



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-353/96
9.10.1997

DECISION

At the meeting of 9 October 1997 concerning the procedure commenced on the initiative of the political party Slovenian Christian Democrats, the Constitutional Court

made the following decision:

1. The section of the last sentence of article 87 of National Assembly Election Act (Official Gazette of RS, No. 44/92) reading: "taking into consideration the ballot papers having arrived by mail before 12 a.m. on the day following the election day" shall be abrogated in so far as referring to ballot papers of the holders of voting right being abroad on the election day because of their temporary or permanent residence there.
2. If the National Assembly should fail to substitute the section of the provision referred to in paragraph 1 of this adjudication, which has been abrogated in part, by a new provision, so that this could apply already to 1997 election of the President of the Republic, the competent election authorities shall in establishing the result of mail ballot from abroad for 1997 election of the President of the Republic take into consideration the ballot papers having arrived to them no later than by 12 a.m. of the fifth day following the election day.
3. In the case of need for second ballot (second round) for 1997 election of the President of the Republic, the National Electoral Committee shall schedule the second ballot so that it will take place on Sunday, 14 December 1997.

Reasons:

A.

1. The initiators dispute articles 54 and 87 of National Assembly Election Act (hereinafter: "the ZVDZ"), claiming that they are in disagreement with articles 14, 43 and 44 of the Constitution. They maintain that the time between the deadline for submission of lists of candidates (article 54) and the time limit by which the ballot papers of those voting by mail should arrive to district election commission, to be taken into consideration in establishing the election result, is too short to allow to all citizens (voters) being abroad on the election day because of their temporary or permanent residence there to vote by mail in accordance with paragraph 1 of article 82 of the ZVDZ.
2. The initiators state that, by the time limit set in paragraph 2 of article 17 of the Act on Voting Right Record (Official Gazette of RS, No. 46/92) - hereinafter: "the ZEPV", 5.000 citizens having permanent residence abroad supposedly filed their request for registration in special electoral list for the election of deputies of the National Assembly held on 8 November 1996, but that only 3.000 ballot papers supposedly arrived by the time limit specified by statute (until 12 a.m. of the day following the election day) to district election committees while the rest supposedly arrived too late, which is why they were supposedly not taken into consideration when establishing the election result. The initiators claim that in this way article 43 of the Constitution (voting rights), article 44 of the Constitution (right of participation in public affairs) and article 14 of the Constitution (equality as regards human rights and fundamental freedoms and equality before the law) were violated. They propose that that section of the provision of article 87 of the ZVDZ be abrogated which provides that district election committee shall in establishing election results take into consideration only the ballot papers having arrived by mail by 12 a.m. on the day following the election day.

3. The Secretariat for Legislative and Legal Matters of the National Assembly in its reply to the initiative states that the National Assembly already found, by almost unanimous agreement, that the said arrangement was inappropriate, which is why in the first half of 1996, after the first reading, it adopted a Bill on Amendments and Supplements to National Assembly Election Act (EPA 1286), in which it provided that in paragraph 1 of article 54 the word "twenty-fifth" should be substituted by the word "thirtieth".

B.

4. Article 1 of the Constitution provides that Slovenia is a democratic republic, and paragraph 2 of article 3 provides that, in Slovenia, supreme power is vested in the people. Citizens exercise that power directly, and most notably, at elections.

Article 14 of the Constitution provides that in Slovenia each individual shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other belief, financial status, birth, education, social status or whatever other personal circumstance. All persons shall be equal before the law.

5. Article 43 of the Constitution provides that the right to vote shall be universal and equal. Each person who has attained the age of 18 years shall be eligible to vote and to stand for election. Article 44 of the Constitution provides that each citizen shall be entitled, subject to statute, to participate, either directly or through his elected representatives, in public affairs. Paragraph 2 of article 80 on the election of the National Assembly provides that deputies must be directly elected by secret ballot on the basis of a universal, adult franchise.

6. The principle of universal franchise (article 43 of the Constitution and paragraph 2 of article 80 of the Constitution) means that each citizen who has attained the age of 18 years shall be eligible to vote and stand for election. It is not sufficient for this right to be defined by statute; the regulation by statute must be such as to allow to each citizen to actually exercise his voting right, although in this connection the citizen should be expected to act conscientiously (timely arrival to the polling station, filing of the request for registration in special election list if being abroad on the election day because temporarily or permanently residing there, immediate sending of the ballot paper and voting card and similar). If statutory provisions should prevent a certain number of citizens who have attained the age of 18 years - in spite of the required conscientiousness regarding their behaviour - from actually exercising their voting right, which they have been granted by statute, this constitutes a violation of their voting right in the same way as if the same has not even been granted to them by statute. This demand also applies to citizens being abroad on the election day because permanently or temporarily residing there. Statutory provisions must make it possible also for these citizens to exercise their voting right. In this connection, the legislator must take into consideration the constitutionally prescribed time limits regarding the election of the National Assembly (article 81 of the Constitution) and the President of the Republic (article 103 of the Constitution), and the calling of the first session of the new National Assembly (article 81 of the Constitution); in the case if such reasons as relate to implementation do not make possible a regulation by statute which would at the same time make possible the exercising of voting right to all holders of voting right as well as compliance with the constitutionally stipulated time limits, it is necessary, having regard to the principle of proportionality, to weigh the weight of interference with voting right (in particular the scope of holders of voting right who are prevented from exercising their voting right) and the weight of interference with constitutional values pursued by the constitutional provisions on time limits relating to elections. This means that a statutory arrangement by which a certain number of holders of voting right are for objective reasons prevented from exercising their voting right may, in spite of interference with voting right, be in conformity with the Constitution if successfully passing the above described test of proportionality. If it turns out that, to ensure the exercising of the voting right of indeed all holders of voting right, it would be necessary to abandon the time limits set in the Constitution, while it is possible by such statutory arrangement as remains within the confines of the time limits set by the Constitution to ensure the exercising of this right to all holders of voting right except to an insignificant or minor number of these, then the legislator may not abandon the time limits set by the Constitution.

7. In assessing the conformity of the disputed statutory provisions with the Constitution, it was necessary to analyze the statutory time limits and the way in which election-related activities are actually carried out in practice. This is why, in the course of the proceeding, the Constitutional Court obtained the necessary information from the National Electoral Committee (hereinafter: "the NEC"). This information was sent by the Secretary of the NEC as head of the services of this election authority.

8. The ZEVP in paragraph 2 of article 2 provides that the voting right of citizens who do not permanently reside in the Republic of Slovenia shall be registered in a special election list. The special election list shall be prepared by the administrative authority competent for keeping the permanent record of voting right. Article 17 of the ZEVP provides that, as regards citizens who do not permanently reside in the Republic of Slovenia, election list shall be established on the basis of a request by the citizen for registration in the election list. The citizen must submit such request to the NEC not later than 30 days prior to the election day. The request must contain the particulars relating to the citizen, information concerning the last place of permanent residence of the citizen or one of his parents in the Republic of Slovenia, or when this cannot be ascertained, a statement, by the citizen, of the electoral unit and electoral district where he will exercise his voting right; also attached to such request must be a certificate of citizenship. As to article 24 of the ZEVP, it provides that a voting card shall be issued by competent authority for any citizen being abroad on the election day because temporarily or permanently residing there and who has informed the NEC of his wish to vote. The voting card contains the information from the election list, the information about the electoral unit and electoral district, a space set aside for confirming the identity of the voter and the address of the citizen abroad, to which materials relating to elections should be sent for him.

9. The ZVDZ provides in article 82 that voters being abroad on the election day because of their temporary or permanent residence there may vote by mail, or in diplomatic or consular representations of the Republic of Slovenia, if they have notified the NEC about this not later than 30 days prior the election day, and if the State in which they reside permits such voting, or, as the case may be, if this is made possible on the basis of bilateral agreement between the two states. Voting in diplomatic or consular representations is not regulated in detail. In the case of mail ballot, the ballot paper is taken into consideration if the envelope includes attached to the ballot paper also the voting card authenticated by the diplomatic or consular representation of the Republic of Slovenia or authority of the State in which the voter permanently or temporarily resides.

10. Mail ballot is also allowed in the case of voters who are not in the place of their permanent residence on the election date because they serve in the army, as well as in the case of persons living in old persons' homes who do not have their permanent residence in such homes, as well as in the case of voters receiving health care treatment in hospitals, if they inform about this the district electoral committee or the electoral committee of their electoral unit not later than 7 days prior to the election day. Mail ballot is effected prior to the date set in the announcement of the election as the election day.

11. Regular elections must be carried out no more than two months, and no less than fifteen days, before the expiration of four years from date of the first sitting of the previous National Assembly (paragraph 3 of article 81 of the Constitution; paragraph 1 of article 13 of the ZVDZ). They must be called no more than 135 days and no less than 75 days before the expiration of four years from the date of the first sitting of the previous National Assembly (paragraph 1 of article 15 of the ZVDZ). No more than 90 days and no less than 60 days should expire between the date when regular elections were called and the election day (paragraph 2 of article 15 of the ZVDZ). The first session of the National Assembly must be called by the President of the Republic no more than 20 days after the election of the deputies (paragraph 3 of article 81 of the Constitution).

12. The ZVDZ provides in paragraph 1 of article 54 that lists of candidates shall be submitted to the electoral committee of the electoral unit no later than on the 25th day before the election day. The second paragraph of this article provides that the electoral committee of the electoral unit must test for timely arrival and legality the list submitted immediately after the receipt of the same. Decision concerning the approval or rejection of a list of candidates must be issued no later than by the 18th day before the election day (article 59 of the ZVDZ). Registers of approved lists of candidates and lists

of individual candidates in reference with whom voting will take place in electoral districts must be published in mass media no more than 15 days before the election day (article 61 of the ZVDZ). This time limit, however, does not agree with the deadline for the issuance of decision by the NEC concerning the annulling or amending of a decision of the electoral committee of an electoral unit issued within the framework of the procedure of approving the lists of candidates (article 104 of the ZVDZ). Appeal against such decision, as well as appeal against a decision of the electoral committee by which a list of candidates has been rejected, or against a decision of the electoral committee concerning complaint for irregularities relating to nomination procedure may be lodged before the court competent for administrative lawsuits (article 105 of the ZVDZ). The time limit for lodging the appeal is 48 hours after the receipt of the decision. The court must decide the appeal no later than in 48 hours after receipt of the appeal. Also to be taken into consideration is the possibility of constitutional complaint lodged against such court decision.

13. Article 87 of the ZVDZ regulates the manner of establishing election results in electoral district. District electoral committee must establish, for the area of the electoral district, the number of voters registered in the election list, the number of voters having cast there votes at polling stations in accordance with the election list and the number of voters who have voted on the basis of certificates, the number of voters having voted by mail, the number of spoilt votes, the number of votes cast in favour of individual candidates and the share of votes of individual candidates in the total number of votes cast in the electoral district. The last sentence of article 87 of the ZVDZ provides that the district electoral committee must also establish the result of mail ballot, and that in this connection it must take into consideration the ballot papers having arrived by mail by 12 a.m. of the day following the election day.

14. According to the information relating to the development of electoral activities in reference with the election of deputies of the National Assembly of 8 November 1996, which was submitted by the service of the NEC, immediately after the calling of the election, at the beginning of September 1996, the NEC published in daily newspapers a call addressed to the citizens of the Republic of Slovenia who were then abroad and wanted to cast their vote in the election of 8 November 1996, to communicate to the NEC:

- in the case of persons with permanent residence abroad (emigrants), a request for registration in a special election list, in which case the NEC shall consider this to be also a request for voting by mail, unless indicated otherwise that the voter would like to cast his vote at a polling station in the Republic of Slovenia or in some other manner,

- in the case of persons with permanent residence in the Republic of Slovenia who would be abroad on the election day because they temporarily resided there (migrant workers), their request for mail ballot.

The NEC has on record more than 4.900 requests, out of which more than half are requests for registration in a special election list, and the other half are requests just for mail ballot abroad. From the emigrants who submitted prior requests for registration in a special election list, 74 cast their vote at polling stations in Slovenia, and 91 cast their vote at polling stations in Slovenia on the basis of certificate.

15. On the 24th and 23rd day before the election day, a test of legality of candidatures was carried out. In one case, the list was rejected by a decision of the electoral committee of an electoral unit. Within the time limit set by statute (48 hours), an appeal was lodged before the Supreme Court of the Republic of Slovenia, which complied with the request of the complainant within the time period specified by statute. On the 19th day before the election day, last drawings were carried out, and ballot papers were prepared in accordance with electoral districts. Ballot papers were immediately sent to district electoral committees, and on the 18th day before the election day, the major part of ballot papers designed for mail ballot were sent abroad. The materials were sent by registered air mail, the exceptions being the four neighbouring countries.

According to the information of the Postal Service of Slovenia, the delivery to the reception centres of each particular country took 3 to 4 days. From there on, the delivery depends on the postal service of

each particular country. In confirming voting cards (a proof for the service to check whether the ballot paper is in the hands of the person whose particulars are stated in the card), the NEC did not identify any special problems.

16. With respect to the returning of voting materials, it was only during the last week before the election that diplomatic and consular representations were engaged, so that voters could submit the materials addressed to district electoral committees to representatives who approved the voting cards. The latter sent the materials by express mail to the address of the NEC, and this one delivered it through couriers to competent district electoral committees on Monday following the election, by 12 a.m. By the time limit specified by statute, 2.898 ballot papers were received by district electoral committees. After the expiry of the time period (after 12 a.m. on Monday), by 14 November 1996 additional 380 items of mail arrived, out of which 188 envelopes arrived to the address of the NEC, the majority of these having been sent by express mail or via the Ministry of External Affairs.

17. From the said empirical data it follows that an important or considerable number of holders of voting right (Slovenian citizens having attained the age of 18 years) who were abroad on the election day because of their temporary or permanent residence there were prevented from exercising their right to cast their vote in the election of deputies of the National Assembly. Although the NEC carried out the election-related activities within the time limits specified by statute and although in reference with procedures of nomination and approval of lists of candidates no problems occurred concerning legal remedies (objections, appeals or constitutional complaints), a number of ballot papers which is not insignificant arrived to district electoral committees after the expiry of the time limit set in article 87 of the ZVDZ. Those ballot papers were not taken into consideration when establishing the election result, and the voters who had sent them were thus prevented from exercising their right to cast their votes. It turned out that the period between the deadline for submission of lists of candidates and the time limit by which the ballot papers of those who voted by mail should have arrived to district electoral committees was so short that an important or considerable number of holders of voting right being abroad on the election day because of their temporary or permanent residence was prevented from exercising their voting right.

18. Also aligned with the time limit for submission of lists of candidates under paragraph 1 of article 54 of the ZVDZ (25th day before the election day) are the other time limits set by statute (time limit for the issuance of decision of the electoral committee on approval or rejection of a list of candidates under article 59 of the ZVDZ, the time limit for the publication under article 61 of the ZVDZ and the time limit for the issuance of decision by the NEC under article 104 of the ZVDZ). The said time limits are so near the election day that, even in the case if no appeal is lodged at the court competent for administrative disputes or if not constitutional complaint is lodged, they in fact prevent the timely performance of election-related activities in so far as voting by mail from abroad is concerned. The time period between the day when the ballot papers are ready, in accordance with the time schedule set by statute, to be sent to holders of voting right abroad and the deadline by which ballot papers must arrive by mail to district electoral committees, to be taken into consideration, is so short that an important or considerable number of holders of voting right being abroad on the election day because of their permanent or temporary residence there is prevented from exercising their voting right. Such finding is also further confirmed by empirical data concerning the progress of election-related activities during the election of deputies of the National Assembly of 8 November 1996 (section 11 hereof).

19. The arrangement now in force, then, does not make possible the exercising of voting right to an important or considerable number of holders of voting right being abroad on the election day because of their temporary or permanent residence there.

Such arrangement violates the principle of universal suffrage and is in disagreement with article 1 of the Constitution (principle of democratic state), paragraph 2 of article 3 of the Constitution, paragraphs 1 and 2 of article 43 of the Constitution, article 44 of the Constitution and paragraph 2 of article 80 of the Constitution.

20. If it should turn out that, due to the time limits set by the Constitution in reference with the election, it is impossible to modify the time limits set by statute in such a way as to facilitate or make possible the exercising of the voting right to the category of holders of voting right affected, it would be

necessary, as indicated in section 4 hereof, to weigh both instances of interference with the constitutional values. But, in the instant case, this is not necessary, for it is possible to modify the time limits set by statute so as to improve the legal status of the category of holders of voting right affected without endangering by such statutory regulation the carrying out of election and post- election activities within the time limits set by the Constitution.

21. The Constitutional Court abrogated just the provision which sets the time limit by which mail ballot papers must arrive to the district electoral committee, to be taken into consideration in establishing the election result. In this connection it should be noted that this provision is not in itself in conflict with the Constitution, but is so when linked with other statutory provisions concerning the time limits set for individual election activities. What is in disagreement with the Constitution is the entire arrangement, the result of which is that the time period between the day when the ballot papers are ready, in accordance with the time schedule set by statute, to be sent to holders of voting right abroad, and the deadline by which ballot papers must arrive by mail to district electoral committees, to be taken into consideration, is so short that an important or considerable number of holders of voting right being abroad on the election day because of their permanent or temporary residence there is prevented from exercising their voting right. The Constitutional Court decided to annul just the time limit under article 87 with a view to making the resulting gap in the law as small as possible.

22. For, the consequence of the abrogation is a gap in the law, which the legislator must fill in. In this connection he must analyze the development of election activities in practice and must set statutory time limits so that there will be enough time between them to make possible, assuming normal or foreseeable development of events, the taking into consideration of as great a number as possible of ballot papers sent, assuming their conscientious conduct, by holders of voting right by mail from abroad. In this connection, it is the legislator who has the discretionary power - of course paying due consideration to other constitutional and statutory time limits - to determine which time limits to be shifted. He must take into consideration the time limits set by the Constitution and allow the possibility of disregarding the same just in the case if interference with voting right were to exceed in weight the interference with constitutional values protected by the said time limits.

23. The Constitutional Court also points out that, with regard to National Assembly election, the ZVDZ does not regulate sufficiently well the voting in diplomatic or consular representations of the Republic of Slovenia abroad. In regulating the manner of exercising the voting right by the said category of holders of voting right, the National Assembly will have to pay attention also to this question, for this framework permits solutions which substantially facilitate the voting abroad.

24. The Constitutional Court also draws attention to a gap in the law having occurred, as the result of abrogation of the disputed provisions, in the Act on Election of the President of the Republic (Official Gazette of RS, No. 39/92). The said statute provides in article 9 that, concerning the questions which are not specifically regulated by it, in reference with the election of the President of the Republic provisions of the ZVDZ shall apply. Paragraph 1 of article 17 provides that any proposed nomination for President of the Republic shall be submitted directly to the NEC not later than on the 25th day before the election day. The list of candidatures shall be published by the NEC not later than 15 days before the election day (article 19). However, the statute does not include any special provisions regarding mail ballot and the exercising of voting right of holders of voting right being abroad on the election day because of their permanent or temporary residence there. The gap in the law thus occurred with regard to the deadline by which ballot papers of those who have voted by mail should arrive to election authorities so that the latter could take these into consideration in establishing the election result. Also this gap in the law must be filled in by the legislator; and he can achieve this by amending the ZVDZ or the Act on Election of the President of the Republic.

25. Due to the relatively short period of time remaining until the expiry of the time limit set by the Constitution for the election of the President of the Republic (paragraph 5 of article 103 of the Constitution), and because the President of the National Assembly has already called the election of the President of the Republic for Sunday, 23 November 1997 (Ordinance on the calling of the election of the President of the Republic, Official Gazette of RS, No. 56/97), the Constitutional Court decided to use the authorization granted to it in paragraph 2 of article 40 of Constitutional Court Act (Official Gazette of RS, No. 15/94 - hereinafter: "the ZUstS"), and instructed the election authorities on the

manner of implementation of its decision. In the event if the legislator should fail to set a new time limit instead of the one which has been annulled, before the election of this year is carried out, the carrying out of the election will be rendered difficult because of the gap in the law. This is why the Constitutional Court decreed that in the case if the legislator should fail to fill in the said gap in the law in such time as would still make possible the application of the statutory provision in this year's election of the President of the Republic, in establishing the election result those ballot papers must be taken into consideration which would arrive by mail from abroad to competent election authorities not later than by 12 a.m. of the fifth day after the election day. In this connection, the Constitutional Court points out that this decree, which was issued on the basis of the authorization granted to it in paragraph 2 of article 40 of the ZUstS, shall only apply to the presidential election of this year, and only in the case if not provided otherwise by statute.

26. The Constitutional Court finds that the presidential election of this year has been called so that the time limit set by the Constitution for the election of the President of the Republic dictates that the second round of the election, which must be called by the NEC in accordance with paragraph 2 of article 24 of the Act on Election of the President of the Republic, be carried out just fourteen days after the first round of the election (7.12.1997), in spite of the fact that the Act on Election of the President of the Republic provides in paragraph 1 of article 21 that the second ballot may be carried out not later than 21 days after the first ballot. For the time period set by the Constitution for electing the President of the Republic expires 15 days before the expiry of the 5-year term of office of the preceding President, that is, on 8 December 1997 (the present President of the Republic took office, in accordance with article 104 of the Constitution, after his oath of 23 December 1992). Having regard to the short period between the first and second ballot, in the case of second ballot (in the second round of election), an important or considerable number of holders of voting right being abroad on the election day because of their permanent or temporary residence there would be prevented from exercising their voting right through mail ballot. The Constitutional Court weighed the weight of such violation of the voting right as a constitutional value, on the one hand, and the constitutional value protected by the Constitution by the time limit set for the election of the President of the Republic (paragraph 5 of article 103 of the Constitution), on the other hand. The said value is the ensuring of the election of the President of the Republic within a time period which makes it possible for office to be taken in time, before the expiry of office of the preceding President of the Republic. The Constitutional Court judges that interference with the voting right is more serious than the exceeding of the said time limit by 6 days, which is why it instructed the NEC, in the case referred to in article 23 of the Act on Election of the President of the Republic, to call a second ballot which should be carried out 21 days after the first ballot - that is, on Sunday, 14 December 1997. For this date still makes it possible for the taking of office of the President of the Republic before the expiry of the term of office of the preceding President of the Republic.

C.

27. This Decision was made on the basis of paragraph 2 of article 40 and article 43 of Constitutional Court Act (Official Gazette of RS, No. 15/94) by the Constitutional Court in the following composition: Dr. Lovro Šturm, President, and Dr. Peter Jambreč, Dr. Tone Jerovšek, Matevž Krivic, M.L., Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič, the judges. The Decision was reached unanimously with regard to sections 1 and 3 of the adjudication hereof, and by six votes in its favour and one against it with regard to section 2 of the adjudication hereof. Vote against was cast by judge Šturm, who expressed a dissenting opinion.

P r e s i d e n t
Dr. Lovro Šturm