

U-I-201/96
June 14, 1996

DECISION

At the session held on June 14, 1996 in the proceedings to review constitutionality and legality, instituted by the request of the National Council, the initiative of the Social-Democratic Party of Slovenia and the signors of the initiative for collecting the signatures under the request for a referendum as to the majority electoral system, the Constitutional Court

d e c i d e d :

1. The Referendum and Popular Initiative Act (Official Gazette of the RS, No. 15/94) is not inconsistent with the Constitution if interpreted:

- that referenda on all questions to be answered by the referendum, raised in all the initiatives or requests for calling a referendum on questions regulated by the same statute, are to be carried out at the same time, if these were lodged by the time of adoption of the act for calling a statutory referendum, and as to all of them the conditions from Articles 15 and 16 of the Statute are fulfilled, and

- that the National Assembly, if a decision is made in two or more referenda, is bound by the referendum which got the highest percentage of votes "in favor" from the total number of voters voted at a particular referendum.

2. Items 3 and 4 of the Decree on Calling of a Statutory Referendum for Elections to the National Assembly (Official Gazette of the RS, No. 25/96) are abrogated ab initio.

R e a s o n i n g :

A.

1. The National Council challenges the Decree on Calling of a Statutory Referendum as to the Elections to the National Assembly (Official Gazette of the RS, No. 25/96 - hereinafter:

Decree), since by adopting this decree the National Assembly has allegedly in a discriminatory manner treated the request of the National Assembly for calling a preliminary statutory referendum. The National Council asserts that its request for calling the referendum was made only few minutes after the request of a group of 35 National Assembly deputies.

Furthermore, the National Council argues that the request of 35 deputies violated the proceedings "by the purpose to overtake the National Council and make the execution of its request impossible".

2. Subsidiarily, the National Council (if the Constitutional Court would not abrogate or abrogate ab initio the decree) challenges also the provisions of Article 9 through 25 of the Referendum and Popular Initiative Act (Official Gazette of the RS, No. 15/94 - hereinafter: ZRLI). According to its allegations, the statute allegedly regulates a preliminary statutory referendum incompletely, thus enabling various procedural infringements of the constitutional right to request the calling of a referendum (Para. 2 of Article 90 of the Constitution) or the National Council's power to request the calling of a referendum conferred by the Constitution (Para. 1 of Article 97 of the Constitution).

3. The signors of an initiative taken for collecting the signatures appended to the request for a referendum as to the majority electoral system (hereinafter: signors) and the Social- democratic party of Slovenia (hereinafter: SDS) challenge the Ordinance, for the request of 40.000 voters for the call of referendum was thus allegedly discriminated against. The signors and the SDS believe that the National Assembly should not have called any referendum as to the Act on Amendments and Supplements of the Elections to the National Assembly Act (ESPA 1286) before the time limit set for collecting the signatures appended to the request does not expire. Of the initiative for collecting the

signature, pursuant to the signors and SDS' allegations, the President of the National Assembly was informed on April 12, 1996.

The signors and the SDS assert that by the call of a referendum on the deputies' request "the essence of a referendum was questioned", in this being included that the opposition between the will of the people and the National Assembly is to be solved by an authoritative decision of the people which binds the National Assembly. The call of a referendum requested by the group of deputies and the submittance of a National Council request for the calling of the referendum is viewed (by the initiators) as abusing the right to request the call of the referendum. They believe that the National Assembly was first to call the referendum as requested by 40.000 voters. They oppose, though, to the stay of implementing or the abrogation of the ZRLI, for this would be, in their opinion, inconsistent with the principles of a state governed by the rule of law.

4. The signors of the initiative and the SDS challenge the decree also from the reason of having a referendum question in the part dealing with "the direct influence of voters on the selection of deputies" unclear and misleading, and therefore inconsistent with the ZRLI and the Constitution.

5. To the National Council request and the initiative of the signor and the SDS, the Secretariat for Legislation and Legal Affairs of the National Assembly (hereinafter: Secretariat) replied.

The Secretariat believes that the challenged decree is not a general rule but an individual act, and thus cannot be subject to the proceedings for review of constitutionality and legality. It also believes that the decree is not controversial as to its contents, for the National Assembly was allegedly to call the referendum as requested by the group of deputies who made the request first. The Secretariat refers to the "general legal principles of priority as to the time of making requests and their deciding". It refers also to Article 25 of the ZRLI, according to which the National Assembly is bound to the results of a referendum, and one year after the carrying-out of the referendum it can neither pass a statute, which would be contrary to the results of a referendum, nor repeat the referendum on the same question. It refers as well to Article 49 of the ZRLI which prescribes that in establishing the results of a referendum the number of voters voted "in favor" and number of voters voted "against" shall be found out. Accordingly, pursuant to the Secretariat's opinion, the situation when two or more referenda on the same contents yet with different referendum questions are to be carried out is not regulated by the ZRLI.

Also, the concept of "the same question", meaning "the same statutory solution or an issue that is regulated by the statute or should be regulated in a such or different manner", is analyzed in the Secretariat's reply. The Secretariat concludes that given circumstances do not give grounds to the call of another referendum on the same questions of statutory regulation, "for this would mean two alternative statutory referenda being alternatives".

The Secretariat points also to the position taken by the Constitutional Court in decision Up-62/96 that the referendum on essential amendments to the electoral system in the time just before the elections are held could be constitutionally controversial. However, the referendum question on which the referendum was called by the decree refers, according to the Secretariat, to minor corrections of the existing electoral system.

6. As to the initiative lodged by the signors of an initiative and the SDS, the Secretariat argues that all the reasons, stated in connection with the request of the National Assembly, apply accordingly. Nevertheless, it specially alleges that "concerning a clear provision of the Constitution and Article 19 of the ZRLI, the National Assembly was not empowered to wait with the call of the referendum once the request of the National Assembly deputies had been made". Regarding the question of clarity of the referendum question, raised in the initiative, the Secretariat argues that this question "pursuant to the ZRLI is to be considered and decided upon by the National Assembly and not the Constitutional Court".

7. As to the request for review of the constitutionality of Articles 9 through 25 of the ZRLI, the Secretariat believes that the reasons argued by the National Assembly are not founded well, and by

appropriate interpretation of the provisions of the ZRLI a dispute, presented as such by the National Assembly, could be solved.

B. - I.

8. The state of facts is not disputable between the initiators and the National Assembly.

On 12 April 1966, the Social-Democratic Party of Slovenia informed the President of the National Assembly of an initiative given to the voters for collecting of the signatures appended to the request for calling of a referendum as to the Act on Amendments and Supplements to the Elections to the National Assembly Act. The referendum question is raised in a way asking the voters whether they are in favor of the introduction of two- circle majority electoral system in 86 voting units, or not.

On 17 April 1996, the National Council and a group of 35 National Assembly deputies made the requests for two referenda.

The request of the group of deputies was made prior to the one lodged by the National Council. The requests contain two referendum questions referred to the same contents - electoral system. The referendum question raised by the request of a group of deputies is related to the modification of valid proportional electoral system (abolition of national lists, equal representation of voting units, considering the successfulness of an individual candidate from the list in distributing of mandates within the list, reduction of voting quotient needed for winning a mandate in a voting unit).

However, a referendum question raised by the request of the National Council is referred to the introduction of electoral system based on two votes. One is cast by the voter for direct election of a deputy in one of the 44 voting districts, whereas the other is cast for the list of candidates in a voting unit, where all the deputy mandates are distributed to the lists proportionally (on the basis of other votes).

On 23 May 1996, the Constitutional Court received from the signors and the SDS a request of 43.710 voters and the record from 23 May 1996 on the acceptance of this request, together with signatures. It is considered (in so far as the deficiencies will not be established later) that the voters' request, made on the basis of the SDS initiative, was lodged on this day.

9. The challenged decree contains five items. Item 1 provides that a preliminary statutory referendum as to the draft Act on Amendments and Supplements to the Elections to the National Assembly Act (EPA 1286) shall be called. In Item 2 a referendum question is defined. By Item 3, 23 May 1996 is determined as the day of calling of a referendum, causing the time limits, set for the actions necessary for the carrying-out of the referendum, to run. Item 4 provides that the referendum shall be carried out on Sunday, 30 June 1996.

As to its form the decree is a by-law. Yet the analysis of its contents shows that it contains legal norms, which are general (for they apply to all citizens with voting rights) and concrete (for they concretize the statutory provisions for the purposes of all citizens with voting rights who shall vote, and all organs in charge of the preparation and carrying-out of the referendum). The Constitutional Court established that although the decree can be subjected to constitutional review proceedings, it can not be considered in constitutional complaint proceedings.

10. The Constitution provides in Para. 2 of Article 3 that in Slovenia, supreme power is vested in the people. Citizens exercise that power directly and at elections. And it is provided in Article 44 of the Constitution that each citizen is entitled, subject to statute, to participate, either directly or through his elected representatives, in public affairs.

Referendum is a type of indirect democracy. Statutory referendum is regulated by the Constitution in Article 90, where it is provided (in Para. 1 and 2) that: "(1) The National Assembly may call a referendum on any issue which is the subject of regulation by statute. The National Assembly shall be bound by the results of such a referendum. (2) The National Assembly may call such a referendum on its own initiative, but it must call such a referendum if the same is demanded by no less than one third

of all elected Deputies of the National Assembly, by the National Council or by no less than forty thousands voters." The Constitutional provisions (Article 90) determine the subject of the deciding at a referendum ("questions regulated by the statute"), binding nature of the result of a referendum for the National Assembly and an obligation of the National Assembly to call a referendum if so requested by the National Council, no less than one third of deputies or 40.000 voters. In Para. 4 of Article 90, it is provided that a proposal put to the referendum is deemed to be accepted if a simple majority of the voters voting at the referendum vote in favor of the same.

11. By the ZRLI, the legislator regulated two types of statutory referendum - preliminary and subsequent. Subsequent referendum is a referendum on the statute already enacted by the National Assembly, whereas a referendum question, voted about at a preliminary referendum refers to the draft statute submitted to the National Assembly for consideration. The contents of a referendum question put at the preliminary referendum are regulated in Article 18 of the ZRLI.

The ZRLI regulates the proceeding of making requests for the call of a referendum. In the case of a 40.000 voters' request the proceeding is begun by an initiative of any voter, political party or other association of citizens can lodge. The initiative should contain a defined request (in material sense, i.e. "potential" request) which should be reasoned and where a referendum question is clearly expressed, and must be supported by the signatures of no less than 200 voters. The initiator informs the President of the National Assembly of an initiative, who notifies the Ministry in charge of the voting rights register. The President of the National Assembly must also set the time limit for collecting of the signatures.

The cited provisions apply both to the preliminary and subsequent referendum. The ZRLI contains only some procedural provisions that apply only to the preliminary referendum. Such provisions are Articles 17, 18 and 19. The latter sets a time limit in which the National Assembly must call a preliminary statutory referendum. This time limit is thirty days after a submittance of a request or seven days after the Constitutional Court decision made in possible proceedings for review of the constitutionality of a referendum question.

Referendum (preliminary or subsequent) shall be called in a manner not having less than 30 days, and not more than 45 days, lapsed from the day of the calling until the carrying-out (of the referendum) (Article 33). In Article 46 of the ZRLI, the contents of a voting list and the manner of voting, are prescribed. The voting list contains a question put to the referendum and the instructions on how to vote. If more referendum questions are being voted, a special voting list pertains to each question. At voting a voter encircles on the voting list either word "in favor" or "against". The decision at the referendum is adopted if the majority of voters who come to vote vote in favor of this decision (Article 23 of the ZRLI).

In Article 25 of the ZRLI, the constitutional provision providing that the National Assembly is bound to the results of a referendum, is realized. It is provided in Para. 2 that the National Assembly, in enacting a statute, must respect the decision come to at a preliminary referendum. And according to Para. 3 of Article 25 of the ZRLI, the National Assembly should not - one year after the holding of a referendum - either pass a statute that would contradict the results of the referendum or repeat the referendum on the same question.

By the rule that the National Assembly is bound to the results of a preliminary statutory referendum, it is perceived that the National Assembly should regulate the contents, being the subject of a referendum question, in the manner including in a statute the solutions taking into account (positive or negative) results of the referendum, or that it does not insert certain solutions (again, considering the results of the referendum) in the statute. The provision on the one year limitation of enacting a statute that would contradict the results of a referendum means that the National Assembly, in the statute relating to the referendum question or any other statute, should not insert the solutions contrary to the results of the referendum.

12. The request of the National Council and the initiatives of the signors and the SDS reproach the Decree with unjustly favoring of the request of a group of deputies. The National Council believes that the ZRLI provisions on preliminary statutory referendum are to be abrogated or find their unconstitutionality, if it is not possible to interpret them in a manner preventing the abuses and discrimination.

13. The challenged decree includes the provisions on calling of the referendum requested by the group of 35 deputies. Although the request of the National Council was lodged on the same day, the National Assembly did not consider this request and did not call the referendum on the question raised by the National Council. As well it did not consider the possibility of collecting, on the SDS initiative about which was the President of the National Assembly informed pursuant to the ZRLI, enough signatures to make a new request for the call of the referendum.

14. The ZRLI does not regulate specifically a situation of the cumulation of more referendum requests on the same issue, although it is possible according to the statute (and what is in reality to expect) that opposing to any initiative for the commencement of collecting of signatures appended to the request for the call of the referendum the National Council and the group of deputies submit their counter-proposals in connection with the same statute. Also, the National Assembly can submit its counter-proposal calling the referendum on its own initiative. It does not follow from the ZRLI that the National Assembly is in such a case to take the order of precedence concerning the submittance of the requests into account.

Considering the criterium of priority as to the time (of submittance) has no grounds in the statute, and besides, it violates the principle of equality before the law (Article 14 of the Constitution). Such incorrect interpretation of the ZRLI violates also the principle of a democratic state (Articles 1 and 3 of the Constitution). Namely, consecutive calling of referenda on the same issue does not ensure democratic establishment of the voters' will, for it is possible that these as a majority support more than one from among the submitted proposals (requests). So it could occur that the referendum which is carried out first succeeds making thereby impossible the carrying-out of the referendum on the counter-proposal, that could also be supported by the majority (and even maybe by a greater number) of voters.

15. The requests of the National Council and the group of National Assembly deputies were submitted on the same day. The voters' request was otherwise submitted 35 days after the requests of the National Council and the group of deputies, yet the initiative for the commencement of collecting the signatures appended to the request had been given earlier. In such a situation the National Assembly should treat all the three requests equally.

Although all the referenda shall be carried out on the same day, each one shall be carried out specially; for each referendum a special voting list shall be made, containing pursuant to Article 46 of the ZRLI a question, instructions of how to vote, and words "in favor" and "against". A voter can take part in one or more referenda. At each referendum he can vote "in favor" or "against". For each referendum specially, pursuant to Article 49 of the ZRLI, the number of voters that vote, the number of voters who vote "in favor" and number of voters voting "against", is established. According to Para. 4 of Article 90 of the Constitution and Article 23 of the ZRLI, the decision at a single of the referenda is reached, if the majority of voters, voting at a single referendum, vote in favor [Šof this referendum].

16. When more referenda with opposing proposals are carried out at one time, a situation can occur in the sense of Para. 4 of Article 90, where more referenda succeed at the same time. In such a case Para. 1 of Article 90 of the Constitution and Article 23 of the ZRLI shall be interpreted in the manner taking into account, as the criteria as to which of the succeeded referenda is to bind the National Assembly, the percentage of votes "in favor" within the total number of the voters voted at a single referendum. However, the National Assembly can, as authorized by Para. 5 of Article 90 of the Constitution, amending the ZRLI set also some other criterium. Yet this criterium can be used for the referenda called by the request of the National Council, group of deputies and voters, only in the case this statutory provision takes effect a day prior to the carrying-out of the referendum.

17. The Constitutional Court abrogated ab initio Items 3 and 4 of the Decree, determining the day taken as the day of calling of the referendum (23 May 1996), and the day of voting (30 June 1996). The National Assembly shall set a new day of voting in the Decree, and call the other two referenda on the same day.

The National Assembly shall, if the obstacles from Articles 15 and 16 of the ZRLI (unclearly raised question, request without reasoning, inconsistency between the request's contents and the Constitution) do not exist, call all the referenda no later until the day when the time limit from Para. 1 of Article 19 of the ZRLI, set for the last from among the submitted request, expires.

C.

18. The Constitutional Court made this decision on the basis of Articles 21 and 45 of the Constitutional Court Act (Official Gazette of the RS, No. 15/94), composed of: dr. Tone Jerovšek, President, 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. The decision was come to by five votes in favor and four against. Judges Krivic, Snoj, Šinkovec and Ude voted against. Judges Krivic, Šinkovec and Ude wrote their dissenting opinions, and Judges Jambrek, Jerovšek, Šturm and Testen their concurring opinions.

President of the Constitutional Court:
dr. Tone Jerovšek