



**Number:** U-I-32/15-61

**Date:** 29 November 2018

**Dissenting Opinion of Judge Marko Šorli  
regarding Decision No. U-I-32/15, dated 8 November 2018**

I voted against Point 1 of the operative provisions – i.e. that the second paragraph of Article 91 of the NAEA, which determines the allocation of deputy seats obtained by a list of candidates to individual candidates, is not inconsistent with the Constitution.

Article 80 of the Constitution determines the three fundamental elements of the electoral system: a proportional system for allocating deputy seats, the personalisation of elections, and an electoral threshold. Although I agree with the majority that the constitutional requirement that voters have a decisive influence on the allocation of deputy seats cannot be interpreted in the sense of the greatest possible influence of an individual voter, such does not entail that any kind of influence of an individual voter must be deemed to be decisive. Among proportional electoral systems there exist a number of means that ensure a voter's influence on the allocation of seats to a different extent.

According to the majority position, within the electoral system in force, such an influence on the allocation of seats to candidates is ensured by the fact that voters vote for individual candidates in electoral districts and that from an individual list of candidates seats are allocated to those candidates who obtained the greatest shares of votes in the total number of votes cast in the electoral districts. A criticism of this regulation states that voters' participation is excessively limited because there is a difference between an electoral district and a constituency. An individual voter may only cast one vote in his or her electoral district despite the fact that 11 deputies are elected in every constituency, i.e. the unit of election. It is a particularity of parliamentary elections in Slovenia that the instructions for voters state that the voter votes for a candidate, but the vote primarily goes to a list of candidates.<sup>1</sup>

The main arguments in favour of the majority decision, i.e. that the challenged regulation ensures that voters have a decisive influence, were in fact adopted from the explanatory memorandum of the Draft of the Constitutional Act Amending Article 80 of the

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<sup>1</sup> S. Zagorc, Volilni sistem in delovanje parlamentarnega sistema [The Electoral System and the Functioning of the Parliamentary System], Podjetje in delo, Nos. 6–7 (2011).

Constitution of the Republic of Slovenia, which was prepared by the Commission for the Electoral System and Constitutional Amendments as the proposer of this constitutional amendment; according to such, the amendment excludes the possibility of allocating seats according to the order as determined on a list of candidates by the proposer of the list and seats are allocated to the candidates who have obtained the highest share of votes in their electoral district.

I am convinced that the true meaning of the term “decisive influence of voters” cannot be established only on an abstract regulatory level, but primarily by means of a comparison of the concrete regulation with other functioning systems in comparable countries (especially EU Member States). A comparative perspective shows that the regulations on personalisation in proportional systems in other countries (e.g. Austria, Belgium, Finland, Ireland, the Netherlands, Denmark) enable a voter to choose among different candidates of the same party; this is not possible within the Slovene system, the voter does not have such a choice and the political party forces a candidate upon the voter. In some of the mentioned systems, voters enjoy different combinations of the right to choose – i.e. by voting for a list of candidates as ranked by the party or by casting a preferential vote (e.g. Belgium). In such a manner, the influence of voters on the allocation of seats is ensured. The influence of voters is even greater in systems where parties do not rank their candidates and the decision on the candidates depends *entirely* on preferential votes (Finland, Denmark). Some systems further increase the influence of voters by ensuring that voters also have an influence on the nomination of the candidates and thus indirectly also on the final allocation of seats. It is thus the voters and not the party who have the last word regarding the allocation of seats.

In comparison with these systems, it cannot be claimed that in the Slovene electoral system the voter has a decisive influence on the allocation of seats. Unfortunately, when deciding whether the challenged regulation ensures that voters have a decisive influence, the majority of judges did not apply a comparative law approach and thus failed to consider that in the period between 2000 and today the social and political circumstances have changed and that possibilities of political participation have developed that ensure that voters have a significantly greater influence on the choice of deputies. If the Constitutional Court truly considered the requirement that the electoral system must ensure that voters have a decisive influence on the allocation of seats, it should have found that, in comparison to numerous foreign proportional systems, the influence of [Slovene] voters on the allocation of deputy seats is in fact weak and definitely not decisive, and therefore the challenged regulation is inconsistent with the Constitution.

Marko Šorli  
Judge