Number: U-I-32/15-68
Date: 30 November 2018

Partly Dissenting and Partly Concurring Opinion of Judge Dr. Dr. Klemen Jaklič regarding Decision No. U-I-32/15-56, dated 8 November 2018

The Unconstitutionality of the Slovene Electoral System

I The Violation of Equal Suffrage

1. I voted for Point 3 of the operative provisions – i.e. that Article 4 of the Act Establishing Constituencies for the Election of Deputies to the National Assembly is inconsistent with the Constitution. However, in my opinion, the challenged Article is unconstitutional due to reasons that are significantly simpler and less ambiguous than the reasons which the majority became entangled in when trying to avoid admitting that the country has a serious professional and political embarrassment.

2. The challenged Article enacted a severe violation of equal active suffrage. As regards the decision on the decisive question, i.e. which candidates from among the candidates competing with one another on a list of the same party in a constituency are to be allocated the seats obtained by that party in that constituency and which candidates are not to be allocated a seat, the Article at issue namely accords some voters one vote, while according others almost four (really!). Such an evident violation of equal suffrage is

untenable in any country that declares itself, at least formally, to be democratic. Such a violation could also never pass the review of the Strasbourg Court regarding its consistency with equal suffrage ("one person, one vote") as an element of the European Convention on Human Rights and it is likewise not consistent with the minimum common European standards in this field as defined by the European Commission for Democracy through Law (the Venice Commission).[1] What are we dealing with?

3. The decisive question – i.e. which of the candidates from the same party will, considering the number of seats the party has obtained at the constituency level, be going to the National Assembly and which of them will not – is decided at the level of electoral districts. From among the candidates from the same party, the candidate who obtained a higher share of votes than his or her competitors from the same party in other districts of the same constituency becomes a member of the National Assembly, and so on until the number of seats that the party obtained has been filled. The problem arises from the fact that, due to the challenged Article 4 of the law that allows such, electoral districts are not even approximately equal in terms of the number of voters, as in practice there are radical differences between districts! Thus, in the 2014 election, for example, the largest district had 3.73 times more voters than the smallest one. This entails that the vote of a voter from the smallest district counts 3.73 times as much as the vote of a voter in the largest district. In other words, as regards the choice of who among the competing candidates from the same party will obtain the concrete seat they are competing for, one voter has almost four votes while another has only one. This is a blatant – as well as shocking – violation of equal active suffrage that is without compare in democratic states and which should not occur in any such state, as a state that has enacted such a violation cannot be democratic. It namely fails to acknowledge a basic principle of the democratic order, i.e. that in elections every citizen – regardless his or her social, economic, sexual, racial, or any other status, such as, e.g., the place of residence – only has one vote ("one person, one vote").[2] This blatant violation of the foundations of democracy, i.e. the right to

[1] Venice Commission, Code of Good Practice in Electoral Matters, Strasbourg, 25 October 2018. Accessible at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e.

[2] Only in rare instances, such as positive discrimination for the protection of minorities, is an exception allowed, and only some citizens, i.e. the members of a minority, can have two votes: one in the general election of deputies and another in the election of the representative of the minority. However, these rare exceptions do not include instances of specific electoral systems, such as split voting, i.e. an electoral system wherein a voter does not have only one vote as he or she may cast votes for more than one list, or an electoral system that enables separate voting in two districts. In such instances where the voter has more than one vote, the "one person, one vote"

vote as a fundamental human right, has persisted in Slovenia for more than twenty years. In the 21st century such is unacceptable and regrettably also disgraceful for a state that is allegedly a democratic republic.

4. I understand the discomfort of the majority, which tried to avoid the disclosure of this evident and long-lasting violation. Experts who co-operated in the drafting of such an electoral system and allowed it to proceed through the political filter without criticism in this regard or who even proposed such a system failed the proverbial test along with the politicians.[3] It is also true that even the Constitutional Court itself already confirmed such a regulation as constitutionally consistent a few times in the past. However, it never did so on the basis of the argument I have just presented. Parties in previous proceedings before the Constitutional Court have always erroneously asserted[4] an inequality of suffrage in general, i.e. between the candidates from one political party in relation to the candidates from a different political party. Hitherto, the Constitutional Court has therefore found that there was no such inequality as in the electoral competition the number of seats is divided *among the different* parties at the level of the constituencies and, *in contrast to electoral districts, these <u>were</u> approximately equal in size*. There thus existed no violation of equal suffrage in terms of the choice between the candidates from different

---

rule is namely thoroughly observed – as is explicitly explained and highlighted by the Venice Commission, in these instances the "one person, one vote" rule entails that each voter has the same number of votes (See, e.g., the Code of Good Practice in Electoral Matters cited in the preceding note, pp. 15–16).

[3] One of the experts from the field of electoral law who did not participate in the procedure for drafting the electoral system (Prof. Dr Jurij Toplak) also drew attention to the outlined violation at the public hearing. To my knowledge, this was the first time an expert explicitly took a position regarding this issue (from this perspective). See the transcript of the magnetic tape recording of the public hearing on 7 November 2017 (statements by Prof. Dr Toplak). The petition of Dr Toplak before the Constitutional Court in Case No. U-I-226/00 from over fifteen years ago can also be understood as having alleged such type of violation. However, the Constitutional Court evidently did not understand it in such a manner, as in the reasoning of its decision rejecting the petition it considered the passive (and not active) right to vote, also including in its reply that seats are allocated at the level of the constituencies and not districts and that the constituencies <u>are</u> approximately equal in size. However, such is of course the answer to the question of whether there exists an inequality as regards the allocation of the number of seats to *different* political parties and not the answer to our further question regarding unequal active suffrage with regard to the allocation of the seats obtained in such manner to one and not a different candidate *within one and the same* political party. If it was intended to respond to the latter – i.e. our present – challenge, then the answer of the Constitutional Court was evidently wrong, as the decision on which of the candidates from the same political party will be allocated the obtained seats is decided at the level of the districts (and not the constituencies) that are radically unequal.

[4] Or they were at least (erroneously) understood in such a manner by the Constitutional Court; see the preceding note.

parties. However, up until the present case no party before the Constitutional Court (nor any member of the expert community as a co-author of the law) ever drew attention expressly to the argument of an inequality as regards the choice between the candidates from *one and the same party which is made at the level of the radically unequal electoral districts*. With regard to the choice of which of the candidates from the same political party will be given a place in the numerical quota of seats obtained by the party, the above outlined radical violation of equal suffrage has been mathematically proven.

5. That the violation is extremely serious can be explained already with basic knowledge of the constitutional limits and a comparative overview of this fundamental guarantee – i.e. equal suffrage or "one person, one vote". Such a violation did not only persist for a long time, which raises doubts regarding the legitimacy of the compositions of the National Assembly up to the present moment (as a different composition certainly also entails the different rights that the respective representatives would accord us), but, in fact, it also entails a radical deviation from the constitutionally admissible limits of this principle. In the USA, e.g., one of the most consistent implementations of this principle has been in force since the 1960s; there, already the slightest deviations in the size of districts (i.e. even those amounting to one percent) are abrogated as violations of equal suffrage and found to be unconstitutional.[5] The Code of Good Practice in Electoral Matters prepared by the Venice Commission establishes the common minimum standards for European countries regarding this fundamental question. It prescribes that states have to consider specific circumstances, whereby the difference in the size of the districts may in exceptional instances amount to about 10 percent, but never to 15 percent, except in truly exceptional instances, such as, e.g., the protection of minorities.[6] In Australia, Belarus, Italy, and Ukraine, deviations of up to 10 percent are allowed,[7] whereby Australia has the additional limitation that a district may not deviate by more than 3.5 percent in a period of three years and six months following the new redistricting. In

[5] Karcher v. Daggett, 462 U.S. 725 (1983): "Congressional districts must be mathematically equal in population, unless necessary to achieve a legitimate state objective."

[6] "The maximum admissible departure from the distribution criterion adopted depends on the individual situation, although it should seldom exceed 10% and never 15%, except in really exceptional circumstances (a demographically weak administrative unit of the same importance as others with at least one lower-chamber representative, or concentration of a specific national minority)." The Code of Good Practice in Electoral Matters (*op. cit.*, note No. 1), p. 16, point 15.

[7] Analysis by the Department for Analyses and International Cooperation of the Constitutional Court, see the case file. See also the ACE Encyclopedia: Boundary Delimitation, accessible at: http://aceproject.org/ace-en/topics/bd/onePage.

Germany and the Czech Republic, deviations in the size of districts up to 15 percent[8] are admissible, which is still deemed to be acceptable in the [legal] literature.[9] In 1944, the United Kingdom established the standard of 25 percent, which was invalidated only two years later. The rule currently in force there determines deviations not exceeding 5 percent.[10] We can thus see where Slovenia belongs with its deviation in the size of districts that amounts to 373 percent! In other words, as regards the decision-making on the above outlined question (i.e. the choice among the candidates from the same party), some voters have almost 4 votes, while others only have one. Such entails a radical, inadmissible, and evident unconstitutional violation of the fundamental democratic postulate of the equality of the right to vote as a human right – and it has persisted for over twenty years.

6. I understand that the majority wished to avoid this direct, shocking reason for the unconstitutionality of the Slovene electoral system and diminish the embarrassment by abrogating the challenged Article 4 on the basis of completely different (i.e. less compromising) arguments. However, at the same time, the majority was aware of the fact that there was no other way than to abrogate this Article. Otherwise, the Strasbourg Court would have effected its abrogation in its stead at the first opportunity on the basis of the now publicly known argument that I have outlined above without restraint and that, following my explicit question, the applicants have also confirmed as part of the basis of their statements at the public hearing. In contrast to the majority, I wanted to present the violation to the public without restraint as in my opinion the Constitution does not leave any room for the tactical attenuation of such shocking violations. The Constitutional Court adjudicates in the name of the people and for the people as the sovereign of the state. By what right would we then – albeit in order to protect the expert community, politicians, or the apparent legitimacy of the compositions of the National Assembly elected up to the present moment – keep them in the dark and not inform them that all these years their fundamental democratic right has been violated to such an extent and therefore the

---

[8] Analysis by the Department for Analyses and International Cooperation of the Constitutional Court, see the case file. See also the ACE Encyclopedia: Boundary Delimitation, accessible at: http://aceproject.org/ace-en/topics/bd/onePage, p. 44, 122; as well as Delimitation Equity Project: Resource Guide, pp. 251–260, accessible at: https://www.ifes.org/publications/delimitation-equity-project-resource-guide.

[9] See note No. 7 and J. Toplak, *Volilni sistem in oblikovanje volilnih enot* [The Electoral System and the Delineation of Constituencies], Nova revija 2000, pp. 68–69, 90–93.

[10] See the preceding note.

democratic quality of the Slovene state has not been realised? If, now that the violation has become known, the legislature wishes to avoid the condemnation of the electoral system in Strasbourg, it will have to remedy the unconstitutionality not only to the extent deceptively falsely communicated by the majority due to tactical reasons, but to such an extent that it will not violate the “one person, one vote” principle also at the level of the districts. The common minimum European standards regarding this question are completely clear and codified.

II The Violation of the Constitutional Requirement that Voters have a Decisive Influence

7. I voted against Point 1 of the Operative provisions – the regulation of the Slovene electoral system currently in force namely also does not satisfy the explicit requirement of the Constitution that *voters have a decisive influence on the allocation of deputy seats*. The legal term “decisive influence” can be understood in at least three basic ways that mutually supplement one another, but the electoral system currently in force satisfies neither of them and therefore also does not enable a decisive influence in accordance with the common meaning of all three aspects.

8. **Firstly**, it follows already from the above depiction of the violation of the principle of equal active suffrage that the allocation of a seat to one and not to another candidate from the same political party violates the [requirement of the] decisive influence of the voters, who decide on choosing among candidates competing against each other on the same list in radically larger districts. Voters from the smallest districts have a 373 percent greater influence than voters from the largest districts as regards which of the candidates from *the same* political party who compete against each other will be allocated a seat from the quota of seats that this party obtained in light of the overall number of votes it received at the level of the state. It is thus evident that in contrast to some voters other voters do not have a decisive influence on the allocation of seats within the same party, not even in terms of this first and most simple meaning of the term decisive influence, which measures the decisive influence of voters on the allocation of seats from the voter–voter perspective. In the relation of one voter to another, the first voter has a decisive influence on the allocation of seats while the other does not.

9. **Secondly**, the non-implementation of the requirement that voters have a decisive influence on the allocation of seats is equally evident if such influence is assessed from the voters–political party perspective. It follows from comparative constitutional law that there are electoral systems that leave the decisive influence on the allocation of seats to the political parties and systems that diminish such influence of parties by placing it in the hands of the voters instead. A comparative perspective demonstrates that as regards voters' influence (rather than the influence of political parties or some other influence), the Slovene system is even one of the most restrictive systems.

10. In the [legal] literature, an essential aspect of the openness of an electoral system for voters to have an influence on the allocation of seats is measured by whether when casting a vote the voter can choose from among a number of candidates from the same political party or whether it is the political party itself that forced only one of its candidates into the district where the voter is voting and the voter thus cannot choose from among a number of candidates from the same party, but can only vote for the one who was placed there by the political party itself.[11] The following applies in the Slovene electoral system: the political party itself determines and therefore forces upon the voter a single candidate from its party. As a result, when voting on the allocation of a seat, the voter cannot choose from among different candidates from the same party! Therefore, we cannot speak of any kind of decisive influence of the voter on the choice from among different candidates from the same party. On the contrary, in electoral systems based on proportional representation throughout Europe, which I have carefully studied, such an influence of voters is ensured. In Austria, for example, a voter has the possibility to choose from among approximately 12 candidates from the same political party on the ballot paper, in Denmark from among about 7 candidates from the same political party, in Finland even from among 20, and in the Netherlands 30, while in Belgium the number varies between 4 and 22 candidates from the same political party.[12] A voter may choose by means of a preferential vote and vote for any of them. Those are systems that enable

[11] See, e.g., M. Gallagher and P. Mitchell (eds.), *The Politics of Electoral Systems*, Oxford University Press 2008. For a concise overview of preferential voting throughout the world, see J. Toplak, "Preferential Voting: Definition and Classification", Lex Localis 15(4), 2017, pp. 737–761.

[12] See, e.g., M. Gallagher and P. Mitchell (eds.), *The Politics of Electoral Systems*, preceding note. See also the concrete ballot papers from the listed countries, which I acquired while studying the case and filed in the case file – the ballot papers list the candidates from a political party by their names and subsequently the voter freely chooses from among them.

that voters have a significantly greater influence than the one enabled by the Slovene system, where a choice from among different candidates from the same political party is completely excluded. Already for this reason, it would thus be difficult to claim that, in comparison with other systems, our system – i.e. precisely the system that is the most rigid for the voter as it allows the political party to force the voter to vote for a single candidate – is one that enables a decisive influence of the voter (and not the party) on the allocation of seats.

11. How untenable such a position is becomes even more apparent when one learns that many European legal experts from the field of electoral systems complain of the fact that the influence of voters is frequently too small even in the outlined systems where voters may choose from among numerous candidates from the same political party and where political parties thus do not deprive the voters of such an influence by forcing upon them only one candidate per voting district, as is the case in our system. Lieven De Winter, an expert on the Belgian electoral system, thus observes that, at the time when their electoral system was introduced in 1919, voters made use of their preferential votes (i.e. their individual choice from among the candidates from the same political party) in 15 percent of the cases, and throughout the history of that system this has increased and today amounts to 60 percent or more.[13] As the author explains, it nevertheless happens that, due to various reasons in practice, the influence of preferential votes is too small, as, in addition to the preferential vote, the Belgian system also enables a voter to confirm an unaltered list of candidates as proposed by the political party (so-called alternative voting).[14] If 60 percent of the preferential votes of voters in practice do not suffice to define a system as one that ensures a decisive influence of voters, what would De Winter have to say about the Slovene system, which does not even provide for the precondition

[13] L. De Winter, "Belgium: Empowering Voters or Party Elites?", in: M. Gallagher and P. Mitchell (eds.), *The Politics of Electoral Systems*, Oxford University Press 2008, preceding note. The findings for Slovenia are similar – see thus far the only analysis of the preferential votes of Slovene voters conducted with regard to local elections (where, in contrast to elections to the National Assembly, Slovene voters may choose from among the different candidates from a political party), J. Toplak, "Preferenčni glas in njegova uporaba v Sloveniji" [The Preferential Vote and Its Usage in Slovenia], Lex Localis 1(2), 2003, pp. 15–43.

[14] *Ibidem*. Although they allow a choice from among the different candidates from the same political party (preferential voting), certain other regulations subsequently diminish the influence of the voters in relation to political parties in other ways, e.g. by introducing different thresholds for the consideration of preferential votes. In instances of such thresholds, preferential votes are only considered if a candidate obtains a sufficient number thereof. J. Toplak, "Preferential Voting: Definition and Classification", *Lex Localis* 15(4), 2017, pp. 737–761.

of such influence, i.e. that the voter could vote (i.e. cast a preferential vote) for different candidates from the same party (really!)?

Scholars agree that, e.g., the Danish or Finnish electoral systems are much more open to voters having a decisive influence than the Belgian system. As in the Belgian system, also in the Danish and Finnish electoral systems voters may choose from among a number of candidates from the same party; the difference when compared with the Belgian regulation lies in the fact that they do not have the above mentioned alternative voting option, but only preferential voting, and that therefore *only* the candidate who obtained a higher number of voters' preferential votes can be elected. As described by an expert for the Danish electoral system, Jørgen Elklit, on a Danish ballot paper the different candidates from a political party are listed in alphabetical order (in contrast to the alternative manner of voting in Belgium, the political party does not initially rank the candidates itself) and the voter must necessarily circle one of the candidates and thus make a choice by him- or herself. The elected candidate is the one who obtained the highest number of such inevitably preferential votes.[15] Such entails that in the Danish system the decisive influence of voters (and not of political parties) on the allocation of seats is ensured in practice.

The Finnish system is described and commented on by Tapio Raunio, an expert on this electoral system, in very similar terms as regards the decisive influence of voters.[16] The Finnish regulation goes even a step further as regards the decisive influence of voters on the allocation of seats, and, in contrast to the Belgian and Danish systems, requires that in Finland the question of who becomes a candidate on the list of a party is already to a significant extent determined by voters and not political parties. The majority of the candidates on the list of a party are thus proposed and chosen by the party's members residing in the relevant district *themselves* and one fourth or one fifth (depending on the party) of the candidates chosen in this manner may be changed by the bodies of the party (primarily in order to ensure a balanced composition of the lists in terms of geographical, socio-economic, gender, and demographical aspects); however,

[15] J. Elklit, "Denmark: Simplicity Embedded in Complexity (or is it the Other Way Round?)", in: M. Gallagher and P. Mitschell (eds.), *The Politics of Electoral Systems*, Oxford University Press 2008, note No. 11, pp. 463–465.

[16] T. Raunio, "Finland: One Hundred Years of Quietude", in: M. Gallagher and P. Mitchell (eds.), *The Politics of Electoral Systems*, Oxford University Press 2008, note No. 11, pp. 474–484.

according to Raunio, in practice, this is rare and does not undermine the decisive influence of voters in Finland.[17]

These are examples of systems that feature a decisive influence of voters, and as we have seen, those of them that diminish the enacted decisive influence in practice have been subject to criticism from experts as being systems that do not allow for a sufficient influence in the relation voter–political party. The comparison of such comparative legal literature on the decisive influence of voters (and not political parties) with the Slovene system, which, as already mentioned, does not enable voters to choose from among the different candidates from the same political party as the party forces only one candidate (really!) into every district, does not require any further comment. It is evident that the Slovene system precludes a decisive influence of voters as such is understood in comparative legal literature already from the outset, before the question of how it should be best developed in practice even arises.

12. In addition to the issues outlined above, the almost complete exclusion of the decisive influence of voters (and not parties), the Slovene system has another severe anomaly that in practice completely undermines the influence of voters on the allocation of seats. As it entails the only system in Europe that I know of wherein a political party forces upon voters only one single candidate per electoral district, an untenable situation arises – a voter votes for a candidate only because he or she comes from the political party that the voter wants to support although the voter may not even like and otherwise never would have supported the imposed candidate, but would have wanted to exclude the candidate and support one of the other candidates from that party who have been forced upon voters in other districts of the same constituency. However, the voter cannot support another candidate from the same party, as, within the Slovene system, he or she may only vote for the party's imposed candidate if he or she wants to vote for that party. However, in doing so – and herein lies the anomaly – the voter must even vote AGAINST the allocation of a seat to his or her preferred candidate from the same party who stands for election in one of the neighbouring districts of the same constituency. As initially explained, which of the candidates competing against each other in a constituency

[17] T. Raunio, pp. 477–478. In this light, it should be stressed that the stage of selecting the candidates for the list of a party is also essential to the question of the decisive influence of the voters on the allocation of seats, as no one can be allocated a seat unless they were previously included in a list and therefore the position (the evasive manoeuvre) of the majority that the phrase "a decisive influence on the allocation of seats" refers only to the final stage and not also to the selection of the candidates on a list, is not correct.

obtained a relatively higher number of votes in his or her district is namely decisive for the allocation of seats to candidates from the same political party. The anomaly of the unique Slovene electoral system thus lies in the fact that it does not only prevent but even perverts and thereby nullifies any important (and genuine) influence of voters on the allocation of seats within a single list. Experts on electoral systems and legislatures in western European countries knew better than to enact something similar to this electoral system anywhere else. It perverts the influence and will of the voters, and therefore democracy itself, to a point where it is no longer clear whether the personal outcome of an election can still be said to be an expression of the genuine will of the voters and therefore of the rule of the people.

13. **Thirdly**, the decisive influence of voters on the allocation of seats may also be measured from the perspective of whether from every electoral area where you yourself had a chance to actually vote at least one or more deputies were elected (i.e. that seats were allocated). If no deputy was elected (i.e. no seat was allocated) from the electoral area where you actually had a chance to vote, then your influence on the allocation of seats is insignificant. If such electoral areas without a deputy are numerous, there are thus also many voters without a decisive influence. The decisive influence of voters on the allocation of seats is namely not merely an empty phrase, but such also serves a purpose – the constitutional value of voters having an effective influence on the system of representative democracy, i.e. the system of the most efficient manner of a voter managing his or her life through the relationship with a deputy, by which the deputy shall be truly bound. Only if the relationship between a voter and a deputy is truly democratic – such that the deputy's election is in fact directly dependent on the voter's vote – can we say that the constitutional value behind the term "decisive influence" has been realised. Such a situation is the complete opposite of that wherein voters who were effectively left without a decisive influence on the allocation of seats in their electoral area where no deputy was elected and who are thus voters who, as regards the question of the allocation of seats from among candidates from the list of the same party, could only have voted against such an elected deputy from another district. No sufficiently democratic relationship could develop between these voters and the deputies, as such remains at a weak and merely principled or theoretical level and is even growing into an anomaly. Therefore, the importance of the requirement that voters have a decisive influence is diminished and an inequality between voters is being created as regards this important lever of truly democratic governance.

14. A quick comparative overview also leads to the conclusion that countries with longer democratic traditions were very well aware of the importance of that value (i.e. also of this third aspect of the influence of voters on the allocation of seats). Wherever in Europe I turn, I see instances of proportional electoral systems that at the same time also ensure, in a mathematical sense and also to all groups of voters, that at least some seats will be allocated from the electoral area where they actually have the right to vote. In Austria,[18] e.g., on average 4–5 deputies are elected per each electoral unit, in Denmark, in 17 electoral districts approximately 8 deputies are elected (a maximum of 16 and a minimum of 2), in Finland 13 deputies in 14 districts on average, in Belgium 4 to 22 deputies in 11 districts, and in the Netherlands and in Israel, all deputies are elected by all voters within the framework of one electoral unit at the level of the state. At first glance, there is thus no system that would result in a group of voters in an electoral unit, i.e. the only unit where they could vote, not allocating a seat directly to at least one concrete candidate. On the contrary, it appears that such a decisive influence of voters on the allocation of concrete seats is enabled in all systems except in Slovenia,[19] where allegedly 21 out of 88 districts do not have an elected deputy. At the same time, one can easily see how we could also have avoided the outlined deficiency in our system. If the current 88 electoral districts were replaced, for example, by 44 electoral units, two deputies would be allocated seats in every unit; if the current districts were replaced by 22 electoral units, 4 deputies would be allocated seats in each of them; and if the current districts were replaced by 11 electoral units, 8 deputies, if they were replaced by 8 units, 11 deputies, etc. One of the numerous possibilities would certainly also be to abolish the 88 electoral districts and maintain the 11 existing constituencies; also in such a manner the legislature would ensure, in a mathematical sense, that no voter would remain without an elected deputy whom he or she had a chance to vote for directly and thus without a decisive influence. As such appears to apply to all other electoral systems throughout Europe, the Slovene electoral system should also remedy this constitutional deficiency (especially as our Constitution expressly requires that voters have a decisive influence on the allocation of seats).

[18] At least according to my analysis of this complex comparative issue (for which, due to my work on other open cases, I could not take as much time as I would have normally wished to accord to a more thorough study of this aspect).

15. As the Slovene electoral system does not enable the actual – and even less so decisive – influence of voters as regards not even one of the three meanings outlined above (see Firstly, Secondly, and Thirdly above), and therefore also does not guarantee the cumulative character of such decisive influence as follows from these three meanings, in my assessment, it cannot be justifiably concluded that a decisive influence is ensured. A review that fails to respond to the above statements would be overly general. If it referred to the legislature's allegedly wide margin of appreciation in connection with electoral legislation, it would disregard the fact that the right to vote entails (1) first-class constitutional subject-matter and (2) that the requirement of a decisive influence originates in an explicit and special constitutional provision and is not "merely" derived from some general constitutional principle. Therefore, it is only the Constitutional Court that is called upon to fill the content thereof with meaning.

III The Issue of the Unconstitutionality of a Constitutional Amendment

16. I voted against Point 5 of the operative provisions because the majority's reasoning in this part is too brief (i.e. only two short paragraphs in total) and without significant substantive arguments. It concerns the response to the applicant's claims that the National Assembly should have respected the will of the people regarding the majority electoral system from the 1996 referendum, which was subsequently affirmed by the Constitutional Court, but the National Assembly outmanoeuvred the Constitutional Court with a constitutional amendment that wrote into the Constitution the requirement that the electoral system is to be proportional with due consideration that voters have a decisive influence on the allocation of seats to the candidates.[20]

17. The majority decision responds to this argument by means of only two sentences, namely that "[n]either the Constitution nor any laws determine the power of the Constitutional Court to review the mutual consistency of different constitutional provisions. As the Constitutional Court thus lacks the power to review the mutual consistency of

[19] Nineteen districts allegedly have two deputies each and one district even has three. These data were provided by the National Council as the proposer of the application for a review of constitutionality, see the case file.

[20] Constitutional Court Decision No. U-I-12/97, dated 8 October 1998.

constitutional provisions, it rejected the request for a review of the constitutionality of the fifth paragraph of Article 80 of the Constitution (Point 5 of the operative provisions)."

18. Such an overly general position disregards the fact that the doctrine of the so-called unconstitutional constitutional amendment has become well established over the last few decades in comparative constitutional case law, as well as in expert and scientific literature.[21] International constitutional law experts at the highest level have written scientific articles[22] and leading publishers have published scientific monographs[23]

---

[21]Prof. Richard Albert, e.g., writes as follows: "If we look carefully around the world, we cannot deny as a descriptive matter that there are limits to the amendment power. In countries far and near – from Argentina to Austria, Belize to Brazil, Greece to Hungary, India to Italy, Peru to Portugal, South Africa to Switzerland, Taiwan to Turkey – high courts have with accelerating frequency adopted the doctrine of an unconstitutional constitutional amendment, authorizing themselves (sometimes in defiance of the constitutional text) to strike down an amendment for violating their reading of the constitution, whether on procedural or substantive grounds. What has largely prompted courts to adopt this doctrine is the defense of democracy. Courts have invoked the doctrine to protect what they regard as the fundamental values of their constitutional democracy. [F]or example, … [i]n the Czech Republic, the Constitutional Court annulled an amendment that it determined would have changed "the essential requirements for a democratic state governed by the rule of law." R. Albert, "How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments", see the following note.

[22] See, *inter alia*, R. Albert, M. Nakashidze, T. Olclay, "The Formalist Resistance to Unconstitutional Constitutional Amendments", Hastings Law Journal, No. 70, 2019 (accepted for publication); R. Albert, "Constitutional Amendment and Dismemberment", Yale Journal of International Law 43(1), 2018; R. Albert, "How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments", Maryland Law Review 77(1), 2017; R. Albert, "Four Unconstitutional Constitutions and Their Democratic Foundations", Cornell International Law Journal 50(2), 2017, pp. 169–198; R. Dixon and D. Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment", International Journal of Constitutional Law (ICON), No. 13(3), 2016, pp. 606–638; R. Passchier and M Stremler, "Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision", Cambridge Journal of International and Comparative Law, No. 5(2), 2016; R. Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada", Queen's Law Journal, No. 41(1), 2015; C. Dupré, "The Unconstitutional Constitution: A Timely Concept", in: A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area*, Nomos 2015, pp. 364–383; V. Jackson, "Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism", in M. Bäuerle and P. Dann, *Demokratie-Perspektiven: Festschrift für Brun-Otto Bryde zum 70. Geburtstag*, Michael & Astrid Wallrabenstein 2013; Y. Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea", The American Journal of Comparative Law, No. 61(3), 2013, pp. 657–720; G Halmai, "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution", Constellations, No. 19(2), 2012, pp. 182–203; A Kavanagh, "Unconstitutional Constitutional Amendments from the Irish Free State to the Irish Republic", Oxford Legal Studies, No. 10/23, 2013, and in: E. Carolan, *The Constitution of Ireland: Perspective and Prospects*, Bloomsbury 2012, pp. 331–354; Y. Roznai and S. Yolcu, "An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision", International Journal of Constitutional Law (ICON), No. 10(1), 2012, pp. 175–207; A. Barak, "Unconstitutional Constitutional Amendments", Israel Law Review, No. 44(3), 2011,

regarding such and regarding the conditions for abrogating constitutional amendments, and, in addition, constitutional and supreme courts around the world have developed quite interesting practical variations of the doctrine that, subject to certain conditions, allow for or even require that constitutional courts abrogate constitutional amendments for being inconsistent with a more fundamental constitutional value. Such power, which is grounded in the nature of the matter, does not require an expressly determined competence in the Constitution or a law, as this power originates from an understanding of the essence of the Constitution as the highest legal act for the protection of the fundamental values of constitutional democracy.

19. As the case at hand raises precisely some of the questions that are also raised in the mentioned comparative legal literature and constitutional case law, in my opinion, the two-sentence reasoning of Point 5 of the operative provisions was so general that also in this part I felt a duty to vote against such a careless approach to first-class constitutional law issues.

Dr. Dr. Klemen Jaklič

Judge

---

pp. 321–341; S. Issacharoff, "Constitutional Courts as Democratic Hedging", Georgetown Law Journal, No. 99, 2011; R. Albert, "Nonconstitutional amendments", Canadian Journal of Law & Jurisprudence, No. 22(1), 2009, pp. 5–47; K Gözler, *Judicial Review of Constitutional Amendments*, Ekin 2008; G. Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective", International Journal of Constitutional Law (ICON), No. 4(3), 2006, pp. 460-487; I. Gomez, "Declaring Unconstitutional a Constitutional Amendment: The Argentine Judiciary Forges Ahead", University of Miami Inter-American Law Review, No. 31(1), 2002, pp. 93–119; P. Jambrek and K. Jaklič, "Contribution to the Opinion of the Venice Commission on the Constitutional Amendments Concerning Legislative Elections in Slovenia", European Commission for Democracy through Law (Venice Commission), Strasbourg, 2000; R. O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms", Journal of Civil Liberties, No. 4(48), 1999, pp. 48–75; D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, 1997, p. 38; G. Wright, "Could a Constitutional Amendment be Unconstitutional?", Loyola University of Chicago Law Journal, No. 22(4), 1991, pp. 741–764; J. Rosen, "Was the Flag Burning Amendment Unconstitutional?", Yale Law Journal, No. 100(4), 1990, pp. 1073–1092.

[23] For example, Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford University Press, 2017.