It has, *inter alia*, been taken into consideration that the constitutional requirement under review must be implemented within the framework of a proportional electoral system, this also being a constitutional requirement stemming from the fifth paragraph of Article 80 of the Constitution, and that a systemic interpretation does not allow for the conclusion that the requirement [as to the decisive influence of voters] forms an integral part of the right to vote. The relationship between the voters, on one hand, and the proposers of lists of candidates, on the other, was only one of the relationships considered in connection with the allocation of seats to candidates (*cf.* paragraph 31 of the reasoning of the Decision). Understanding the meaning of the phrase "the decisive influence of voters" in this regard as entailing that the allocation of seats to the candidates must be in the hands of the voters and not in the hands of the proposers of the lists of candidates was crucial for the final solution. Precisely due to the fact that the allocation of seats is in the hands of the voters (and not the proposers of the lists of

[5] If the Supreme Court of the United States of America encounters a new domain, it nearly inevitably commences with the text. Taken from M. Tushnet, The United States: Eclecticism in Service of Pragmatism, in: J. Goldsworthy (Ed.), Interpreting Constitutions: A Comparative Study, Oxford University Press, Oxford 2006, p. 48.

[6] With regard to the usual methods of interpretation of the German Basic Law before the German Federal Constitutional Court, *cf.* D. P. Kommers, Germany: Balancing Rights and Duties, in: J. Goldsworthy (Ed.), Interpreting Constitutions: A Comparative Study, Oxford University Press, Oxford 2006, pp. 196–201. In my understanding, these are exactly the same as follow from the reasons of the majority decision.

candidates), it cannot be claimed that, from the perspective of the fifth paragraph of Article 80 of the Constitution, the regulation of the electoral system in the narrower sense does not ensure the decisive influence of voters on the allocation of seats. The adopted interpretation thus does not support the argument that the regulation is inconsistent with the Constitution already as, due to the partiality of the allocation of seats to individual candidates, a higher number of votes obtained from voters in a constituency that guaranteed election is not decisive; and, therefore, the influence of voters could be "stronger" than that ensured by the challenged second paragraph of Article 91 of the NAEA. Or, simply put, the challenged regulation is not inconsistent with the Constitution already due the fact that the influence of voters, or of an individual voter, on the allocation of seats to candidates in general could be "greater" than that ensured by the challenged provision of the NAEA.

An interpretation that, in the given context, assigned to the open-textured legal term, as its decisive meaning, a different meaning than that which prevailed in the Decision would collide with the definition of the same term in the explanatory memorandum to the draft of the CA80, which the Commission for the Electoral System and Constitutional Amendments (hereinafter referred to as the Commission) prepared concerning the new constitutional text as the proposer of this constitutional act. It follows from such that this amendment to the Constitution "enables the introduction of all forms of proportional representation or proportional electoral systems. However, it excludes the possibility of allocating seats according to the order as determined on a list of candidates by the proposer of the list (i.e. a political party or a different proposer of a list), as well as the possibility of applying so-called national lists, as it requires that voters have a decisive influence on the allocation of seats to the candidates."[7] It thus suffices that voters (and not some other entity) have an influence on the allocation of seats. It would further collide with Section II of the CA80, the review of which falls outside the jurisdiction of the Constitutional Court (*cf.* above); as well as with the position that follows from the Commission's explanatory memorandum, according to which that section "ensures the implementation of the proposed amendment of the Constitution and the transition to its application."[8] It seems logical to me that by adopting Section II of the CA80 the Constitution framers concurrently expressed that, as it is intended to enable the transition to the new constitutional order, in its opinion, that section is consistent with Section I and it regulates precisely those elements of the electoral system that the implementation of the amendment to the Constitution requires. I could namely not disregard that in doing so the Constitution framers did not dictate to the legislature that the further implementation of the newly established constitutional requirements by the law referred to in the fourth paragraph of Article 80 of the Constitution was required, and, naturally, it therefore also did not determine a time frame for the adoption of a law with content that would satisfy the requirement under Section I of the CA80. The Decision clearly explains all of this when it draws attention to the teleological and historical interpretations of the fifth

[7] Gazette of the National Assembly, No. 52/2000.

[8] *Ibidem*.

paragraph of Article 80 of the Constitution (*cf.* paragraphs 40 through 43 of the reasoning of the Decision).

IV.

The majority's decision does not entail that the Constitution precludes the legislature from regulating the requirement of the decisive influence of voters on the allocation of seats differently (for example, by enacting one of the electoral systems listed in note No. 9 of the Decision). Not at all. It does, however, entail that by placing the regulation of the electoral system in the narrower sense within the scope of the question of the appropriateness of the statutory regulation it leaves the discussion of such and the search for allegedly more appropriate solutions to political principles. In this regard, I would like to add that I have not overlooked the issue that was pointed out at the public hearing: on the one hand, the Constitution entrusts the National Assembly with the adoption of a law that regulates the electoral system (the fourth paragraph of Article 80 of the Constitution) and therefore the rules that define how it is constituted following every election; on the other hand, we might question the likelihood that deputies who have obtained their seats in accordance with the rules in force would deem those same rules to be inappropriate. However, the effect of the Constitutional Court intervening in the resolution of this issue would, in my opinion, be much worse than the issue itself. It would water down the key political principle upon which the constitutionalisation of the electoral system in the fifth paragraph of Article 80 of the Constitution is based. Such was, I believe, unmistakable: to only frame in a minimalist manner the constitutional requirements for the statutory regulation of the electoral system in the narrower sense (*cf.* the summarised statements from the *travaux préparatoires* for the constitutional amendment). And *a contrario*: anything that exceeds this minimal requirement of the Constitution, therefore, has been left to regulation according to political principles.

In this regard, the message of the majority Decision is the same as the message of Constitutional Court Order No. U-I-346/05, dated 4 October 2007. The choice of a system that ensures the influence of an individual voter on the allocation of seats to the candidates in a different manner and perhaps also to a greater extent, is a question of the appropriateness of statutory regulation and a political question *par excellence* (*cf.* paragraph 33 of the reasoning of the majority Decision). The Constitutional Court must – also in accordance with the principle of judicial self-restraint that is known in all countries wherein the principle of the separation of power applies – leave the assessment of the greater or lesser political fairness and appropriateness of one or another electoral system to parliament.[9]

[9] *Cf.* Constitutional Court Order No. U-I-128/92, dated 27 October 1992 (Official Gazette RS, No. 53/92, and OdlUS I, 75).

*Conclusion.* According to the Constitution, the majority of the judges of the Constitutional Court controls the meaning of the text of the Constitution (*cf.* the first sentence of the third paragraph of Article 162 of the Constitution). Also in the case at hand, the Constitutional Court decided on the meaning of one of the requirements stemming from the fifth paragraph of Article 80 of the Constitution, which was crucial for the decision in Point 1 of the operative provisions of the Decision, by a majority vote. However, the rule that the Constitutional Court decides by a majority vote of all its judges (the first sentence of the third paragraph of Article 162 of the Constitution) does not entail that the Constitution belongs to the constitutional judges and that they may therefore interpret it at will. Constitutional law does not merely concern the meaning of the provisions of the Constitution and the counting of judges' votes that support one or another meaning of a constitutional provision that is subject to interpretation. The process of searching for and uncovering the path that has led to the determination of that meaning is also a part of it and thus subject to reasoning by means of constitutional arguments. I am convinced that the majority Decision has consistently construed these arguments. Therefore, I voted for the Decision. I would like to conclude with the thought that the majority resisted the temptation to cross the Rubicon in the name of searching for a regulation of the electoral system that would allegedly be fairer and more appropriate.

Dr Dunja Jadek Pensa
Judge