Number: Up-745/18-9
Up-716/18-9
Date: 17 May 2018

Dissenting Opinion of Judge Dr.Dr. Klemen Jaklič with regard to Order No. Up-745/18, Up-716/18, dated 17 May 2018, Joined by Judge Marko Šorli

Protection of the Right to Vote in Instances of the Rejection of a List

In my assessment, the Constitutional Court already made a mistake when deciding the [also recent] case of *Koalicija Združena levica in SLOGA* (hereinafter referred to as ZL-SLOGA). Already there it failed to notice an important safeguard that the Constitution determines against the provision or the interpretation of the provision of the National Assembly Elections Act (hereinafter referred to as the NAEA) that does not provide for a possibility to remedy a list before its rejection where such is perfectly possible. No system of constitutional review that determines, as the Slovene system does, that interferences with a fundamental right are without exception only admissible if the constitutional principle of proportionality is observed can *per definitionem* allow such interferences with the right to vote. Upon the lodging of the constitutional complaint in ZL-SLOGA, I advocated that it be debated at a plenary session of the Constitutional Court and not only by a three-judge panel in order to ensure the most thorough analysis of such sensitive cases, which are far from simple and of importance for the legitimacy of elections, and which due to the [short] time limits do not allow for lengthy consideration. A greater number of minds may notice more and may therefore also more easily avoid potential traps. This is especially the case when under time pressure, when the time needed to conduct the most thorough analysis possible is running short. The practice that a judge from a three-judge panel decides and “transfers” a case to a plenary session is usual and I cannot recall another instance wherein such a transfer did not take place when one of

the members of a panel or one of the other judges indicated that such should be done. In the case of the constitutional complaint in ZL-SLOGA this did not happen in spite of my proposal, and the three-judge panel then quickly decided not to accept the constitutional complaint of ZL-SLOGA for consideration on the merits and completely overlooked the mentioned constitutional safeguard. Had it noticed such, in accordance with the Constitutional Court Act (hereinafter referred to as the CCA), it should have, in my assessment, proposed that the statutory provision and the application thereof that might be unconstitutional be considered at a plenary session. Instead, it did not accept the constitutional complaint for consideration on the merits and provided no reasoning regarding this – as we will see – crucial part of the problem at issue.

However, the Court cannot escape this trap. We are faced with a new complaint and petition (lodged by Združena desnica in the case at issue), which in detail and clearly expose the problem in connection with the mentioned statutory provision and the application thereof. An *Amicus Curiae* (i.e. a letter submitted by a so-called "friend of the court"), which was provided in the case at issue by an expert in electoral law, Prof. Dr Jurij Toplak, states that a rejection of a list in its entirety due to alleged irregularities in connection with gender quotas in fact entails an extreme sanction that entails a severe interference with the right to vote and even the deprivation thereof:

> "Esteemed Constitutional Court RS,
>
> I work with the international organisations OSCE, EU, and the UN as an expert in electoral law and human rights. I have provided advice in France, Finland, Canada, Malta, Latvia, Serbia, Montenegro, Monaco, the USA, Uganda, and in other countries.
>
> In Europe, the rejection of a list in its entirety due to a gender quota is an extreme and unusual sanction. It entails a severe interference with the constitutional rights of political parties, candidates, and voters.
>
> **In examining over 30 European states,[1] I have not been able to find any state among the countries in Europe that have introduced gender quotas in which as a result of the non-observance of a gender quota a list would be rejected without a possibility to remedy its deficiencies.**
>
> In certain countries, the competent body requires a party to remedy deficiencies within a few days, or the party may submit a new list within a few days following the rejection of its list. This is, for example, the case in Spain, Serbia, Belgium, and Poland.
>
> In other countries with gender quotas the sanctions are only pecuniary, in particular less money [is allocated to the party] from the state budget, such as in Portugal and

[1] The OSCE ODIHR database, which contains reports on over one hundred elections in all European countries. I have also checked the available literature, the ECtHR case law, and documents of the Council of Europe and the European Union.

Ireland. This is also the case in Germany, where quotas are not mandatory, but political parties are entitled to financial incentives for having a balanced gender composition in their lists.

In a report of the European Parliament, in addition to Slovenia, Belgium is cited as a country where the sanction is the rejection of a list.[2] However, I called the Belgian electoral body and they confirmed that a list is in fact rejected, but a proposer may then submit a remedied list in accordance with Article 123 of the Belgian *Code Electoral*.[3] They have never rejected a list immediately and with finality, as such a measure would be disproportionate. And the proposers have always remedied their lists.

The only country regarding which I found that a court considered the rejection of a list in its entirety is Ukraine, and even then the court abrogated such decision of a lower court.[4]

I believe that only an interpretation of Articles 54 and 56 of the NAEA according to which, in accordance with the second paragraph of Article 54 of the NAEA, which requires an electoral body to ascertain if a list is "determined in accordance with this Act," the electoral body must also verify if the gender quota rule has been observed, is consistent with the Constitution and the ECHR. And if the body finds that such is not the case, it should grant the proposer a few days to remedy the list. If Articles 54 and 56 of the NAEA do not enable such an interpretation, they are unconstitutional as they disproportionately interfere with and violate the constitutional rights of candidates, voters, and political parties (the right to free elections, the right to vote, the right to an effective legal remedy).

I propose that the Constitutional Court abrogate the judgments by which the Supreme Court affirmed the decisions of the electoral commissions and amend the decisions of the electoral commissions to the effect that the lists are confirmed (and that the legislature be required to introduce other, more adequate sanctions) or that it require the proposers to submit remedied lists within a few days.

Respectfully,

Maribor, 14 May 2018 Jurij Toplak"

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[2] Electoral Gender Quota System and their Implementation in Europe. European Parliament, Directorate General for Internal Policies, 2013. Accessible at: http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493011/IPOL-FEMM_NT(2013)493011_EN.pdf.

[3] Telephone conversation of 14 May 2018 at 13:36 with the Direction générale institutions et population, Bruxelles, Service élections — SPF Intérieur, Tel: +32 25182189, direlec-verk@rrn.fgov.be, Head of the Directorate, Mr Regis Trannoy, regis.trannoy@rrn.fgov.be.

[4] Laura A. DEAN, Pedro A. G. DOS SANTOS. THE IMPLICATIONS OF GENDER QUOTAS IN UKRAINE, Teorija in Praksa, 2/2017. Accessible at: https://www.fdv.uni-lj.si/docs/default-source/tip/tip_02_2017_dean_santos.pdf?sfvrsn=2.

However, according to established constitutional case law, in instances of interferences with fundamental rights, especially those that entail a deprivation thereof (*and this is true*!), there is no other possibility – and there has never been one – than for the Constitutional Court to review the relevant statutory provision or its interpretation in practice (i.e. an authoritative interference) in the light of the proportionality test (which is what the Constitutional Court should have already done in the case of ZL-SLOGA). The "problem" lies in the fact that if a proportionality test had in fact been performed, as it always is in instances of interferences, anyone who even occasionally works in the field of constitutional law could see that such a statutory provision would not pass this type of test (see below for the application of the proportionality test to the case at issue). If the statutory provision and the application thereof in practice had been identified as unconstitutional in the present case of Združena desnica, as they should have been, the [same] three-judge panel that did not notice such in the case of ZL-SLOGA would have thereby itself brought about an inequality with regard to the right to vote of the complainants in both cases. It appears, however, that as it is too difficult for the three-judge panel from the case of ZL-SLOGA to admit such a mistake and remedy it with *ex tunc* effect, the majority would like to avoid the embarrassment that would result if the opposite decision were reached in the case of Združena desnica by acting as if interferences with the right to vote (and even instances of deprivations thereof!) do not have to be considered in the light of the principle of proportionality. However, by means of this new serious mistake the Constitutional Court, which has not explained its silence regarding proportionality, because it cannot be explained,[5] has violated its own fundamental, established, case law, adopted at the very beginning of the Constitutional Court of the Republic of Slovenia. In my assessment, such conduct is unacceptable and detrimental from the perspective of the consistency and therefore the legitimacy and persuasiveness of the decision-making of the Constitutional Court. A constitutional court that acted fairly would admit its previous mistake, establish that the statutory provision or

[5] If it were in fact true that neither the interpretation of the statutory provision as applied to the case at issue nor the provision itself may be reviewed as to their constitutionality around the time when an election is called, by means of which, as I understand it, the majority wishes to escape a predicament of its own making, such would entail that no violation or deprivation of the right to vote, regardless its severity or arbitrary nature, can be effectively sanctioned. Such entails that the Constitutional Court would also tolerate unfair and unequal elections, as it would not be allowed to review and remedy violations while there was still time. Ironically, such a position would further entail that (as the application of a norm must always take into account the constitutional framework and the content of constitutional restrictions) all bodies in the hitherto proceedings in the case at issue, including the electoral commissions that rejected the lists, acted erroneously by adopting decisions in the case (as such entailed an interpretation of the mentioned constitutional restrictions) following the calling of the election. The majority's failed attempt to escape the predicament of its own making leads us to absurd conclusions which a reasonable observer recognises as harmful for the effective protection of fundamental rights as well as evidently erroneous.

the application thereof in the case at issue are unconstitutional, and determine a manner of implementation of its decision for the duration of the invalidity of the provision that would determine a short time limit for remedying potential deficiencies of all lists that would be consistent with the principle of proportionality.

Why is it thus completely undisputed and evident that the challenged statutory provision or its interpretation cannot pass the proportionality test? For it to be consistent with the first step ("prong") of such test, it must pursue a *legitimate aim*. Although some constitutional questions arise already at this point, for the sake of argument let us presuppose that a legitimate aim exists: lists that are inconsistent with the gender quota and thereby with encouraging greater inclusion of women in politics are not admissible and have to be rejected in due time, so as to enable the uninterrupted holding of the election.

Following the establishment of a legitimate aim, the proportionality test requires a review of whether the provision in question, which in the case at issue determines that due to a violation of the gender quota rule the list of candidates in the relevant constituency is rejected in its entirety, is *appropriate* for achieving the mentioned legitimate aim.[6] "Appropriateness" entails a review of whether the specific sanction or limitation of the right to vote, envisaged by the legislature for the case in question, is capable of attaining the mentioned aim or whether it "misses the mark," and a different, more "narrowly tailored" sanction or limitation would attain the aim to a much greater extent. The provision and the application thereof in practice fail already at this stage of the test. As the complainants and petitioners clearly demonstrate, (1) the rejection of a list in its entirety, which also includes female candidates, who due to the rejection will not have a chance to be elected, and (2) the resulting significant decrease in the chances of the other female candidates of this political party to be elected in other constituencies (the number of obtained seats depends on the number of votes cast for the political party at the national level, whereby due to the rejection of the lists in their entirety in two constituencies the party will not obtain the corresponding share of votes for its remaining female candidates) even contradict the aim of facilitating women's path to the National Assembly to an important degree. Such a sanction to a significant extent and evidently "misses the mark" of the pursued legitimate aim and even tears it down. However, there concurrently exists a series of modalities of the sanction that would attain the aim with greater precision and effectively contribute to its achievement. The provision could, for example, determine that lists have to be submitted by the 32nd instead of by the 30th day before election day, whereby in instances of a rejection of a list due to irregularities in connection with the gender quota rule a party would be given the opportunity to amend the list with a sufficient number of female candidates by the 30th day before election day.

[6] The same applies with regard to the application of such a provision in the case at issue.

The same or similar time limits for amending lists are in place in the majority of European countries that have introduced gender quotas (in European countries, they range from 48 hours to 3 days or even 5 days). Such a provision would not only enable the candidature of a sufficient number of female candidates on the list in question, but also increase the chances of a successful candidature of the remaining female candidates from that party on the lists in all other constituencies (which would contribute to attaining the provision's aim with great efficiency). Similar conclusions can be drawn with regard to other modalities of sanctions that are more appropriate than the draconian rejection of a list in its entirety; for example, if the provision envisaged a 24-hour time limit for the potential voluntary withdrawal of the candidature of a male candidate from the constituency in question in order to satisfy the rule regarding the quota in such manner, whereby the remaining female candidates on the list in question and on the other lists of the party would not lose their chance to be elected. Furthermore, there exist constitutionally consistent interpretations of the existing 3-day time limit for the remedying of deficiencies of a formal nature, etc. As such sanctions, which from the perspective of the legitimate aim are more narrowly or precisely tailored, evidently exist, in accordance with the principle of proportionality the state should have applied one of them instead of the one that misses the aim to a significant degree and then unnecessarily sweeps it away with its tail almost completely (even if it does so with good intentions). Such an instance, and this is what happened in the case of the challenged provision, entails a provision or the application thereof that evidently does not pass the "appropriateness" prong of the proportionality test and is therefore inconsistent with the Constitution.

When an inconsistency with the Constitution has already been established in the second prong or stage of the proportionality test, the Constitutional Court does not review the remaining stages. However, if, for the sake of argument, we presuppose that the provision or the application thereof are appropriate, we can see that they would on no account pass the third prong of a review in accordance with the principle of proportionality. The third prong encompasses a review of whether a sanction or limitation of a right as envisaged by the provision in question is necessary to attain the legitimate aim. This entails that even if the sanction were appropriate for attaining the legitimate aim (whereby it would attain such completely and efficiently), such does not yet mean that it would also be necessary. From among the different equally appropriate sanctions that would be able to attain the legitimate aim in equal measure (appropriateness), only the sanction that entailed the least burdening measure with regard to other rights (necessity) would be necessary. For the reasons outlined in the preceding paragraph, the rejection of a list in its entirety undeniably significantly affects the right to vote of *all* candidates on the list in question, i.e. not only the female candidates, but the *male* candidates *as well*. It affects both those who are completely eliminated from the electoral battle in the constituency in question, as well as those who are standing for election in undisputed constituencies, but whose chances of entering the National Assembly are consequently significantly impaired. Due to the fact that the sanction or limitation also indiscriminately affects all other candidates of the political party in question, the party might not even

surpass the parliamentary threshold, although it would have surpassed such if another sanction that is equally appropriate yet less severe with regard to the rights of others had been imposed. The draconian sanction of rejecting a list or the application thereof in the case at issue, which is thus not necessary, might significantly "cut down" the rights of those who would not have to be affected at all in order to efficiently attain the legitimate aim. When such less severe sanctions that are equally or even more appropriate for attaining a legitimate aim exist, it is inconsistent with human reason and thus it is unreasonable and unconstitutional if sanctions that are more burdening for rights are nevertheless imposed. There simply exists no argument in favour of such that would be based on reason. There are, however, numerous examples of less severe modalities of the sanction in question (that are equally efficient with regard to the legitimate aim). In addition to the evident examples already mentioned in the preceding paragraph, we can also add a provision determining a three-day time limit for remedying a list that, in its constitutionally consistent variant, would refer to corrections of such nature that a party could carry them out within the three-day time limit and the verification of these corrections would not burden the electoral commission for a disproportionate amount of time. This distinction firstly eliminates the less appropriate current delineation between "formal" and "substantive" deficiencies. Less appropriate, as from the perspective of the electoral timetable and the amount of time the verification [of a list] consumes, the determination of a number of formal irregularities and deficiencies[7] in some cases is significantly more problematic than the simple verification of whether a list added a missing female candidate or two, which can be performed instantly. This constitutionally consistent distinction in no manner burdens the electoral timetable more than the existing one (the three-day time limit for remedying formal deficiencies), but in contrast to the existing distinction it has another characteristic that is essential: it entails a significantly less severe measure with regard to an interference with rights due to the rejection of a list! As it is evident that there exist less severe modalities of the sanction that are concurrently less time consuming with regard to the electoral timetable and some even fit it better, anyone who either enacts such a norm or applies it by means of interpretation violates the Constitution. In light of the given time limit, there is no need to pretend, as the majority's reasoning clearly does, that in any case a party cannot amend a list with new female candidates in such a short time. As we all know, in many cases this is not true

[7] See the number of formal data required by Article 51 of the NAEA that might result in the (cumulative) need for correction: the designation of the constituency, the name of the proposer, the name of the list, the personal data of the candidates – name and surname, birth data, level of education, title of education, professional or academic title, occupation, and permanent residence, as well as the name, surname, and address of permanent residence of the representative of the list. The written consent of the candidates confirming that they accept the candidacy and the minimum number of voters' signatures on the prescribed forms as determined by this Act must be enclosed with the list. The distribution of the candidates on the list of candidates by electoral district must also be enclosed with the proposed list.

(given today's means of mass communication and efficient party organisation, the voting and signatures required to amend a list with a female candidate or two can be held and collected, respectively, in a single day, let alone in three days), whereby the opposite, negative, and paternalistic assessment in the majority's reasoning, by which it pushes for a rejection at any cost, is also inappropriate. Even under the erroneous presumption that a party cannot prepare an adequate amendment of a list within three days, the constitutionally consistent distinction comprising the three-day time limit merely transfers the burden to the shoulders of the party and to verification in practice. If in a concrete case it becomes clear that a deficiency is such that the party concerned cannot remedy it within three days, its list will be rejected. If it is such that the party will be able to remedy it and the electoral commission will be able to confirm it without serious difficulties, it will be confirmed. Such a regulation is still significantly less severe, and from the perspective of the electoral timetable at least as (and perhaps even more) effective than the current sanction, which is considerably more restrictive as to rights and therefore not necessary. Some other countries have also resolved the issue of less severe measures by means of statutory provisions that require that, in addition to the list of female and male candidates, a "reserve list" containing a smaller number of female and male candidates be submitted in advance so that in the event a primary list is inconsistent with the quota rule, the electoral commission includes a candidate pertaining to the underrepresented gender from the reserve list in the primary list. We could continue to list examples of sanctions that are equally or more appropriate (and effective with regard to the legitimate aim), but represent less of a burden as regards rights, which entails that the existing sanction is not necessary. In order for the provision to be consistent with the Constitution, the relevant authorities would have to adopt or apply such less severe options.

The majority's reasoning speaks of the necessity of parties submitting their lists within the time limit and without the possibility to amend a list within 48 hours, three days, or five days. However, these are evidently inexact and general statements. If it were true that a short time limit (such as is already determined by the NAEA with regard to formal deficiencies) for amending a list would prevent elections, such time limits could not be in force in the great majority of European countries, yet they are and they function perfectly and efficiently! In Belgium, the central electoral commission rejects lists that do not fulfil the gender quota 26 days before the election. In accordance with point 6 of Article 123 of the Act governing elections, the proposer or an individual candidate may submit a remedied list by the 24th day before the election. In accordance with Article 124 of the Act governing elections, the central electoral commission then remedies [*sic*] the lists and confirms them with finality. In Poland, electoral commissions require a proposer to remedy deficiencies within three days. If the proposer remedies them, the list is confirmed.[8] In Spain, proposers have 48 hours to remedy deficiencies. If they are

[8] In Paragraph 16 of the reasoning the majority misleads readers (or perhaps it has made a mistake?) when it leads them to the conclusion that in addition to Slovenia also Belgium and Poland have enacted the rejection of a list without the possibility to amend it. The analysis of the

remedied, the electoral commission confirms the lists. In Serbia, it is deemed that a list is not complete and the proposer is required to amend it in accordance with the law. The proposer has to remedy the deficiencies within 48 hours. In Montenegro, it is deemed that a list has deficiencies if it cannot be confirmed due to such; the proposer is required to remedy the list in accordance with the law within 48 hours. If the proposer does so, the list is confirmed. Such follows from a comparative study of the Department of the Constitutional Court for Analyses and International Cooperation; furthermore, the *Amicus Curiae* of Prof. Dr Toplak confirms these findings with additional details and opinions of foreign experts from this field.[9]

Furthermore, the attempts at the overly general (blanket) reasoning in the sense that the Constitutional Court could allegedly cause an inequality between different parties are far fetched. If the Constitutional Court established that the statutory provision and/or the decisions of the authorities that are based on such and entail its unconstitutional realisation in practice are unconstitutional, the CCA authorises it to determine the manner of implementation of its decision for the duration of the invalidity of the provision and of the application thereof, by which it could determine a short time limit for remedying potential deficiencies of all lists that would be consistent with the principle of proportionality. Such an approach, which the Constitutional Court applies very frequently in other cases, would have *erga omnes* effects, i.e. it would apply to all parties equally.

If the Constitutional Court had acted in such a manner it would have removed any subsequent doubt regarding the legitimacy and constitutional consistency of the election and thereby safeguarded fundamental constitutional rights and free and fair elections. The protection of such rights is the essence of its role. However, as it tried, at any cost, to avoid a review of constitutionality and its evident result, it bears its part of the

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Department of the Constitutional Court for Analyses and International Cooperation as well as the clarification in the *Amicus Curiae* have demonstrated that this is not the case, as in Belgium as well as in Poland the regulation in place namely includes a time limit for amending lists. In this part of the reasoning the majority further misleads readers as to the false conclusion that a study on gender equality carried out for the Directorate-General for Internal Policies of the European Parliament, which was also cited in the opinion of Prof. Dr Jurij Toplak, allegedly clarifies that experience thus far shows that precisely the rejection of a list of candidates in its entirety by the competent electoral commission is the most effective way of ensuring that the mentioned constitutional requirement is observed. See the message of Prof. Dr Toplak to the Constitutional Court (dated 17 May 2018) regarding his enquiry with the authors of the mentioned study, which denies such conclusion: “Dear Professor Toplak, With regards to your question on gender quotas and sanctions for non-compliance: I do not know of any country besides Slovenia that rejects the electoral list without giving time to the party to adjust the share of women.” (Message from Lenita Freidenvall, CC Drude Dahlerup, 15 May 2018.)

[9] *Ibid*.

responsibility for such substantively justified and serious allegations. Those who pass judgment on the protection of the rights of others also pass judgment on themselves and on the fulfilment of their mission.

Dr.Dr. Klemen Jaklič
Judge

Marko Šorli
Judge

Number: Up-745/18-6

Up-716/18-6

Date: 17 May 2018

Concurring Opinion of

Judge Dr Špelca Mežnar

with regard to Order No. Up-745/18, Up-716/18, dated 17 May 2018

The decisive point of dissent between the majority and the minority of the judges in the case at issue lies in the assessment of the constitutional consistency of the consequence that ensues if a list of candidates does not observe the so-called gender quota. The consequence entails the rejection of the list of candidates in its entirety (the loss of the passive right to vote) without the possibility to remedy the list. I agree with the majority position that such a consequence, although severe, is consistent with the Constitution.

I agree with the underlying reasons of the Order. This also applies to Paragraph 29 of the Order. Therein, the Constitutional Court replies to the allegation of complainant Damijan Kozina that there had been different treatment of lists of candidates. The Supreme Court affirmed the rejection of his list, but confirmed the list of another proposer (entitled Čuš's list), although neither list fulfilled the condition arising from the gender quota.

Why, thus, does the case not concern an instance of treatment (and a violation of the second paragraph of Article 14 of the Constitution) although the Supreme Court rejected the complainant's list but allowed Čuš's list to participate in the election? Or, put differently, why is the complainant's list not permitted to participate in the election if the Supreme Court also allows lists that do not observe the gender quota (and are thus, as is the complainant's list, not determined in accordance with the law) to participate in the electoral battle?

The reason for the different treatment is convincing, sound, and objectively justified.

When determining the statutory regulation that requires an electoral commission to reject substantively deficient lists of candidates without providing an additional time limit to remedy such, the legislature proceeded from the experientially logical (i.e. reasonable) presupposition that the proposer is not only the one who can but also the one who has to ensure that the list is substantively adequate. Whoever compiles a list of candidates must ensure that it contains a sufficient number of female and male candidates, that the

candidates are of age, and that they are alive. If doubts arise, the proposer is obligated to verify whether these conditions are fulfilled. The obligation to submit a list of candidates that is in accordance with the law (i.e. a substantively correct list) does not entail a disproportionate burden on the proposer.[1]

However, the legislature did not explicitly regulate the exceptional situation that occurs if a list of candidates is substantively deficient despite the fact that the proposer acted with due diligence and did (verified) everything the law required of him or her. The proposer of the list entitled Čuš's list submitted a list of candidates that was substantively correct (i.e. in accordance with the law). The list became substantively deficient as a result of the (subsequent) illegality of the candidature of one of the female candidates. The proposer could not influence the reason for the invalidity of that candidature (the candidate in question featured on two lists), as he could not have known of it – and was not even allowed to – at the time he submitted his list. As the Supreme Court rightly established (Judgment No. Uv 8/2018, dated 12 May 2018), this is precisely the circumstance that significantly distinguishes the mentioned case from the case of the complainant.[2]

The Supreme Court interpreted the NAEA in accordance with the Constitution when it provided convincing reasons why, in exceptional circumstances, also a list of candidates that does not observe the gender quota may participate in an election without such resulting in an inequality as to different lists or candidates.[3]

The outcome of the weighing between the (individual's) right to vote and ensuring observance of the gender quota (as a collective good) was different in the instance where the proposer compiled a list diligently than in the instance where the proposer acted without due diligence.[4] Especially the latter – the proposer's (lack of) diligence and (in)ability to influence the reason underlying a substantive deficiency – is in my opinion a sound reason justifying the different treatment.

Dr Špelca Mežnar

Judge

[1] Held by the Constitutional Court also in Decision No. Up-304/98, dated 19 November 1998.

[2] The complainant not only could have been aware of the incorrectness of his list throughout the relevant time, he was in fact obligated to know.

[3] See Paragraphs 21 and 22 of the reasoning of Supreme Court Judgment No. Uv 8/2018, dated 12 May 2018.

[4] In the first instance, the passive right to vote takes precedence (the list may participate although it does not satisfy the gender quota), whereas in the second instance the gender quota prevails (the list is rejected because it does not observe the gender quota).

Number: Up-745/18-7

Up-716/18-7

Date: 17 May 2018

Concurring Opinion of Judge Dr Jadranka Sovdat

with regard to Order No. Up-716/18, Up-745/18, dated 17 May 2018

1. I completely agree with the Order. In this separate opinion I merely wish to provide some additional highlights. Firstly, no amendments to electoral rules are admissible during an election period.[1] Already due to such, the Constitutional Court may not adopt a decision on the constitutionality of an electoral law during such period. Such a decision could namely lead to the abrogation of individual statutory provisions as well as the establishment of the unconstitutionality of laws. Although the Constitutional Court has observed this rule for a long time, it is true that after more than twenty years of deciding on constitutional complaints in electoral cases, the case at issue here provided the first opportunity to also explicitly put such in writing. It is also true that many petitioners decide to challenge electoral legislation precisely before or even during an election, while otherwise it does not trouble them. During periods when there are no elections, the Constitutional Court broadly recognises the legal interest of voters for a review of the constitutionality of electoral legislation, and even continued to do so after it strongly restricted its position regarding such in general, precisely in order to avoid changes in electoral rules during the above mentioned period. This is also a reason why a decision on the petition has to be postponed until a later time, as we cannot make the lodging thereof dependent on the exhaustion of the alleged unconstitutionalities before the Supreme Court when it decides in an *a priori* electoral dispute.

2. In accordance with this position, we also deemed that a change of our positions regarding the constitutionally consistent interpretation of legislation that we adopted in Decision No. Up-1033/17, dated 30 November 2017 (Official Gazette RS, No. 72/17), would constitute an inadmissible amendment of the rules after an election had already been called; in that case we decided on the determination of the number of electors for elections to the National Council. We expressly wrote that such may not apply until the

[1] There is a reason why the Code of Good Practice in Electoral Matters suggests that electoral rules should not be open to amendment less than one year before an election.

next elections. Otherwise we would be concerned not only with the retroactive enforcement of rules or their mandatory interpretation, but also with the establishment of inequalities. The same would have happened in the case at issue – with regard to those who observed the strict rules and whose lawful lists of candidates were confirmed, and even more so with regard to those who did not even submit lists of candidates precisely due to the fact that they failed to comply with these strict rules in time or to those who did not lodge an appeal against the decisions of the competent electoral commissions [rejecting their lists]. The strictness of these rules and the consequences of failure to comply with them have been known for a long time and the Constitutional and Supreme Courts have clarified them in a number of decisions. Therefore, no political stakeholder can claim that they were unexpected, which is also explained in the Order.

3. It is generally accepted that the time frame of an election, from the calling of the election until election day, is precisely determined in advance.[2] The situation in Slovenia can be no different. However, in Slovenia these time limits are also constitutionally restricted by the third paragraph of Article 81 of the Constitution. The electoral process and all electoral tasks have to be completed within this time period. Already the decree by which an election is called (which is a regulation) determines when electoral tasks may begin and sets the date of the election. The National Electoral Commission may only determine the dates and time limits for performing electoral tasks within this time frame, whereby it also has to take into account the requirement that the candidates have to be announced in time for the election campaign (which begins 30 days before election day) – i.e. in order to ensure that all female and male candidates have the same opportunities to present themselves and their programmes to the voters, as well as to ensure that the voters have sufficient time to familiarise themselves with such, thus enabling them to freely choose who they are going to trust with their vote. Therefore, the positions of the Constitutional Court regarding the duties of proposers of lists of candidates who want to ensure the participation of their female and male candidates in the electoral battle have been well established for a long time, i.e. since 1998. If proposers fail to fulfil these duties, they have to assume responsibility for the consequences. It certainly cannot be a constitutional requirement that lists of candidates that have not fulfilled the statutorily determined conditions for submission are allowed to join the electoral battle. The nature of the right to vote (also including the passive right to vote) is such that it cannot be exercised without statutory regulation.

4. The term of office of the deputies of the National Assembly is determined by the Constitution. It is the Constitution that explicitly determines the circumstances in which such may be extended, which is logical because an extension of the term of office entails a serious interference with the principle of periodic elections – which constitutes the very core of democratic elections – as voters entrust the exercise of power to deputies only for the duration of their term of office, and upon its expiry they establish their political

[2] In Delpérée's eloquent words: "Le temps est compté."; F. Delpérée, *Le contentieux électoral*, Presses Universitaires de France, Paris 1998, p. 13.

accountability with regard to them[3] precisely by means of new elections, which must, therefore, in accordance with Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94), be held at regular intervals. If, on the one hand, we allowed the Constitutional Court to order an interruption of the electoral process in order for it to secure more time (certainly at least a month or two, in order to observe the principle of adversarial proceedings) for a review of the constitutionality of the law on the basis of which the election had already been called, and an extension of the terms of office that would necessarily follow therefrom – whereby the Constitutional Court would also have to set a new election day and order that the electoral process continue in accordance with the new rules or, if it avoided such (and it would have to avoid such in order to abstain from changing the electoral rules), it would essentially in any case have to order that the election be called anew following its decision – such would entail an inadmissible interference with the democratic electoral process. It must be taken into account that as a general rule (!) it is the legislature that has to remedy unconstitutionalities established by the Constitutional Court – which in such an instance would have to be done by the legislature whose term of office the Constitutional Court extended, and only subsequently could a new election be called. Such could significantly delay an election. Activism in the decisions of the Constitutional Court, when we essentially create statutory rules by means of the manner of implementation of our decisions, namely has and must have its limits. These limits are of particular importance with regard to elections due to the complexity of the questions that are being regulated and the broad margin of appreciation that the legislature enjoys regarding specific points when enacting them. Moreover, the procedure for a review of the constitutionality of a law could also end with the finding that the law is not unconstitutional (which cannot be predicted!). Concurrently, the Constitutional Court would have been interrupting and postponing elections. Such reviews could certainly be numerous and essentially aimed at all provisions of the legislation according to which elections are held. What would remain of the requirement that elections have to be held at regular intervals? And what of the requirement that electoral rules should not be changed in the year leading up to an election? No state could conduct elections in such a manner.

5. Precisely due to the restricted time frame of elections, states that enable their constitutional courts to examine the constitutionality of judicial decisions regarding the rejection of candidatures before election day remain in the minority (while some states do not envisage any judicial control at all!). Our legislature did not accord any attention to this question. It is clear that the time limit for lodging a constitutional complaint against a decision of the Supreme Court cannot be 60 days, which is the general time limit for lodging a constitutional complaint, as such would in any event be absurdly long after election day. As a result, after they receive the decision of the Supreme Court,

[3] Or, as eloquently stated by a former President of the Constitutional Court: "There must exist […] an interrupted chain of democratic legitimacy and of responsibility corresponding to such that leads from the people to an authority and back to its source." P. Jambrek in: L. Šturm (Ed.), Komentar Ustave Republike Slovenije [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za državne in podiplomske študije, Ljubljana 2002, p. 48.

complainants may essentially freely choose the time limit for lodging a constitutional complaint. Precisely due to the restricted time frame and the mentioned constitutional reasons, it is, furthermore, equally inadmissible that the time limit by which the Constitutional Court has to decide on the constitutional complaint is not determined. Therefore, I strongly support the appeal to the legislature that it has to regulate such in the future. This is yet another problem in the mosaic of the unconstitutionality of the regulation of electoral disputes to which I have been drawing attention for quite some time and to which the Constitutional Court has also drawn attention, but sadly there has been no response. If the legislature wants to uphold an *a priori* electoral dispute with regard to the rejection of candidatures it must further consider whether such dispute will end before the Supreme Court or whether it also has to be reviewed before the Constitutional Court, as well as the conditions in which such is even possible. The few states that allow for such a review have precisely determined very short time limits for lodging a constitutional complaint as well as a very short time limit for the constitutional court to adopt a decision regarding such. It is, of course, completely clear that a three-day time limit, which would be appropriate for the decision-making of the Constitutional Court on a constitutional complaint [regarding electoral disputes], would not allow for an assessment of the constitutionality of the law that constitutes the basis for a decision on the constitutional complaint.

6. In light of the above, it is further clear that the review of the Constitutional Court when deciding on such a constitutional complaint has to be limited only to whether the Supreme Court interpreted the relevant statutory provisions in a constitutionally consistent manner, insofar as the statutory text allows for such, and not whether the provisions as such are constitutional. Just as the Supreme Court, when deciding on the (constitutionality and) legality of the rejection of a candidature, cannot request a review of the constitutionality of an electoral law in accordance with Article 156 of the Constitution within 48 hours (nor could it do so if it had three or five days at its disposal!), the nature of things also prevents the Constitutional Court from performing such a review of constitutionality; even if it were possible, in accordance with all the rules of constitutional review, in such instances we would have to require that the complainants first exhaust their allegations regarding the unconstitutionality of the statutory regulation before the Supreme Court. The latter would essentially be prohibited from deciding thereon if it believed that they could be substantiated, as it cannot request a review of constitutionality. We would then completely disregard the constitutional requirement that legal remedies have to be exhausted and at the same time reproach the Supreme Court for violating a human right. In my opinion, this would be absurd.

7. If we nevertheless had engaged in a review of the constitutionality of the statutory provisions regarding the nomination of candidates, even if the review were restricted solely to that which troubles the petitioners and the complainants, in order to ensure the effect of the decisions in these cases, we also would have had to initiate proceedings to review the constitutionality of a number of other statutory provisions. In accordance with Article 50 of the NAEA, a candidate may namely not revoke his or her consent to be included in a list of candidates, which entails that no candidate may willingly decide to offer his or her candidature to another candidate. In addition, in accordance with the

fourth paragraph of Article 43 of the NAEA, voters express support for lists of candidates by signature. In accordance with the second paragraph of Article 46 of the NAEA, each voter may give his or her signature of support only once. In accordance with the first paragraph of that Article, voters may only give their support until the day that has been determined as the date by which lists of candidates have to be submitted to the competent electoral commission. This provision is of extreme importance and has a constitutional basis as it ensures the equality of the right to vote. All lists must thus collect a sufficient number of voters' signatures within the precisely determined time limit. It would be untenable if some had to comply with a specific time limit, while others with another (i.e. additional) time limit simply because they did not act with sufficient diligence when checking their lists of candidates, whereby a simple mathematical equation would have quickly brought them to the realisation as to whether their lists contain an adequate number of female and male candidates. Would such entail that, if we found any constitutional deficiencies with regard to the sixth paragraph of Article 43 and Articles 54 and 56 of the NAEA, we would essentially have to order the legislature to adopt an entirely new regulation of almost the entire procedure for the determination of lists of candidates? During the time of an election? Should the Constitutional Court simply have allowed itself to write that entire chapter of the Act anew and order that the election begin anew in order to ensure respect for the equality of the right to vote?

8. Lastly, I will address the position that we were concerned with a substantive deficiency that cannot be remedied once a list of candidates has been submitted. Leaving completely aside that an interpretation of the term "formal deficiency" that also included all substantive deficiencies in its meaning would pierce the statutory text, we might ask ourselves what such would entail for future elections. It is namely clear that the need to conduct the process of nominating candidates anew, which would in fact also entail a violation of the provisions of the NAEA that I have particularly highlighted, indicates a substantive deficiency of a list. Such would, of course, entail not only a change of the hitherto long-established positions of the Constitutional Court regarding what constitutes a formal and what a substantive deficiency of a list, which, once it has been submitted, can no longer be remedied during an on-going election. It would entail that, in accordance with the principle of equality, with regard to all future elections, all substantive deficiencies of a list of candidates may and must be remedied within three days following the finding of an electoral commission that such list was not compiled in accordance with the law: for example, a list of candidates that had been determined by a public vote would be determined again by a secret vote (I honestly do not know how a secret vote could be ensured after having already expressed my vote by publicly expressing my will!); a change of candidates if one of them does not possess the passive right to vote; or collecting the missing number of voters' signatures. Furthermore, I do not know how an electoral commission could decide that a list is in accordance with the law if such concurrently entailed an unequivocal violation of other statutory provisions. And since we have gone this far – why not also decide which green party is in fact *the* Green Party in the same procedure so as to enable the electoral commission to confirm its list, which was the main question at issue in Decision No. Up-304/98?[4] In such manner, we truly

[4] Decision dated 19 November 1998 (OdlUS VII, 240).

could not interfere with the right of anyone who believes that he or she obtained the passive right to vote already by giving his or her consent to be included in a list of candidates. How long would the electoral process have to be in order to enable everything to be taken care of while no accountability for the lawfulness of their lists could be imposed on the political parties and proposers of lists? The first “body” deciding on their lawfulness would be their attorney, who would then also be the arbiter in all potential disputes that would in any way impede the party’s nominations. You might say that I am being sarcastic. Perhaps; however, I simply wanted to clearly show where such positions might lead.

Dr Jadranka Sovdat

Judge