Number: U-I-32/15-64
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Concurring Opinion of Judge Dr Jadranka Sovdat regarding Decision No. U-I-32/15, dated 8 November 2018, joined by Judge Dr Marijan Pavčnik

I

1. The electoral system is one of the fundamental elements of any constitutional order. It establishes the mechanism that enables the effective exercise of state power. In a democratic state, such is vested in the people and they decide on who shall exercise it in their name precisely through elections. As it is namely unimaginable that the people would directly do so always and in all areas, the electorate elects its representatives.[1] The right to vote for representatives who exercise power in the name of the people has developed into one of the fundamental political-human rights and belongs to every individual as a personal right, but can only be exercised by all voters together in an organised election process. It is important that this happens at regular intervals, as such enables the responsibility of the elected bearers of power to the people to be continuously upheld.[2] Any electoral system must be built in such a manner that respect for the six fundamental electoral principles is ensured (i.e. universal, equal, free, secret, and direct suffrage, and the frequency of elections, which, as a general rule, are held at regular intervals). The Code of Good Practice in Electoral Matters prepared by the Venice Commission deems these principles to be part of the European electoral heritage. They must be considered when regulating the right to vote and the electoral system as a whole as well as during exercise of the right to vote at every election. The right to vote and the principles underlying its regulation form part of the essential elements of any electoral system. This also includes the definition of the rules according to which the votes of the voters are translated into the allocation of seats to the elected bearers of power, which is

[1] See B. Watt, UK Election Law, A Critical Examination, Glass House Press, London 2006, p. 11.
[2] This was nicely illustrated by Jambrek when he spoke of the uninterrupted chain of democratic legitimacy and of the responsibility corresponding to such that leads from the people to an authority and back. See P. Jambrek in: L. Šturm (ed.), Komentar Ustave Republike Slovenije [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske in državne evropske študije, Ljubljana 2002, p. 48.

also referred to as the electoral system in the narrower sense; such allocation is closely linked to certain other elements, such as the size of the constituencies, the number of deputies to be elected in each of them, and the electoral threshold.[3] We can also agree with the position that election results are not only an expression of the votes cast by the voters, but to some extent also an expression of the rules that apply to the organisation of the election.[4] How the elected representative body will be constituted and to what extent the effective exercise of state power will be ensured namely also depends on the electoral formula.

2. Throughout history, a considerable number of types of electoral systems have developed whose common characteristic is that the mentioned fundamental electoral principles apply to all of them. At the same time, they also differ from one another in a whole series of aspects, one of the differentiating features being the so-called degree of personalisation of elections, which is certainly greatest in variations of majority electoral systems and lowest in some pure variations of proportional electoral systems. In between lies a whole range of degrees of personalisation, including those in so-called mixed electoral systems. Nevertheless, none of them can be said to not respect the fundamental electoral principles and the very essence of the right to vote. The latter entails the free expression of the will of the voters regarding who shall exercise power in their name during the representative body's next term of office.

3. Why do we need this insight into the very foundations of the electoral system as a whole? Because, when discussing the individual systems for the allocation of seats to the elected representatives – i.e. the electoral formula – we have to be aware of not only the constitutional law framework, but also the fundamental elements of elections. We must keep in mind under which rules, established in accordance with respect for all fundamental electoral principles, the elements of the right to vote are implemented and by which rules the electoral formula is established as a system. While it is true that to a certain extent they are mutually intertwined, it is also true that in some important aspects the elements of the electoral formula do not intrude on the very content of the right to vote. If they intruded on such (and in all instances), we namely would not have the range of different types of electoral formulas that have become established and have been functioning within democratic states during the last 100 years, as any discussion of their constitutional admissibility would end already at the point of their (in)consistency with the content of a human right. The Constitution framers and the legislature have the fundamental elements of elections in mind when they regulate the electoral system, and, within the framework of such, the electoral formula. Therefore, the constitutional judge

[3] *Cf.* F. Grad, Volitve in volilni sistemi [Elections and Electoral Systems], Uradni list Republike Slovenije, Ljubljana 2004, pp. 53–54. What is meant is the formally enacted electoral threshold, not a so-called effective electoral threshold (regarding such, see A. Lijphart, Electoral Systems and Party Systems, Oxford University Press Inc., New York 1994, pp. 25–29, and M. Kasapović, Izborni leksikon, Politička kultura, Zagreb 2003, pp. 154–156).
[4] See R. Taagepera, S. Shugart, Seats & Votes, The Effect & Determinants of Electoral System, Yale University Press, New Haven 1989, pp. 2–6.

must also keep them in mind when he or she is called upon to review whether the legislature regulated the electoral formula in a constitutionally consistent manner.

4. I have no reservations regarding amending the electoral formula, not even as regards fundamental changes to the type of formula used, including the adoption of a two-round majority electoral system, such as was also already proposed in electoral referenda.[5] It is interesting that some simplistically imagine that copying the electoral system of another country will produce the same effects on electoral results, society, and the political life within it as within a system where it has already been functioning for a longer period of time.[6] From the perspective of constitutional law, the choice of electoral formula is, in principle, a political decision and in making that choice the legislature, provided such choice is left to it by the Constitution framers, enjoys a wide margin of appreciation. Electoral legislation and thus also the regulation of the electoral formula is therefore only limited by the fundamental electoral principles. Until 2000, when certain elements of the electoral formula were introduced into the fifth paragraph of Article 80 of the Constitution, such had also applied in Slovenia. However, once the Constitution framers decide to regulate the electoral formula or certain of its elements, the legislature becomes bound by the constitutionally determined framework. The legislature's margin of appreciation, which is political, is then narrowed to that which is left to it by the Constitution. It may not cross the constitutionally imposed limits, as such would entail unconstitutional conduct. When reviewing the constitutionality of such statutory regulation, the Constitutional Court must ensure, in accordance with the principle of the separation of power, that the legislature does not cross these constitutional limits. However, as long as the legislature remains within them, the Constitutional Court must not encroach on the margin of appreciation that, despite partial constitutionalisation, remains reserved for the legislature's political decision-making. The Constitutional Court thus may not interfere with the choice of one or another electoral formula made within the constitutional framework.

5. I believe that, when interpreting the Constitution and assessing the consistency of an electoral law with such, the Constitutional Court must proceed from the outlined starting points. On the basis of such, I concur with the reasons due to which the Constitutional Court established that the statutory regulation of the electoral formula currently in force does not contradict the requirements or, more precisely, that it does not contradict the constitutional requirement that states that voters shall have a decisive influence on the allocation of seats to the candidates (Point 1 of the operative provisions of the Decision). The review of consistency with the fifth paragraph of Article 80 of the Constitution was namely requested and conducted only in this regard, although this constitutional element cannot be considered separately, especially from the perspective of the constitutional

[5] It is commonly known that, e.g., in France the electoral formula for the election of deputies was changed nine times between 1871 and 1986; while the election in 1986 still took place according to a proportional electoral system, already the following year a two-round majority system was enacted once again; see O. Ihl, Le vote, Montchrestien, Paris 1996, pp. 54–58.
[6] Regarding such, see, e.g., Cox, Making Votes Count, Strategic Coordination in the World's Electoral Systems, Cambridge University Press, Cambridge 1997, pp. 23–24.

requirement of a proportional electoral system. In this connection, it does not appear important to me whether one requirement is defined as primary and the other is thus ensured within its scope[7] or whether it is stressed that the two requirements are not mutually exclusive.[8] In any event, they have to co-exist, insofar as their co-existence is concurrently enabled by the nature and characteristics of one or the other requirement. Alongside the reasons contained in the Decision that are a response to the applicant's allegations, which are not particularly clear from the perspective of elections, I would also like to clarify my view of the constitutional review at issue, namely in this key point of the Decision as well as also regarding some other parts of the Decision and the Order (Point 5 of the operative provisions), which I also concur with.

II

6. Firstly, regarding taking a position on the alleged unconstitutionality of the fifth paragraph of Article 80 of the Constitution. Had it namely become clear that we were concerned with a so-called unconstitutional constitutional amendment, any further discussion of the constitutionality of the statutory regulation would have ceased as immaterial. It was necessary for the Constitutional Court to carry out the same review already immediately after the enactment of the mentioned constitutional amendment. The Constitutional Court took a position on such by Order No. U-I-214/00, dated 14 September 2000 (OdlUS IX, 201). In the case at hand, other than having repeated the request for a review of the constitutionality of the constitutional provision, the applicant submitted no reasons, even less so from the field of constitutional law, that would have required the Constitutional Court to change its position adopted in the cited Order. Therefore, in my opinion, the reply of the Constitutional Court is completely justified. It clearly follows already from Order No. U-I-214/00 that the Constitutional Court is not competent to review the constitutionality of a constitutional amendment as such. Two questions, which the Constitutional Court could not answer as it rejected the request in this part, may arise in this regard. A constitutional judge, however, may tackle them in his or her separate opinion. One of them concerns the content of the allegation raised, and the other the relationship between the Constitutional Court and the legislature. As regards the alleged thwarting of the will of the voters as expressed in the legislative referenda, following a request of the Slovene Government, the Venice Commission replied by way of an opinion soon after the cited Constitutional Court Order was adopted. It stated that there was no conflict between the decision adopted by referendum and the constitutional amendment, as the constitutional amendment prevails over the decision of a 'preliminary'[9] legislative character adopted in the referendum.[10] It further substantiated why the

[7] Prof. Zagorc at the public hearing.
[8] Prof. Toplak at the public hearing.
[9] Those were so-called *a priori* legislative referenda that were part of our legal order at the relevant time.
[10] Opinion on the Constitutional Amendments concerning Legislative Elections in the Republic of Slovenia, adopted by the Venice Commission at its 44th Plenary Meeting (13–14 October 2000), p. 3.

constitutional amendment was not in conflict with European democratic standards.[11] That the Constitution framers are not legally bound by the will of the voters as expressed in a legislative referendum seems logical to me. The political responsibility of the deputies to the voters in such an instance is, however, debatable, although voters in fact always have the last say on such in the next election.

7. The situation in 2000 concerned not only the question of respect for the will of the voters as expressed in the legislative referendum and the constitutional amendment. Due to Constitutional Court Decision No. U-I-12/97, dated 8 October 1998 (Official Gazette RS, No. 82/98, and OdlUS VII, 180), it also directly concerned the relationship between the constitutional judicial branch of power and the legislative branch of power. By Decision No. U-I-12/97, the Constitutional Court namely decided not only on the constitutionality of the law in question, but it also assumed the competence of the referendum judge[12] and proclaimed a different[13] outcome of the referendum according to which the legislature should have enacted a majority electoral system. It thus concerned in some manner the fundamental relationship between two central stakeholders within the principle of the separation of power. In accordance with that principle and the principles of a state governed by the rule of law that oblige it to respect Constitutional Court decisions, the legislature must follow the decisions of the Constitutional Court. In this country, it has become commonly accepted that we have an entire list of Constitutional Court decisions establishing unconstitutionalities of laws to which the legislature has (thus far) failed to respond despite the expiry of the deadline set by the Constitutional Court for so doing. However, such is not only wrong, but also untenable, as it entails a grave violation of fundamental constitutional principles, which the Constitutional Court has stressed on numerous occasions. In fact, it entails a severe anomaly in the legality of the functioning of our state that should be remedied as soon as possible and no longer allowed in the future. From the perspective of constitutional law, it goes without saying that the legislature must respond to each and every Constitutional Court decision. Only the question of the extent of its room for manoeuvre when responding within the constitutionally established system of checks and balances may be raised – i.e. to what extent and in what manner it may enter into a constitutional law dialogue with the Constitutional Court. It is namely completely clear that at the outset we are dealing with the relationship between two equal branches of power – the legislature and the constitutional judiciary, whereas with regard to a constitutional amendment – i.e. the Constitution – such is no longer the case, as the Constitution binds both of these branches of power.

[11] *Ibidem*, p. 4.
[12] For more regarding such, see Sovdat, Ali je v referendumskem sporu ustavnopravno kaj novega [Have there been any new constitutional developments regarding referendum disputes], Podjetje in delo, Nos. 6–7 (2018), pp. 1235–1236.
[13] According to the official result published by the National Electoral Commission, none of the proposed possible electoral formulas won in the referendum.

8. In my opinion, the situation wherein the legislature transforms into the Constitution framer when responding to a Constitutional Court decision and outdoes the Constitutional Court by adopting a constitutional amendment is clear. As a general rule, it must be allowed to do so, albeit not without limits. Unless it does so, it must respect the Constitutional Court decision and ensure by means of a law that the established unconstitutionality is remedied, as the disputes on which the Constitutional Court is called to decide can only be resolved by an authoritative decision in such manner.[14] What are the legislature's limits if it chooses a constitutional amendment? Hitherto, the Constitutional Court has not encountered a case wherein it would have had to reply to the question of whether the legislature abused the power to frame the Constitution by placing into the Constitution a regulation that by its nature would undoubtedly and evidently only possess the quality of a statutory law merely in order exclude the possibility of its constitutional review sometime in the future. The Constitutional Court could not allow such an abuse, which surely entails the first such limit. In addition, it has to be taken into account that human rights and fundamental freedoms are regulated not only by the Constitution, but also by numerous international instruments, which due to the fifth paragraph of Article 15 of the Constitution are deemed to be on a par with the constitutional level. The Constitution must give them precedence whenever it protects an individual human right or fundamental freedom to an extent that does not reach that accorded by the international instrument. This is already the second limit, as any such constitutional amendment would in fact be immaterial, as from a constitutional law perspective the treaty regulating the relevant right or freedom would in any event prevail. In addition, the question of a so-called eternity clause could arise, although, in contrast to some other (e.g. the German or Czech) constitutions, such is not expressly regulated by the Slovene Constitution, but it might potentially be inferred from the values written into the Preamble in connection with the fundamental constitutional principles. Even if the legislature responds to a Constitutional Court decision by transforming into the Constitution framer, it must nevertheless consider certain constitutional limits. However, in my opinion, the amendment of the electoral formula from 2000 cannot be included in any of those categories.

9. A specific question could be raised in the case of the establishment of the referendum result as adopted by the Constitutional Court, as that decision was in fact not adopted in a procedure for the review of the constitutionality of a law. It was adopted within a referendum dispute procedure, which was not even regulated at the time, and according to the regulation currently in force the Supreme Court would be competent to adopt such a decision. Therefore, there might even arise the question of whether in this regard such truly entails an element of the fundamental relationship between two central branches of power, which, in my opinion, must be governed by the outlined rules. However, this question does not have to be answered. I namely see no reason to doubt Order No. U-I-214/00 on the basis of an application by a privileged participant in proceedings – i.e. a so-

[14] *Cf.* J. Sovdat, Zavezujoča narava odločb Ustavnega sodišča [The Binding Nature of Constitutional Court Decisions], Podjetje in delo, Nos. 6–7 (2015), pp. 1377–1379.

called institutional applicant – who failed to submit a substantiation of the reasons underlying the alleged unconstitutionality or the reasons due to which the Constitutional Court should reassess the positions it had already adopted regarding the same question.

10. In the same breath, the applicant aims substantively the same allegation against the constitutional as well as statutory regulation. It namely claims with regard to both that they determine the predominance of political parties and limit the ability of the people to actually exercise power. If this allegation were true at the constitutional level, the allegation of the unconstitutionality of the statutory regulation would naturally not be justified, as it would implement precisely what the Constitution dictated. What is more, elections do not entail the actual exercise of power (such as, e.g., a referendum with binding effect), but are a mechanism by means of which the people – i.e. the voters – decide on who shall (actually) exercise power in their name. Once the possibility of discussing the constitutionality of constitutional amendments has been laid aside, by means of a benevolent interpretation, the applicant's allegations can be understood in connection with the allegations aimed at the statutory regulation of the electoral formula, which taken together with its connected elements is allegedly regulated in such a manner that political parties, and not the voters, are the ones who have the decisive say in the allocation of seats to the candidates (paragraph 24 of the reasoning of the Decision).

III

11. I concur with the reasoning that, if voting concerns lists of candidates,[15] the constitutionally enacted requirement "with due consideration that voters have a decisive influence on the allocation of seats to the candidates" does not concern the question of how many seats an individual list of candidates will obtain in an individual constituency, but the question of who has an influence on which of the candidates from a list of candidates will obtain a deputy seat. The electoral formula is in any event regulated by legal rules, but what remains at issue is whether they have been formulated in such a manner that the final word on the decisive question lies with political parties and other

[15] In light of the fact that the Constitution determines an electoral threshold, the question could arise whether it would be possible to introduce a variation of the proportional system wherein in constituencies individual candidates would stand for election instead of lists of candidates. In such case, the number of deputies to be elected in a constituency determines the type of system. If voters vote for candidates with the option of a single transferable vote in one constituency, such concerns an alternative voting system, which is a variation of the majority electoral system. If several (as a general rule 5) deputies are elected in a single constituency, the application of a system of voting by means of a transferable vote produces proportional effects, as in the case of the single transferable vote system. Such is in force, e.g., in Ireland, where voters vote for candidates and all seats are allocated to the individual candidates in constituencies according to the Droop quotient. It is, however, questionable if there is room for an electoral threshold in these systems, as such is not part of the legal orders where such systems are in place. For more on the electoral formula in Ireland, see M. Gallagher, Ireland: The District Charm of PR-STV, in: M. Gallagher, P. Mitchell (ed.), The Politics of Electoral Systems, Oxford University Press, Oxford 2008, pp. 511–532.

proposers of nominations or with the voters. In my opinion, there is no third actor who could decide on such. And the applicant also claims: the political parties decide.

12. Before I delve into this central question, I would like to offer a few thoughts on whether this constitutional requirement also extends to the question of who has the right to nominate candidates, i.e. the nomination stage of elections. I concur with the position from the Decision that it does not. Following the clarification by the Constitutional Court that the right to nominate candidates is a part of the active right to vote, it is clear that such is exercised by the voters – whereby they may do so directly (so-called individual nominations) or by organising into political parties. When a political party nominates candidates from its own ranks according to a democratically regulated procedure, such also entails the exercise of the active right to vote. Political parties are important for democratic processes, especially elections. In contrast to some other constitutions, our Constitution does not expressly regulate the basis of their activities. Such is surprising, as the introduction of political pluralism, with political parties being the central element of such, was one of the fundamental requirements during the establishment of our independent democratic state. Political parties are an expression of the right of assembly and association, which is a human right. It also includes the right to establish political parties. That right is, in the words of the Constitutional Court, the foundation of a multi-party political system, without which no free democratic society can exist.[16] Political parties are thus constitutionally protected. Due to their significant role in the struggle for power and the exercise of (legislative and executive) power, elections are practically inconceivable without them.[17] The fundamental rules according to which political parties nominate candidates are regulated by the electoral law, which may also enact restrictions regarding such. The decision on which nominations or lists of candidates a political party is going to submit in which constituencies is of course always left to the party. Anyone who believes that this does not apply to majority electoral systems is wrong. It remains an open question whether a political party's central bodies or its local bodies[18] have a greater say in such, which can to a certain extent depend on the elements of the electoral formula, including the organisation of constituencies and their potential further division, which also applies in other legal orders. Legislation could surely significantly restrict political parties if it required that only a candidate with permanent residence in the territory of an electoral district can be nominated to stand for election in that district. Such would decrease the possibility of political parties speculating regarding the positioning of individual candidates based on their chance of being elected. However, there is no doubt

[16] Held by the Constitutional Court in Decision No. Up-301/96, dated 15 January 1998 (Official Gazette RS, No. 13/98, and OdlUS VII, 98).
[17] *Cf.* F. Lanchester, Gli instrumenti della democrazia, Giuffrè Editore, Milano 2004, p. 84, and R. S. Katz, A Theory of Parties and Electoral Systems, The Johns Hopkins University Press, Baltimore 2007, p. 1.
[18] Regarding an electoral reform that aimed to intensify the personalisation of elections in the country where the proportional electoral system first developed, but in the end produced the exactly opposite effects, see L. De Winter, Belgium: Voters or Party Elites, in: M. Gallagher, P. Mitchell (ed.), *op. cit.*, pp. 421–431.

that political parties would also adapt to such rules.[19] They always adapt, which is only natural and may be observed in other countries following amendments to the electoral formula at issue, which may be triggered precisely due to political parties' speculations regarding the "benefits" such might bring them.[20] This question was not in fact the subject matter of the review in the case at issue, as no statements were made in this respect. Ultimately, the Constitution clearly speaks of the allocation of seats to the candidates. And the candidates are the ones who obtained the passive right to vote with the registration of their nomination following the nomination procedure of the election, i.e. at the very beginning of the electoral race, in order to enable such to take place. However, even this is an illustrative indication of how intertwined election rules are, and therefore caution is required when we establish causal relationships and attribute specific consequences to (merely) individual reasons.

13. Returning to the central theme, we must first raise the question of whether this constitutional requirement is an element of the right to vote or an element of the electoral formula as a system. If we reply one or the other, we are namely not dealing with the same legal situations. I agree with Professor Zagorc, who stressed at the public hearing that it must be regarded as an objective element of the electoral formula intended to ensure a decisive influence of voters as a whole, and not of a single voter. Such is also the basis of the reasoning in the Decision. I would say that it does not entail an element of the right to vote itself. If that were the case, this requirement would have to apply in each and every electoral system. The requirement of the personalisation of elections would then entail a part of the content of the right to vote, as it would be considered within the framework of the voter's free expression of his or her will regarding whom he or she intends to give his or her vote. It would thus be a necessary element of the active right to vote. As a result, almost all variations of the proportional electoral system would probably constitute an interference that restricts the content of the right to vote, not only from the perspective of equal suffrage, but from the perspective of universal suffrage itself.[21] Already due to the very existence of variations in majority electoral systems, I cannot imagine that any proportional electoral system could pass a constitutional review if put to the test of constitutional admissibility and proportionality, which we use to review the

[19] Such is nicely illustrated by the Belgian example; *ibidem*, p. 431. For more on this, see R. S. Katz, *op. cit.*, pp. 117–119.

[20] Although such views may also entail excessive simplifications; see R. S. Katz. Why Are There So Many (or So Few) Electoral Reforms, in: M. Gallagher, P. Mitchell (eds.), *op. cit.*, pp. 58–60 and 63–69.

[21] In a judgment by which it held for the first time that Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – the ECHR) protects the active right to vote and the passive right to vote as personal human rights, the European Court of Human Rights stressed *inter alia* the following: the Contracting States have a wide margin of appreciation regarding the choice of electoral system; electoral systems seek to fulfil objectives that are sometimes scarcely compatible with each other; any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for the free expression of the will of the people in the choice of the legislature; see paragraph 54 of the Judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, dated 2 March 1987.

admissibility of an interference with a human right. As human rights are by their nature universal, such would have to apply in all democratic countries.

14. Considering the requirement of the personalisation of elections as an element of the right to vote would also negate that the choice of electoral system – i.e. the electoral formula – is an essentially political question. From the perspective of constitutional law, even the Constitution framers would be restricted. We are in fact not dealing with the question of the legal nature of the right to vote, as in each and every electoral system this right is a personal right that can only be exercised in a collective manner, which applies not only to the active right to vote but also to the passive right to vote.[22] Instead, we are dealing with the question of how the expression of the will of the voters should be organised (constituencies, the number of deputies elected in each unit[23]), and whether a vote cast by a voter entails a so-called exclusive candidate vote or whether it entails a vote for the candidate and concurrently also a vote that is counted together with other votes (a so-called nonexclusive candidate vote) or whether and to what extent it is (concurrently) transferred into a vote for the list.[24] None of the mentioned electoral formulas can be said to produce an interference with the right to vote as such, even less so an inadmissible interference with the right to vote. We must thus agree that the greater or lesser personalisation of elections is an (objective) element of the electoral formula as a system, and not of the content of the right to vote. Therefore, from the perspective of whether personalisation exists or not, a review of the consistency of the electoral formula with the right to vote as such is irrelevant. It would be relevant if a decisive influence of voters on the allocation of seats was required with regard to how the seats obtained on the basis of the votes cast by the voters, which are a credible reflection of their freely expressed will, are allocated to the individual candidates. It is relevant whether the electoral formula is regulated in such a manner that this is decided on by the voters and not (already in advance at the moment of nomination) by political parties (i.e. the proposers of the candidates).

15. We are dealing here with a regulation that is based on lists of candidates – lists of candidates are namely registered for the electoral race – while at the same time the electoral units are divided on two levels, i.e. constituencies and electoral districts, and the proposers of the lists of candidates are required to divide the individual candidates from the list among the electoral districts. A voter votes for an individual candidate and concurrently for the list of candidates which that candidate belongs to. I believe that such clearly follows from the statutory regulation and it is not proper if, due to an incomplete reading of the statutory provisions, we underestimate the voters by deeming that they do not know this. Such an electoral system has been in force already since 1992. Once the

[22] See J. Sovdat Pasivna volilna pravica, kandidiranje in varstvo volilne pravice [The Passive Right to Vote, Nominations, and Protection of the Right to Vote], in: I. Kaučič (ed.), Ustavni položaj predsednika [The Constitutional Position of the President], Inštitut za lokalno samoupravo in javna naročila (Lex localis), Maribor 2016, pp. 151–152.
[23] See note No. 15.
[24] For more on this, see G. W. Cox, *op. cit.*, pp. 40–48.

votes have been cast, no deputy can be elected only on the basis of the votes the voters cast for him or her as an individual candidate from a list of candidates in an electoral district. The candidate is in fact elected on the basis of all the votes cast for the list in all the electoral districts. If only the votes of the voters in a single electoral district counted, the list could not obtain any seats at all (in the constituency). Therefore, I take no issue with this regulation from the perspective of equal suffrage. There would be an inequality if only the votes cast for individual candidates in the electoral districts were considered in isolation. However, as I have stressed, none of the candidates could be elected on the basis of these votes. If this were possible, candidates would in fact be elected in electoral districts and constituencies would become useless. However, as professor Grad stated at the public hearing, if deputies were elected in electoral districts, we would have a majority electoral system or an exclusive candidate vote system according to Cox, which is, of course, characteristic of majority electoral systems, and with regard to proportional systems, only for the single transferable vote system.[25]

16. In light of the above, the applicant's statements that, as a result of proportional representation (i.e. a proportional electoral system), every electoral district should have an elected deputy and the equal distribution of deputies across the electorate should be ensured, in fact contradict themselves. The applicant actually claims that within the proportional electoral system we should have a majority electoral system. These two cannot be reconciled. Even if the legislature eliminated electoral districts and introduced open electoral lists with preferential voting and perhaps even *panachage*, such could not be achieved; likewise, it would not be possible to always ensure the equal distribution of deputies across the electorate. This could be achieved by introducing a majority electoral system, but such would be unconstitutional due to the fifth paragraph of Article 80 of the Constitution.

17. The central question is thus who has, according to the statutory rules currently in force, the decisive say on which of the candidates from a list of candidates will be allocated the seat that the list obtained in a constituency. As I have already stated, naturally such can only be attributed to two actors. The proposers of the lists of candidates, which as a general rule are political parties (I will refer to proposers as such hereinafter), or the voters. What is at issue is whether political parties, according to the statutory rules and after having determined the lists of candidates and divided the candidates among the electoral districts, retain any kind of influence on which of the candidates on the list of candidates will be allocated a seat. Such influence would be most evident in the case of voting only on lists, whereby the order of candidates on the list as determined by the political party would be considered, or in the case of the system of so-called national lists that was once in force, but it would also be retained in systems which determine what share of the seats obtained is allocated according to the order as determined by the political party and what share on the basis of preferential votes (e.g. as in Belgium). If, however, the statutory rules prevent a political party from retaining such

[25] See note No. 21.

influence in the mentioned ways or even introduce the express rule that seats are to be allocated to candidates from the same list according to the (relative) number of votes cast by voters for an individual candidate in an electoral district, it cannot be claimed that the political party has a decisive influence on such. Once the nominations have been set, who will be allocated a seat no longer depends on the will of the political party, but only on the will expressed by the voters. With regard to forms of preferential voting where the political party no longer has any influence in the stage of the allocation of seats, the political party's influence also ends in the nomination stage. As within the challenged electoral system only one candidate from a list of candidates stands for election in each electoral district and seats are allocated according to the highest share of votes obtained in an electoral district, it is claimed that a competition among the candidates of the same list is created. However, precisely the same applies in all preferential voting systems, as (positive or negative) preferences within a list produce the same effects.

18. In light of the above, it cannot be claimed that in the challenged electoral formula voters do not have a decisive influence on the allocation of seats to individual candidates from a list of candidates. The allegation that the system in force is unconstitutional is thus also not substantiated from this perspective. It is clear that the legislature retains a political margin of appreciation regarding which of a number of possible variations of the proportional electoral system that ensure that voters and not political parties have a decisive say on the allocation of seats to the individual candidates it will enact.[26] In this respect, the legislature is the one who calls all the shots and must, therefore, also assume full responsibility for the consequences of the choice of electoral system for political and social life within the state in general. The Constitutional Court may not proclaim that the electoral system is unconstitutional simply due to the fact that the legislature has thus far not been willing to amend it.

19. With regard to the interpretation of the text of the fifth paragraph of Article 80 of the Constitution, some of my esteemed fellow constitutional judges had different views than those presented in the Decision, which I supported. However, none of them explained the reasons that would require that the teleological interpretation as follows from the *travaux préparatoires* for the constitutional amendment be rejected. Neither did the applicant. It is true that, at the relevant time, the competent commission held that the amendment to the Constitution "enables the introduction of all forms of proportional representation". If we considered this statement by itself, we would of course have to conclude that it is not true.

[26] At the public hearing, Prof. Toplak mentioned the example of the electoral system in force in Latvia. I had a chance to become more closely acquainted with that system and I like it. It determines a five-percent electoral threshold in order to prevent the fragmentation of parliament and enables both a negative and a positive preferential vote by means of crossing a candidate off a list, which of course entails that the votes of the voters decide on the allocation of seats to the individual candidates, as they cannot only change the order of the candidates, but may even exclude a candidate who had been determined in advance by his or her political party. However, another system's appeal cannot effect the unconstitutionality of the system in force, as long as also within such voters decide on the allocation of a seat to an individual candidate and such is not determined in advance by his or her political party.

It is clear that this sentence must be read together with the remaining text, which very clearly states which variations of the proportional system it does not allow (see paragraph 43 of the reasoning of the Decision). It thus follows from a teleological interpretation of the constitutional provision that in enacting it the Constitution framers did not have the intention of enacting a new electoral system, but wanted to exclude certain elements of the system in force at the time in order to prevent political parties from having in advance an influence on which of the candidates will be allocated a seat. As no one provided reasons why this intention of the Constitution framers should be exceeded, I too may refrain from considering whether such would nevertheless be necessary. The applicant's allegations that the system currently in force negatively affects political and social life cannot substantiate such. Should they nevertheless prove to be substantiated, they could serve as a valid political reason for amending the electoral formula, but of course within the constitutionally determined framework. Otherwise, the Constitution would have to be amended.

IV

20. I agree that within the legal order there exist two different, even conflicting legal rules on observance of the principle of equality as regards the electoral geometry of the electoral districts that cannot be interpreted in an unambiguous manner (Point 3 of the operative provisions). This conflict that results in legal rules being inconsistent to such an extent that it entails an inconsistency with the principles of a state governed by the rule of law must be eliminated from the legal order. However, in my opinion, this conflict already existed when the Constitutional Court first encountered this question. I believe, however, that differences in the size of the electoral districts do not interfere with equal suffrage, namely due to the manner in which votes for a list and the candidates on it are collected and whereon I have already expressed some opinions (paragraph 15 of this Opinion). In fact, the moment when the legislature should have also scrutinised the size of the constituencies from the perspective of equality (i.e. the electoral geometry) already occurred a long time ago. The demographic and other criteria that influence the drawing of the borders of constituencies have been changing over the years. Perhaps the unconstitutionality established in the case at issue, although it cannot of itself influence the key decision in this case from the perspective of constitutional law, will still lead to political reflections on the electoral formula as such. Even if the electoral districts were equal in size, in my opinion, that would not alter the fundamental understanding of the implementation of the constitutional requirement that voters have a decisive influence on the allocation of seats to the candidates.

21. I also concur with the outcome of the review of the allegations of unconstitutionality contained in Point 2 of the operative provisions. I would merely like to add some words of caution with regard to the first paragraph of Article 7 of the NAEA. Already a linguistic interpretation of this provision clearly leads to the content of the rule – the right to vote in individual elections is enjoyed by everyone who has attained the age of 18 years before

the day of the election, i.e. those who are older than 18 years of age, and those who attain this age on the day of the election. It is evident that by means of the manner of implementation of the right to vote (the second paragraph of Article 15 of the Constitution) the legislature had to determine how (the executive authorities, already when drawing up the electoral registers, and) the electoral authorities shall implement the second paragraph of Article 43 of the Constitution.[27] In a way, the choice of the day of the election seems self-evident, as within the electoral process the day of the election, when all holders of the active right to vote express their will, is the most important aspect. Another reason to support such lies in the fact that in this manner the broadest possible circle of electors are enabled to vote. However, it should also be considered that the active right to vote can be exercised already before the day of the election – through nominations, the passive right to vote – e.g. when an individual obtains the right to stand for election by being included in a registered list of candidates. In this regard, in accordance with the first paragraph of Article 7 of the NAEA, the right to vote could also be exercised by persons who do not fulfil the requirement under the second paragraph of Article 43 of the Constitution. However, evidently, there have thus far been no issues in this regard, nor did the applicant even consider such, but simply aimed its allegation where, however, it must be deemed manifestly unsubstantiated in light of the possible interpretations of the relevant legal acts.

Dr Jadranka Sovdat
Judge

I am joining the Concurring Opinion of Judge Dr Jadranka Sovdat. The argument that "the legislature retains a political margin of appreciation regarding which of a number of possible variations of the proportional electoral system that ensure that voters and not political parties have a decisive say on the allocation of seats to the individual candidates it will enact" (note No. 26 appears at this point, which I have omitted) is of particular importance. It is also essential that the legislature is responsible "for the consequences of the choice of electoral system for political and social life within the state in general" (paragraph 18 of the Concurring Opinion).

Dr Marijan Pavčnik
Judge

[27] The electoral law in neighbouring Austria, e.g., determines 1 January of the year of the election as the decisive date.