



Number: U-I-23/12

Date: 5 April 2012

DECISION

At a session held on 5 April 2012 in proceedings to review constitutionality initiated upon the request of the National Council, the Constitutional Court

decided as follows:

The Act Amending the Criminal Code (Official Gazette of the Republic of Slovenia, No. 91/11), the Act Amending the Criminal Procedure Act (Official Gazette of the Republic of Slovenia, No. 91/11), the Confiscation of Illicitly Acquired Property Act (Official Gazette of the Republic of Slovenia, No. 91/11), the Act Amending the Companies Act (Official Gazette of the Republic of Slovenia, No. 91/11), and the Act Amending the Ownership Transformation of Loterija Slovenije [the Lottery of Slovenia] Act (Official Gazette of the Republic of Slovenia, No. 109/11) are not inconsistent with the Constitution.

REASONING

A.

1. The National Council requests a review of the constitutionality of the laws cited in the operative provisions, which were adopted by the National Assembly on the basis of a request of the National Council provided for in the second paragraph of Article 91 of the Constitution to decide again on these laws (the so-called suspensive veto) for a second time and definitively on 2 November 2011, i.e. after the President of the Republic dissolved the National Assembly on 21 October 2011 and called early elections on the basis of the first paragraph of Article 117 of the Constitution.[1] The applicant asserts that after its dissolution the National Assembly is no longer competent to exercise its power, and therefore also not competent to adopt laws or decide on a veto of the National Council. The challenged laws are thus allegedly – as they were adopted by an unauthorised body – inconsistent with the second paragraph of Article 3, Articles 85 and 86, the second paragraph of Article 91, and the first paragraph of Article 117 of the Constitution.

2. The applicant notes that neither the Constitution nor the Rules of Procedure of the National Assembly (Official Gazette of Republic of Slovenia, Nos. 92/07 – official consolidated text and 105/10 – hereinafter referred to as RPNA-1) determine what the dissolution of the National Assembly entails and do not define the powers of a dissolved National Assembly. This fact allegedly demonstrates that the correct interpretation is that a dissolved National Assembly no longer has any powers. In the case at issue, therefore, the Council of the President of the National Assembly allegedly adopted the "Agreement on the Work of the National Assembly in the Period following its Dissolution" without any legal basis and in which it allegedly defined the powers of the dissolved National Assembly broadly, among them, determining a new vote on the already adopted laws against which the National Council had issued its veto.

3. The applicant understands the dissolution of the National Assembly as an element of the principle of the separation of powers (the second paragraph of Article 3 of the Constitution), the essence of this principle being the system of checks and balances between the bearers of the legislative, executive, and judicial powers. The case at issue allegedly concerns the relationship between the National Assembly and the President of the Republic – by dissolving the National Assembly, the President of the Republic allegedly "took away the legislative power" from the former. Any further performance of legislative activity by the dissolved National Assembly would allegedly entail that the laws adopted by such National Assembly are inconsistent with the principle of the separation of powers. In this regard, the applicant further states that after the dissolution of the National Assembly only the President of the Republic, who dissolved the National Assembly, could call an extraordinary session of the dissolved National Assembly on the basis of the second paragraph of Article 85 of the Constitution. In such case, the President of the Republic would prepare the agenda of the session and would also preside over it. However, as in the case at issue the session of the National Assembly was not convened by the President of the Republic, the contested laws are allegedly inconsistent with Article 85 of the Constitution.

4. In the view of the applicant, the term of office of the National Assembly ceases upon its dissolution and thus the office of its members ceases as well. As the National Assembly can validly decide only during its term of office and the termination of this term entails also that the National Assembly is no longer "capable" of adopting decisions, the challenged laws are allegedly also inconsistent with Article 86 of the Constitution, which governs the decision-making of the National Assembly. Regarding the last sentence of the third paragraph of Article 81 of the Constitution, which states that the term of the previous National Assembly ends on the first session of the new National Assembly, the

applicant considers that it should be interpreted as applying only to the termination of the term of office after the regular elections of the National Assembly scheduled to take place every four years, but not to early elections which occur due to the dissolution of the National Assembly.

5. The applicant presents similar arguments also regarding the inconsistency with the second paragraph of Article 91 of the Constitution, which governs a new vote by the National Assembly on a law against which the National Council has issued a veto. After its dissolution, the essence of which is allegedly exactly the termination of the legislative powers of the National Assembly, the National Assembly cannot continue the legislative procedure and decide anew on a law against which the National Council has issued a veto. Due to the dissolution of the National Assembly, by which the term of office of the National Assembly ceases, allegedly also all the on-going legislative procedures cease, including those which the National Council required be decided on again.

6. On the other hand, the applicant opines that even if the last sentence of the third paragraph of Article 81 of the Constitution were to be interpreted in such a way that also in the event of early elections the term of office of the previous National Assembly ends on the first session of the new National Assembly, this would only be a formal continuation of the term of office until the first session of the new National Assembly, however, the dissolved National Assembly should not convene or could convene only in urgent matters. Allegedly, the decision-making of the dissolved National Assembly on matters which are not urgent would namely call into question the relevance of the "instrument" of dissolution of the National Assembly, and that would be inconsistent with the first paragraph of Article 117 of the Constitution, which expressly envisages its dissolution. The applicant opines that in the case at issue none of the challenged laws can be regarded as an urgent matter, as is also evident from the fact that these laws were not adopted by the urgent legislative procedure.

7. In its reply, the National Assembly rejects the arguments contained in the request and proposes that the Constitutional Court reject the request as unfounded. It states that the Constitution does not determine specific consequences of the dissolution, except the calling of new elections. In accordance with the third paragraph of Article 81 of the Constitution, the term of office of the National Assembly ends on the first session of the new National Assembly also in the event of dissolution. As the term of office is that period of time in which an authority can exercise its functions and powers, it allegedly follows from this constitutional provision that at the time of dissolution the deputies retain their parliamentary mandate and that the National Assembly does not cease to exist formally with the dissolution. Such conclusion is allegedly confirmed also by the decisions of the

Constitutional Court, in which it held that after early elections the term of office of the National Assembly has ended with the establishment of the new National Assembly and not with the dissolution of the previous National Assembly (e.g. Decision No. U-I-55/10, dated 26 January 2012). The National Assembly also refers to Constitutional Court Decision No. U-I-356/07, dated 2 July 2009 (Official Gazette of the Republic of Slovenia, No. 55/09 and OdlUS XVIII, 34), from which it allegedly follows that the position and obligations of deputies arise directly from holding such office; the existence of the office of a deputy therefore allegedly entails also the existence of their rights and obligations and hence also the existence of the legislative powers of the National Assembly that these deputies constitute.

8. Due to the nature of the dissolution and call for early elections, the National Assembly allegedly could decide that while the National Assembly is dissolved it will limit the exercise of its powers and consider only urgent matters. However, as neither the Constitution nor the RPNA-1 specify which matters are urgent in the period it is dissolved, this decision is allegedly left to the assessment of the National Assembly itself, in accordance with the principle of parliamentary autonomy. It is on the basis of such interpretation that in the case at issue the Council of the President of the National Assembly adopted the "Agreement on the Work of the National Assembly in the Period following its Dissolution." It allegedly follows from this agreement that the criterion of urgency would be satisfied by those obligations that arise directly from the Constitution and which the National Assembly must fulfil within a certain time limit. Allegedly, deciding again on a law on the basis of a request of the National Council falls among such urgent matters.

9. The National Assembly explains that according to these starting points, deciding again on a law is an urgent matter that arises from the nature of the suspensive veto and its relation to the legislative procedure. Deciding again on a law, as requested by the National Council on the basis of the second paragraph of Article 91 of the Constitution, is allegedly, on the one hand, a right of the National Assembly as the legislative body deciding on laws, and, on the other hand, a duty that must be exercised by the National Assembly on the basis of the principle of the separation of powers. Regarding the substance of this principle, the National Assembly refers to Constitutional Court Decision No. U-I-248/08, dated 11 November 2009 (Official Gazette of the Republic of Slovenia No. 95/09 and OdlUS XVIII, 51). The National Assembly also opines that deciding on a suspensive veto is a part of the legislative procedure and therefore the Constitution itself provides for a brief seven-day period within which the National Council can issue the veto. The issuance of a veto by the National Council requires that the National Assembly decide on it as soon as possible. Precisely for this reason, Article 148 of the RPNA-1

determines that the National Assembly vote again on such law at its next session. These deadlines allegedly ensure that on-going legislative procedures do not cause uncertainty in the legal order and that stalls in legislative procedures, even if the adoption of a law is required due to urgent reasons, are avoided. Deciding anew on a law against which the National Council has issued a veto thus allegedly does not constitute a violation of the second paragraph of Article 91 of the Constitution, but on the contrary, its implementation. Finally, the National Assembly also opines that it complied with all constitutional law requirements of a procedural nature when deciding anew on the laws and that the challenged laws were adopted under a procedure that is consistent with the Constitution. Therefore, it also considers the allegations of inconsistency with Articles 85, 86, and the first paragraph of Article 117 of the Constitution to be unfounded.

B.

10. The Constitution refers to the dissolution of the National Assembly in two places. On the basis of the fourth and fifth paragraphs of Article 111 of the Constitution, the President of the Republic dissolves the National Assembly and calls new elections if after elections to the National Assembly it is not possible to elect the President of the Government and, consequently, a Government cannot be formed. In accordance with the first paragraph of Article 117 of the Constitution, the dissolution of the National Assembly is the consequence of an unsuccessful vote of confidence in the Government and leads to early parliamentary elections. The President of the Government may require a vote of confidence in the Government. If the Government does not receive the support of a majority vote of all deputies, within thirty days the National Assembly can elect a new President of the Government or in a new vote express its confidence in the incumbent President of the Government. If the vote of confidence does not end with one of these two possibilities, the President of the Republic dissolves the National Assembly and calls new elections.

11. In the present case, the issue of what the dissolution of the National Assembly entails for its constitutional position or, phrased differently, for the continued exercise of its constitutional powers, in particular the exercise of the legislative competence, must be reviewed. In this respect, the applicant's allegations can be summarised by two complaints of varying intensity that are mutually exclusive to a certain degree. On the one hand the applicant deems that the term of office of the National Assembly ceases upon its dissolution and, consequently, its legislative competence ceases as well: laws adopted by a dissolved National Assembly are thus allegedly unconstitutional as they are adopted by an unauthorised or non-existent body. This position entails that the laws adopted by a

dissolved National Assembly are not laws at all as they have been adopted by an entity that did not have the constitutional power to adopt them. According to this position, the challenged laws are void. On the other hand, the applicant accepts that following its dissolution the National Assembly would have been able to validly convene (allegedly, only at the request of the President of the Republic who dissolved the National Assembly) and validly decide on urgent matters. According to this position, laws adopted by a dissolved National Assembly would be consistent with the Constitution (i.e. they would exist and be valid) only if they pertain to urgent matters. This position would entail that the challenged laws are unconstitutional because they are not urgent (and probably also because the National Assembly session at which they were adopted was not called for by the President of the Republic). The applicant does not explain which matters are urgent; however, it follows from its allegations that they are connected with the urgent legislative procedure as regulated by the RPNA-1.

12. The Constitutional Court agrees with the applicant's initial assessment that a dissolution of the National Assembly that occurs on the basis of the first paragraph of Article 117 of the Constitution reflects a fundamental constitutional principle of the separation of powers (the second paragraph of Article 3 of the Constitution). A vote of confidence is a standard instrument in a parliamentary state system, in which the existence and functioning of the government depend on majority support in the parliament and in which early elections usually occur if the trust between the government and the parliamentary majority is irreparably broken. The dissolution of the National Assembly and call for early elections, which occur after an unsuccessful vote of confidence, is therefore clearly an enactment of the principle of the separation of powers in the Slovene parliamentary system. However, it is not possible to accept the conclusion of the applicant that the principle of the separation of powers – that is, the relationship between the National Assembly, the Government, and the President of the Republic – is enacted in such a way upon the occurrence of the dissolution of the National Assembly and call for early elections that it is the dissolution itself that causes the term of office of the National Assembly and thus also its legislative competence to cease.

13. In accordance with the first paragraph of Article 81 of the Constitution, the National Assembly is generally elected for four years. Its term of office is prolonged if the term expires during a war or state of emergency (the second paragraph of Article 81 of the Constitution), or reduced if, in accordance with to the fourth paragraph of Article 111 of the Constitution or the first paragraph of Article 117 of the Constitution, early elections are held. In accordance with the third paragraph of Article 81 of the Constitution, elections to the National Assembly are called by the President of the Republic. In the case of regular elections, the new National Assembly is elected no sooner than two months and no later

than fifteen days before the expiry of a four-year time limit from the date of the first session of the previous National Assembly. In the event of early elections, the new National Assembly is elected no later than two months after the dissolution of the previous one. The third paragraph of Article 81 of the Constitution, which determines that the term of office of the previous National Assembly shall end upon the convening of the first session of a new National Assembly (called by the President of the Republic no later than twenty days after the election of the National Assembly), is decisive for determining when – for both regular and early elections – the term of office of the National Assembly expires. It is the order of the sentences in the third paragraph of Article 81 of the Constitution that enables the justifiable conclusion that the term of office of a dissolved National Assembly (although reduced) expires upon the first session of the newly elected National Assembly. The dissolution of the National Assembly and the calling of early elections therefore do not entail the end of the existence of the term of office of the National Assembly: the National Assembly still exists and its term of office continues until a new National Assembly is established.[2] As the National Assembly is the bearer of the legislative branch of power and as the substance of its term of office – which was gained in elections in accordance with the principle of democracy (Article 1 of the Constitution) – is exactly in the exercise of the legislative branch of power, it also follows from the third paragraph of Article 81 of the Constitution that a National Assembly dissolved by an act of the President of the Republic retains its legislative competence, as long as this competence is not assumed by a newly elected National Assembly at its first session.

14. Such conclusion does not stem only from the linguistic-logical interpretation of the third paragraph of Article 81 of the Constitution, but is also confirmed by other provisions of the Constitution, in particular if they are interpreted in conjunction with the principle of the separation of powers determined in the second paragraph of Article 3 of the Constitution. This principle entails that the state powers consist of three fundamental functions (legislative, executive, and judicial), among which a system of checks and balances exists in order to prevent the abuse of power and to safeguard fundamental human rights and freedoms. The essential finding in the case at issue is that in the enactment of the principle of the separation of powers, the Constitution conceived the state powers in such a manner that even in periods in which personnel changes occur, each of its fundamental functions is guaranteed continuous existence and exercise. The second paragraph of Article 165 of the Constitution, for example, thus determines that upon the expiry of the term of office for which he or she was elected, a Constitutional Court judge continues to perform his or her office until the election of a new judge. On the basis of Article 115 and the first paragraph of Article 116 of the Constitution, the Government and individual ministers must continue to perform their regular duties until the election of a new President of the Government or until the appointment of new

ministers, respectively. Also regarding the legislative function, the Constitution proceeds in several instances from the assumption that a functioning legislature must be ensured at all times. If the regular, four-year term of office of the National Assembly expires during a war or state of emergency, the Constitution provides for its prolongation (the second paragraph of Article 81 of the Constitution). In the event that the National Assembly is unable to convene due to a state of emergency or war, the President of the Republic may, on the proposal of the Government, issue decrees with the force of law, but must submit these decrees to the National Assembly for confirmation immediately upon its next convening (the first and third paragraph of Article 108 of the Constitution).

15. It is therefore clear that the Constitution presupposes that all powers of the state government are carried out without interruption. There is, therefore, no reason for interpreting the principle of the separation of powers in such a manner that an act of the President of the Republic by which he dissolves the National Assembly and calls for early elections entails the immediate cessation of the term of office of the bearer of the legislative power or the termination of its legislative competence. On the contrary, it follows from the clear provisions of the third paragraph of Article 81 of the Constitution as well as from the usual enactment of the principle of the separation of powers in several provisions of the Constitution that an interpretation according to which the state does not have a functioning bearer of the legislative power in the period of time from the dissolution of the National Assembly until a new National Assembly is constituted, is not acceptable.

16. A particular issue arises whether the legislative function of the National Assembly is limited in any way during the period of time from its dissolution until a new National Assembly is constituted. The applicant alleges in this regard that during this period the National Assembly can execute urgent matters at most. The Constitution, however, does not support such a conclusion.

17. As is stated by the applicant, the Constitution does not determine the scope of the legislative competence of the National Assembly in the event the President of the Republic dissolves the National Assembly and calls for new elections. There are also no special provisions in the RPNA-1 regarding the activities of the National Assembly in the period after such dissolution. However, a conclusion opposite to that proposed by the applicant follows from the fact that the Constitution does not have any special provisions regarding the legislative powers of a dismissed National Assembly. The absence of specific constitutional provisions on the powers of the National Assembly following its dissolution entails that at the constitutional level there are no restrictions regarding this issue. In accordance with the principle of democracy determined in Article 1 of the

Constitution, the National Assembly gains its term of office – and the essence of this term is precisely in the exercise of the legislative power – at periodic general and direct elections. The dissolution of the National Assembly and a call for early elections certainly do interfere with the uniform periodicity of elections, but this in itself, in the absence of special regulation in the Constitution, does not entail that the legislative function of the previous National Assembly is restricted in any manner until the newly elected National Assembly assumes office. The powers of each composition of the National Assembly to exercise the legislative power are acquired in democratic elections and continue for as long as that power is not transferred on the basis of elections to a new National Assembly. Any restriction of the legislative branch, which is one of the three fundamental branches of state power, should have been expressly provided for in the Constitution.[3] Since the Constitution-framers did not provide for such restrictions, the dissolution of the National Assembly does not affect the constitutional validity of laws and other decisions adopted in the period of time from its dissolution until a new National Assembly is constituted. As is the case with any other laws, the laws at issue must be consistent with the Constitution and this consistency can be reviewed (*ex post*) before the Constitutional Court. However, this does not entail that after the dissolution the National Assembly cannot limit itself, either through *ad hoc* agreements or on the basis of a special regulation in its Rules of Procedure, but such is a matter of its parliamentary autonomy.

18. The foregoing does not entail, as is alleged by the applicant, that dissolution does not have any sense if at the same time it does not entail the termination of the legislative competence of the National Assembly. The purpose of the act of the President of the Republic by which the National Assembly is dissolved in the instances determined in the Constitution is to reduce the term of office of the National Assembly and initiate the procedure for early elections.[4] Since, on the basis of the Constitution (the first paragraph of Article 81), the term of office of the National Assembly is four years, its dissolution is a constitutional precondition for the calling of early elections. To put it differently, with the act on the dissolution of the National Assembly, the President of the Republic determines that the constitutional requirements for the calling of early elections are fulfilled. However, from a substantive point of view, the constitutional position of the National Assembly following the calling of early elections is the same as after the calling of regular elections. The transfer of the exercise of the legislative competence to the new National Assembly occurs only upon the first session of the newly elected National Assembly.

19. In the light of the foregoing, the Constitutional Court established that in the case at issue the National Assembly did not exceed its constitutional powers in deciding again on the challenged laws following the request of the National Council on the basis of the

second paragraph of Article 91 of the Constitution after the President of the Republic had adopted the act dissolving the National Assembly. Consequently, the challenged laws are not inconsistent with the Constitution.

C.

20. The Constitutional Court reached this decision on the basis of the first paragraph of Article 21 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text), composed of: Dr. Ernest Petrič, President, and Judges Dr. Mitja Deisinger, Dr. Dunja Jadek Pensa, Mag. Marta Klampfer, Dr. Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. The decision was adopted by seven votes against two. Judges Deisinger and Zobec voted against and submitted dissenting opinions.

Dr. Ernest Petrič
President

ENDNOTES:

[1] Decree regarding the dissolution of the National Assembly of the Republic of Slovenia and the calling of early elections to the National Assembly of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, No. 83/11). The National Assembly adopted the challenged acts for the first time on 18 and 19 October 2011, i.e. before its dissolution.

[2] Such position follows already from Decisions of the Constitutional Court Nos. U-I-82/10, dated 9 February 2012 (Official Gazette of the Republic of Slovenia, No. 57/10), U-I-279/10, dated 19 January 2012, and U-I-112/11, dated 19 January 2012, in which the Constitutional Court dismissed a request for a constitutional review filed by a group of deputies who held parliamentary office in the 2008-2011 term. The Constitutional Court based its decision on the standpoint that this term of office had ended on 21 December 2011, when, following the (dissolution and early) elections held on 4 December 2011, a new National Assembly was constituted.

[3] There are different comparative law regulations regarding this issue. For example, Article 33 of the Czech Constitution determines that while the Chamber of Deputies is

dissolved, the legislative function with regard to urgent matters is performed by the Senate. On the other hand, Article 78 of the Spanish Constitution, Article 179 of the Portuguese Constitution, and the first paragraph of Article 51.c and the third paragraph of Article 55 of the Austrian Constitution provide that while the respective legislature is dissolved, a (restricted) legislative function is performed by a certain parliamentary working body (e.g. a standing committee or budget committee). The dissolution of the parliament is regulated similarly as in Slovenia in the Federal Republic of Germany (cf. the third paragraph of Article 81 and the first paragraph of Article 117 of the Constitution of the Republic of Slovenia with the first paragraph of Article 39 or the first paragraph of Article 68 of the German Basic Law).

[4] In the commentary to Article 68 of the German Basic Law (regulating the vote of confidence in the Government), U. Mager similarly states that the dissolution of the *Bundestag* in accordance with Article 68 of the Basic Law entails an early termination of its term due to early elections. For more detail, see U. Mager, Artikel 68, in: I. von Münch and P. Kunig (ed.), *Grundgesetz-Kommentar*, First book, Verlag C. H. Beck, Munich 2012, p. 2833.