



**Number:** U-I-32/15-63

**Date:** 30 November 2018

**Partly Dissenting and Partly Concurring Opinion of  
Judge Dr Etelka Korpič – Horvat  
regarding Decision No. U-I-32/15, dated 8 November 2018**

I did not agree with the majority decision that the second paragraph of Article 91 of the National Assembly Elections Act (Official Gazette RS, Nos. 109/06 – official consolidated text, and 23/17 – hereinafter referred to as the NAEA) is not inconsistent with the Constitution. The provision refers to the election of the deputies of the National Assembly (Point 1 of the operative part).

1. It was the task of the Constitutional Court to define the open-textured legal term contained in the fifth paragraph of Article 80 of the Constitution – i.e. *the decisive influence of voters on the allocation of seats to the candidates* – and, following the definition of this term, to decide whether the second paragraph of Article 91 of the NAEA is consistent with the Constitution. I believe that the Constitutional Court failed to sufficiently define the mentioned term as regards its substance.

2. There are different models of proportional electoral systems and I agree with the majority position that the choice of a concrete electoral system, including the manner of the personalisation of deputy seats, falls within the legislature's margin of appreciation, subject to the boundaries set by the constitutional requirements (paragraph 44 of the reasoning). The Constitution requires the legislature to take into account the following when determining the electoral system for elections to the National Assembly: (1) a proportional electoral system, (2) a four-percent electoral threshold, and (3) that voters have a decisive influence on the allocation of seats to the candidates. Therefore, when reviewing whether the regulation of elections in the NAEA satisfies the constitutional requirements, the Constitutional Court should have clearly defined the open-textured term *the decisive influence of voters* and concretely determined the voters who are to have such decisive influence. The Constitutional Court has defined open-textured legal terms on a number of occasions.<sup>1</sup> In the case at issue, however, I believe that the majority

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<sup>1</sup> The Constitutional Court did so in Case No. U-I-266/96 regarding voting on numerous proposals on a single ballot paper, in Case No. U-I-12/97 when reviewing the constitutional consistency of

contented itself with a general definition and did not decide on the intensity of voters' influence that would be required in order to deem such to be decisive and in what manner it should be expressed within the electoral process. It follows from the Decision that any influence of voters, no matter how insignificant or indirect, satisfies the requirement stemming from Article 80 of the Constitution.

3. The reasons why I believe that the challenged regulation does not satisfy the requirement of a decisive influence of voters in accordance with the fifth paragraph of Article 80 of the Constitution follow from the manner of casting a vote determined by the NAEA. Voters cast votes by circling the serial number in front of the name and family name of the candidate they wish to vote for (Article 73 of the NAEA). In addition to the name of the candidate, the ballot paper also contains the logo of his or her party (i.e. the list). The NAEA determines that a voter may only vote for one candidate (Article 73 of the NAEA). The electoral committee determines how many votes individual candidates received. The president of the electoral committee proclaims the election result at a polling station (Articles 84–86 of the NAEA). According to the NAEA, voters thus choose among candidates. The NAEA does not determine that voters also choose among lists. It is, however, true that many voters wonder who they are casting their vote for: the candidate or the party (i.e. the list). The electoral commission deems that a voter does not cast his or her vote only for a candidate but also for his or her list. It remains open what the voter's true will was when he or she circled a serial number on the ballot. It remains open whether the voter wanted to give his or her vote exclusively to the candidate or to the list as well. It is unlikely that all voters wanted to give their vote to both the candidate and the list under the serial number which they circled on the ballot. What the true will of the voters had been cannot be established.<sup>2</sup> Regardless, the majority accepts: "When a voter circles the serial number in front of the name and family name of a candidate, he or she casts a vote for that candidate and thereby inevitably also for the list of candidates that the candidate belongs to" (paragraph 37 of the reasoning). In doing so, the majority refers to the ballot paper, which also contains the names of the lists of candidates (the

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Article 3 of the Act on the Manner of Voting and on the Establishment of the Outcome of the Referendum Vote on the Electoral System, *etc.*

<sup>2</sup> Janez Pogorelc stated the following: "The majority of voters choose a party first and they would then also like to have some say as to which of the candidates from that list will get elected. If they have to choose between a party and a candidate, the decision regarding the party will practically always prevail." (J. Pogorelc, *Odločilni vpliv volivcev na dodelitev mandatov kandidatom* [The decisive influence of voters on the allocation of seats to candidates], *Podjetje in delo*, Nos. 6–7 (2009), p. 1772).

In addition, during the public hearing, Jurij Toplak stated that a voter does not have the possibility of choosing within a party. A preferential vote is forced on him or her. A voter casts his or her vote for a list and is then forced to also vote for the exact candidate from this list who happens to be standing for election in his or her district ([from the transcript of the] magnetic tape recording of the public hearing in Case No. U-I-32/15 on 7 November 2017, p. 22).

third and fourth indents of the second paragraph of Article 73 of the NAEA). Therefore, although the NAEA determines that a voter only chooses a candidate, due to the fact that the ballot paper also contains the names of the lists of candidates, the voter automatically also chooses a list. I believe that such entails a forced electoral choice.

4. The personalisation of a list of candidates (i.e. the allocation of seats to the candidates) is determined at the constituency level, where the shares of votes obtained by candidates in the electoral district wherein they stood for election are taken into account (the second paragraph of Article 91 of the NAEA). Therefore, deputies are elected at the constituency level by means of seats being allocated to them. A voter cannot choose between candidates on a list (i.e. a party's candidates) in a constituency. A voter chooses one candidate in relation to the other candidates in an electoral district, which, however, is irrelevant for the personalisation of a list's seats. A voter does not have a choice between the candidates within a list of candidates. I therefore believe that the result of an election cannot reflect a decisive influence of voters. Such is also confirmed by the results of the elections to the National Assembly in 2014. The applicant states that more than half of the deputy seats were allocated to candidates who obtained fewer votes in the electoral district wherein they stood for election than [some of] the candidates they competed against.<sup>3</sup> Moreover, doubt as regards the existence of a decisive influence of voters was raised by the statements of the legal experts from the field of electoral law at the public hearing. Prof. Grad said it was a matter of assessment whether a decisive influence of voters on the allocation of seats to candidates is ensured.<sup>4</sup> Prof. Toplak is of the opinion that the existing system ensures voters an influence, but such is not decisive.<sup>5</sup> Prof. Zagorc stated that such entails a very minimal manner of ensuring that voters have a decisive influence.<sup>6</sup>

5. In paragraph 39 of the reasoning, the majority states that the decisive influence of voters entails the collective influence of voters, which excludes the direct influence of the proposers of the lists, and that the challenged statutory regulation ensures such an influence of voters. Proposers of lists (i.e. as a general rule, political parties) allegedly do not have a decisive influence on which of their candidates will become a deputy in the National Assembly. Their influence allegedly entails merely the determination of the electoral district in which individual candidates will stand for election, while they can only make a guess regarding the electability of the candidates. I assess that the proposer's influence (i.e. as a general rule, political parties) is important as the proposer determines the candidate who is forced upon the voter, who cannot choose between candidates from

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<sup>3</sup> 46 deputies did not come in first place according to votes obtained (20 came in second, 14 in third, 8 in fourth, and 4 came in either fifth, sixth, or seventh place).

<sup>4</sup> [The transcript of] the magnetic tape recording of the public hearing in Case No. U-I-32/15 on 7 November 2017, p. 16.

<sup>5</sup> *Ibidem*, p. 12.

<sup>6</sup> *Ibidem*, p. 20.

the same political party. This is also confirmed by the statements of the director of the National Electoral Commission, Dušan Vučko, at the public hearing that “within the political parties there is fierce competition concerning which deserving member of a political party will stand for election in which electoral district. This is nothing new. In Slovenia, voters’ preferences are so varied and so typical that we can predict the composition of the [National] Assembly by up to 60 percent.” Therefore, I did not agree with the positions of the majority that the collective influence of voters excludes the direct influence of the proposers of the lists. The position of the majority that the proposer does not have a direct influence on the allocation of seats is insufficient. The fifth paragraph of Article 80 of the Constitution does not determine the influence of proposers of lists, but rather the *decisive influence of voters on the allocation of seats to candidates*. However, the majority failed to sufficiently define such.

6. The majority’s references to the teleological and historical interpretations are, in my opinion, also not convincing (paragraph 40 of the reasoning). Upon the introduction of the new fifth paragraph of Article 80 of the Constitution, the Constitution framer abolished national lists and upheld personalisation by means of consideration of candidates’ relative success in electoral districts. The NAEA was amended in 2006. Section II of the CA80, which had been adopted in 2000, was transposed into it. National lists were abolished and the Droop quotient replaced the Hare quotient in the allocation of seats; however, I believe that such did not achieve constitutional consistency in the sense that voters have a decisive influence on the personalisation of seats. Due to the change as regards the quotient, the influence of voters on the allocation of seats is neither more nor less decisive. Ensuring the consistency of the regulation of elections with the fifth paragraph of Article 80 of the Constitution would also require conceptual changes (electoral districts, the manner of voting).

7. The majority further stated that the Constitution framer did not envisage additional consolidation of the NAEA with the fifth paragraph of Article 80 of the Constitution, as it did not set a deadline by which such amendments to the NAEA would have to be enacted, but determined that the provisions would apply “until the enactment of amendments to the NAEA.” I believe that this statement is not convincing as it is not unusual for laws to announce amendments without also determining a deadline for such. In a state governed by the rule of law, the legislature is expected to observe a written legal provision. In any event, I deem the decision to not set a deadline for the enactment of amendments to the electoral law to be an expected one considering the importance of the regulation of the electoral system in a democratic society, which requires an unpredictable amount of time for numerous discussions and reconciliation.

8. In light of all of the above, I believe that an answer to what constitutes a decisive influence of voters on the allocation of seats to the candidates according to constitutional case law cannot be found in the Decision, and therefore I did not vote for Point 1 of the operative provisions of the Decision.

9. I voted for Points 3 and 4 of the operative provisions – i.e. that Article 4 of the Act Establishing Constituencies for the Election of Deputies to the National Assembly (Official Gazette RS, No. 24/05 – official consolidated text – AECEDNA) is inconsistent with the Constitution and that the National Assembly must remedy the established unconstitutionality within a period of two years following the publication of this Decision in the Official Gazette of the Republic of Slovenia. Districts are not essential for a constitutionally consistent proportional electoral system because they are not necessary and, as votes are counted at the level of electoral districts, can be misleading for voters, who expect that every district will have its own representative in the National Assembly. The size of electoral districts would be negligible if the personalisation of the allocation of seats to lists of candidates were not based on the shares of votes that candidates obtain in the electoral district wherein they stand for election. In my assessment, these shares are not a constitutionally consistent basis for the personalisation of seats of lists of candidates due to the reasons I have stated. Nevertheless, I did not vote against the proposed decision concerning electoral districts because voters vote in electoral districts and it is therefore right that voters and candidates [in all districts] are in an equal position.

10. Perhaps the legislature itself will also recognise that the time has come to amend the electoral system in order to ensure that voters have a decisive influence on the formation of a successful National Assembly and Government and in so doing increase interest in a higher voter turnout in elections to the National Assembly.

Dr Etelka Korpič – Horvat  
Judge