U-I-266/96
31 July 1996

D E C I S I O N

At the session held on 31 July 1996 in the proceedings reviewing constitutionality, instituted by the initiative of the signors of an initiative for collecting the signatures appended to the request for the call of a referendum as to the system of elections, the Constitutional Court

d e c i d e d :

1. Para. 2 of Article 19 of the Referendum and Popular Initiative Act (Official Gazette of the RS, No. 15/94 and 38/96) is not inconsistent with the Constitution.

2. Para. 2 of Article 23 of the same statute is abrogated.

3. Para. 3 of Article 46 of the same statute, and the part of Para. 4 of Article 46 of the same statute, which reads as follows: "whereas in the case of the previous paragraph in such a manner that the voter encircles a serial number in front of the question containing a proposal for which he wishes to vote".

R e a s o n i n g :

A.

1. The initiators propose that the Constitutional Court abrogates Articles 1, 3, 4 and 5 of the Act on Amendments and Supplements to the Referendum and Popular Initiative Act (Official Gazette of the RS, No. 38/96, hereinafter: amended ZRLI). They argue that Article 1 of the amended ZRLI (new Article 12.a of the Referendum and Popular Initiative Act, Official Gazette of the RS, No. 15/94 and 38/96 - hereinafter: ZRLI), prescribing that a statutory referendum which refers to the elections to the National Assembly cannot be called within a period of one year before the regular elections to the National Assembly, unconstitutionally restricts constitutional rights from Articles 44 and 90 of the Constitution.

2. Article 3 of the amended ZRLI (new Para. 2 of Article 19 of the ZRLI), prescribing that the National Assembly, in the case of more than one submitted requests for the call of preliminary referendum on questions being alternatives among themselves, shall call the referendum about all submitted requests on the same day, is allegedly inconsistent with Article 90 of the Constitution, for it supposedly "reduces the right to call referenda as to different questions into the call of only one referendum".

3. The initiators argue that also Article 4 of the amended ZRLI (new Para. 2 of Article 23 of the ZRLI) is inconsistent with Article 90 of the Constitution, prescribing for a referendum as to questions regulated by statute, enacted by the National Assembly with two thirds majority of all deputies, a quorum of the majority of all voters.

4. Inconsistent with the Constitution is allegedly also the provision of Article 5 of the amended ZRLI (new Para. 3 of Article 46 and new part of Para. 4 - before Para. 3 - of Article 46 of the ZRLI), which prescribes that questions being alternatives among themselves are being voted for, through a voting list that contains all referendum questions, in a manner having the voter encircled a serial number in front of the question including the proposal for which he wishes to vote.

The initiators argue that this provision causes votes to be dispersed, and thus it could be abused by submitting new referendum requests to prevent to come to any sort of decision at a referendum.

5. Besides, all the cited provisions of the amended ZRLI are allegedly inconsistent with Article 155 of the Constitution for their supposed retrospective effect.

6. The Secretariat of the National Assembly for Legislation and Legal Affairs replied to the initiative stating that by the amended ZRLI the legislator was about to arrange procedures (primarily the manner of voting and establishing of results) in cases of cumulation of more than one referendum questions about the same statutory subject-matter. The Secretariat states that in adopting the amendments the National Assembly considered also Constitutional Court decision No. U-I-201/96.

According to the Secretariat, controversial provisions do not have retrospective effect, but merely effect for solving the problems emerged in connection with the carrying-out of the ZRLI prospectively.

The provision prohibiting the call of referendum in a certain period before regular elections are held is, according to the Secretariat, well founded by the protection of political system's stability this being an important constitutional value. Additionally, the Secretariat argues that such restrictions are also established in numerous foreign legal systems. Referenda on electoral legislation held in the last year before elections, or in this framework just before the elections, could, pursuant to the Secretariat, cause unstable conditions and threaten normal preparation work for elections. The Secretariat points out special substantial perplexity as to systemic legislation regulating elections, responsibility of the National Assembly for qualitatively regulating these issues, and the fact that a year before the elections, or just before the elections, "there is no assurance that the statute (. . .) will be actually and without any complications as to the necessary majority (. . .) normally prepared and enacted".

As to the new regulation on the manner of voting and establishing results, the Secretariat believes that "the contents of Article 90 of the Constitution undoubtedly refers to the conclusion that the will of voters must be clearly expressed at referendum, thus it cannot be disputable that among more competing questions only the one for which the majority of voters voted is accepted. At this, voters must have an opportunity for an alternative option, however, not to vote at the same time for more proposals being alternatives among themselves.

Prescribing the majority of citizens entitled to vote to take part at referendum as a condition set for a referendum decision to be adopted is, according to the Secretariat, grounded in the nature of the statute regulating elections. Electoral system, alleges the Secretariat, is predominantly constitutional subject-matter. Here, adds the Secretariat, the constituent assembly did not have necessary majority to include the provisions on electoral system into the Constitutional text, thus it is now provided in the Constitution that a statute regulating elections to the National Assembly shall be enacted by two thirds majority. Pursuant to the Secretariat, this statute was allegedly meant to be enacted through procedure even more exacting than is two-phase procedure for amending the Constitution. The provision of Para. 4 of Article 90 of the Constitution does not explicitly prescribe a quorum, yet, according to the Secretariat, it also does not prohibit it.

B.

7. By Articles 3 and 5 of the amended ZRLI the legislator was about to regulate a situation where until the adoption of an act on calling a referendum more than one requests for calling the referendum, being alternatives among themselves, were submitted. At this, it proceeded from the principle of equal treatment of these requests and the principle that a referendum on all competing questions, contained in requests submitted within a certain time period, is to be held at one time respectively.

By Article 3 of the ZRLI, Article 19 of the ZRLI is supplemented with new Para. 2, providing that in the case of more requests for calling a referendum as to questions, being alternatives among themselves, the National Assembly shall call the referendum on all submitted requests on the same day.

By Article 5 of the amendments Article 46 of the ZRLI is supplemented, in a manner reading now in full as follows: "A voting list contains a question on which the referendum is held, and instructions as to the manner of voting.

If the referendum is held as to more questions being alternatives among themselves, the voting is carried out through a voting list containing all the referendum questions put to the referendum.

The voting is carried out in the manner having the voter encircled on the voting list words "in favor" or "against", and in the case of the previous paragraph by means of having the voter encircled a serial number in front of the question including the proposal for which he or she wishes to vote." 8. By the amended ZRLI it is therefore provided that in the case of more than one requests for calling a referendum on questions being alternatives among themselves (hereinafter: competing questions) only one referendum is held as to all referendum questions, having a voting list contained all the questions. The establishing of referendum results is not specially regulated for such a case, so the results also in the case of competing referendum questions are established according to Article 23 of the ZRLI, which is equal to Para. 4 of Article 90 of the Constitution - a decision is made at the referendum, if the majority, of those who voted, vote in favor of it.

9. Deciding at referendum, pursuant to Para. 4 of the Constitution, is based on the principle of absolute majority.

To have a decision made, more than half of those who voted should vote in its favor, and not merely relative majority. In the case of a referendum where no voting on competing questions exists, a voter decides upon two alternatives: either "in favor" or "against"; there is no third possibility. However, in the case of carrying-out the referendum on competing questions the voter does not choose only between two alternatives, but with each question when comparing it to the valid regulation he or she faces the alternative whether "in favor" or "against". If he or she supports more decisions, when comparing them with the valid regulation, he or she can certainly prefer one of these decisions to all others, and another, again, to the next etc.

The fact that he or she voted for one of these proposals does not yet mean that in the case of this proposal's failure (if the proposal does not get necessary majority) he or she supports the valid regulation: that he or she (subordinately) will not wish to vote for another proposal.

10. A part of provision of Para. 4 of Article 46 regulates the voting in the case of competing questions (proposals) so that the voter can choose one of these proposals. For he is by voting included into the number of all who voted (and out of this number necessary majority is counted for a decision to be made), by this choice he or she actually votes against all other proposals, although he or she might not even wish to do so.

From his or her decision for one of the proposals, it cannot be already concluded, that in the case this proposal will not get necessary majority he or she is deemed to support the valid regulation. The voter's will can also be different: facing failure of the proposal for which he voted, the voter might wish his or her vote to go in favor of some other from among the proposals, and in the case of the latter's failure the vote to go in favor to some third proposal etc.

Instead the statute ensured the deciding between the alternatives "in favor" or "against" with any proposal, it forces indirectly the voter (and creates (legal) fiction respectively) into by choosing one proposal, casting a vote "against" all other proposals.

11. In regulation, introduced for the purposes of referenda with competing questions by the amended ZRLI, the phenomenon of splitting of votes emerges what could bring to referendum results not to be in accord with voters' will (this phenomenon is also known from German or Swiss constitutional theory as "Aufsplitterung der Stimmen"). Theoretically, all the voters can oppose the (valid) regulation giving any of the offered proposals preference over this regulation, yet because of dispersion of votes at the referendum no proposal is adopted, so the existing regulation stays in force. This being caused, for the voter is not given a possibility to (if a decision he or she supports the most is not made) support subordinately also the other proposal which he or she still more prefers to the existing statutory regulation. Therefore, his vote for one from among the proposals necessarily means a vote against all other proposals. If at referendum it is being voted for competing proposals, which resemble each other in essential points, there is a great probability to have the votes distributed among certain proposals causing no one of them to get necessary majority, although the vast majority of persons who come to vote clearly oppose the existing statutory regulation of a matter which is the subject of referendum. The danger of splitting of votes and thereby deviating of referendum results from the actual will of voters increases with the number and similarity as to contents of referendum questions. The

regulation, introduced by the amended ZRLI, motivates the proponents of statutory regulation in force to submit requests for calling the referendum only to cause the splitting of votes, thereby preventing any sort of decision at referendum to be made.

12. The challenged statutory regulation concerning the manner of voting in the case of competing proposals is inconsistent with Para. 3 of Article 90 of the Constitution, which prescribes that all citizens, who are entitled to vote, have the right to cast their vote at referendum. By provisions, forcing indirectly the voter to vote against all other proposals except for the one that he supports the most, this right is substantially curtailed, for it thwarts the possibility of voters to vote for each proposal separately.

The challenged statutory regulation, which prevents democratic expression of the will of persons entitled to vote and consistent establishment of this will respectively (results of referendum), is also inconsistent with Article 1 of the Constitution, prescribing that Slovenia is a democratic state, Para. 2 of Article 3 of the Constitution, providing that in Slovenia supreme power is vested in the people and that citizens exercise this power directly and at elections, and Article 44 of the Constitution, providing that each citizen is entitled, subject to statute, to participate, either directly or through his elected representatives, in public affairs.

13. The Bavarian Constitutional Court in its decision (BayVerfGH, E. v. 30 May 1968, E 21 II, 110, cited according to Przygode, Die deutsche Rechtsprechung zur unmittelbaren Demokratie, p. 227) took the same point of view as the Constitutional Court in this decision - that the regulation, where a voter's vote for a certain proposal would count as the vote against all other proposals, is inconsistent with the Constitution.

14. The provision of Para. 1 of Article 5 of the amended ZRLI, by which Article 46 of the ZRLI is supplemented with new Para. 3 (voting for more proposals put on one voting list), is only a technical provision, which regulates the questions in connection with the carrying-out of a referendum on competing questions, and thus it would not be by itself inconsistent with the Constitution, if the legislator appropriately regulated the manner of voting and establishing of voting's results. The Constitutional Court abrogated this provision for it represents an inseparable part of the challenged statutory regulation that the Court found unconstitutional.

15. The provision of Para. 2 of Article 19 of the ZRLI, providing the referendum to be called on the same day, is following the abrogation of Para. 3 and part of Para. 4 of Article 46 necessary to be interpreted in the manner calling a special referendum on each question.

16. Concerning the fact that after the abrogation of Para. 3 of Article 46 and part of Para. 4 of Article 46 of the ZRLI and before their possible substitution with different statutory regulation, in the ZRLI, again, there are no special provisions on the manner of voting and establishing of referendum results as to competing questions, the Constitutional Court points out its decision in case No. U-I-201/96 (Official Gazette of the RS, No. 34/96), according to which the following interpretation of the ZRLI is consistent with the Constitution: in case more proposals get necessary majority of votes of all voters who voted as to the proposals the National Assembly is bound to the decision which got the highest percentage of votes "in favor" within the total number of voters who voted at a certain referendum.

17. Thus, the Constitutional Court emphasizes that the National Assembly could have also regulated a situation where there are more than one requests with competing proposals differently - by prescribing all the questions to be voted on one voting list.

Yet, in such a case the manner of voting and establishing of results should be regulated so that it would not cause distorting of the will of voters and splitting of votes respectively; thus, to unable the voter to appropriately express his will regarding each competing question separately.

Accordingly, more possibilities are offered - from the viewpoint of a possibility to establish consistently the will of voters the most appropriate would be the voting, where the voter could vote "in favor" or "against" with regard to all offered proposals, and in the case of voting for more proposals he would have an opportunity to opt for the proposals that he supports one after another. In this way, a situation,

where in case the decision the voter voted for is not made his vote is transformed actually into the vote supporting the valid statutory regulation, would not occur. If the proposal for which the voter voted first of all is not adopted, his vote is transferred to the proposal which he opted as his second choice, etc.

Next to such regulation which comes the closest to the ideal of consistent establishing of voters' will, constitutionally admissible would also be any other solution which would not exclude the possibility of voters' deciding about each proposal separately.

Necessary amendments and supplements to the ZRLI are possible to be prepared and adopted in a relatively short period of time (what came out also at adopting the challenged amendments to the ZRLI). The carrying-out of the described model, making possible of democratic expression and consistent establishment of voters' will, would not require major intervention with the statute's contents. Thus, the National Assembly still has a chance at the calling of referenda to enact a different type of voting and establishing of results, of course within the time when it is still possible, in accord with the passed amendments to the statute, to accomplish necessary technical work until the day of voting.

18. Cases of referenda on competing proposals are also regulated by comparative law of certain European countries (Germany and Switzerland). The Swiss Constitution was for example supplemented by new Article 121 bis just for the reason to prevent in the case of voting for competing proposals the splitting of votes. The cited constitutional provision enables the voting for two proposals at the same time: for the people's proposal to amend the constitution and the counter-proposal of the federal assembly. The voter has a possibility to reply to the third proposal, too: to which proposal does he give priority in the case both proposals have necessary majority.

Certain statutes of German federal states (e.g. of Bavaria) contain provisions on voting and establishing of the voting's results in the case of a referendum as to competing questions.

The voter can vote only for one vote, yet he can vote as to other proposals "against" or he can refrain from voting. If more than one proposals get more votes "in favor" than "against", the proposal which got the highest (absolute) number of votes "in favor" is adopted. Such regulation to a great extent (but not entirely) prevents the splitting of votes and indirect compelling of the voter into voting ipso facto against all other proposals if he votes for a certain one. The Bavarian Constitutional Court, in its decision (BayVerfGH, E. v. 30 May 1968, E 21 II, 110, cited according to Przygode, Die deutsche Rechtsprechung zur unmittelbaren Demokratie, p. 227) took the same point of view as the Constitutional Court in this decision - that regulation, where the voter's vote for a certain proposal ispo facto counts as the vote against all other proposals, would be inconsistent with the Constitution.

19. The challenged Para. 2 of Article 23 of the ZRLI prescribes that in cases, where at referendum it is being decided on questions regulated by statute enacted by the National Assembly with two-third majority of votes of all deputies, the decision is at referendum made, if the majority of voters who come to vote vote in favor of it, on condition that majority of the electorate come to vote.

The Constitution in Para. 4 of Article 90 of the Constitution provides that a proposal put to the referendum is adopted if the majority of voters who come to vote vote in favor of it. From logical and systematic interpretation of Para. 4 of Article 90 of the Constitution, it follows that determining a quorum as condition necessary for making a decision at statutory referendum is constitutionally inadmissible. The purpose of the constituent assembly was by Para. 4 to regulate finally an essential question on the manner of establishing referendum results (when is a decision at the referendum made). If the constituent assembly wished to prescribe a special quorum for the referendum on certain types of questions, it would have written that down explicitly. If it wished to leave this question to the legislator, it should have also determined that explicitly. The provision of Para. 5 of Article 90 of the Constitution, providing that the referendum shall be regulated by statute, authorizes the National Assembly to regulate only the manner of realizing the constitutional provisions on referendum. Yet, defining the quorum for taking part at referendum means, according to Para. 4 of Article 90 of the Constitution, more than just regulating the manner of carrying- out the referendum - it means setting additional conditions (conditions not defined by the Constitution) for making a decision at the referendum. An additional argument for such a point of view is also the provision of Para. 2 of Article

170 of the Constitution, which prescribes participation of the majority of all voters for adopting amendments to the Constitution at the constitutional referendum. In this provision, the constituent assembly set explicitly the quorum as the condition for making a decision at the referendum. Inference by opposite reasoning leads us to conclude that in the case of statutory referendum the constituent assembly did not intend to determine the quorum or that it excluded the possibility of determining it.

20. Providing the quorum is contrary to Para. 4 of Article 90 of the Constitution and means an interference with the constitutional right to request a referendum, contained in this article. Such interference would be admissible only if aimed at protecting some other constitutional value and being proportional with the meaning of one and the other constitutional value. However, setting the quorum as to participation in voting at the referendum cannot be reasoned in this manner. If the legislator intended to ensure a greater level of voters' consensus (decisiveness), it chose an inappropriate means for this purpose. Quorum as to participation in voting at the referendum only causes a decision to be made more difficult what is not a legitimate goal that would justify such interference. For there was no legitimate goal for the described interference with the constitutional right, the test of proportionality was not needed to be done and not possible to be carried out respectively.

21. The allegation of initiators that the challenged statutory provisions have retrospective effect is not true. The amended ZRLI took effect the day after its publication in the Official Gazette of the Republic of Slovenia and applies for the calling, carrying-out and establishing of results of referendum from the day of coming into force.

22. A part of the initiative, referring to the constitutionality of new Article 12 a of the ZRLI, which pursuant to Article 6 of the amended ZRLI does not take effect until 1 January 1997, was not yet considered by the Constitutional Court; the Court only excluded the said part from the initiative and decided to consider it as a separate case.

C.

23. The Constitutional Court made this decision on the basis of Articles 21 and 43 of the Constitutional Court Act (Official Gazette of the RS, No. 15/94), composed of: dr. Tone Jerovšek, President, and dr. Peter Jambrek, mag. Matevž Krivic, mag. Janez Snoj, dr. Janez Šinkovec, dr. Lovro Šturm, Franc Testen, dr. Lojze Ude and dr. Boštjan M. Zupančič, the Judges. Item 1 of the holding was adopted by eight votes in favor to one against (Judge Zupančič voted against), Item 2 of the holding by five votes in favor to four against (Judges Krivic, Snoj, Šinkovec and Ude voted against), and Item 3 of the holding by seven votes in favor to two against (Judges Krivic and Snoj voted against). Judge Krivic announced his dissenting opinion as to Items 2 and 3 of the holding, and Judge Ude his dissenting opinion as to Item 2 of the holding.

President of the Constitutional Court:
dr. Tone Jerovšek