**Case number:**
Up-716/18, Up-745/18

**ECLI:**
ECLI:SI:USRS:2018:Up.716.18

**Challenged act:**
Constitutional complaint against Supreme Court Judgment No. Uv 6/2018, dated 7 May 2018

Constitutional complaint against Supreme Court Judgment No. Uv 7/2018, dated 10 May 2018

**Operative provisions:**
The constitutional complaint against Supreme Court Judgment No. Uv 6/2018, dated 7 May 2018, is not accepted for consideration on the merits.

The constitutional complaint against Supreme Court Judgment No. Uv 7/2018, dated 10 May 2018, is not accepted for consideration on the merits.

**Abstract:**
In accordance with the fourth paragraph of Article 43 of the Constitution, a law shall provide measures for encouraging the equal opportunity of men and women in standing for election to state bodies and local community bodies. The legislature adopted the sixth paragraph of Article 43 of the National Assembly Elections Act, which determines that on a list of candidates each gender may not comprise less than 35 percent of the total actual number of the female and male candidates on the list, on this constitutional basis. As the legislature did not determine a specific sanction for not observing this rule, it is deemed that a list of candidates that does not observe it has not been determined in accordance with the law and the electoral commission has to reject it.

The right to vote has a particular nature, as all holders of this right can only exercise it concurrently in an organised procedure and within a precisely determined time frame. This restricted time frame and the ensuing extremely short time limits for carrying out individual electoral tasks are a consequence of the principle of periodic elections, which the Code of Good Practice in Electoral Matters determines as one of the fundamental principles of the European electoral heritage. The constitutional expression of this principle with regard to the election of the deputies to the legislative body is not only the determination of the duration of their term of office, but also the express rule of the third paragraph of Article 81 of the Constitution, which determines the time frame in which a new election has to be held. In Slovenia, the time limits determined by the Constitution are particularly short and thus the restricted time frame for carrying out elections is especially accentuated. Such substantiates the statutory determination of short time limits and the requirement that political parties that want to participate in the electoral process have to carry out all electoral tasks in accordance with the rules and within the time limits determined by the National Assembly Elections Act. The rules must apply to

all political parties that are competing for power in an election, as only in such manner can the principle of equal suffrage enshrined in the first paragraph of Article 43 of the Constitution, which is a special expression of the general principle of equality determined by the second paragraph of Article 14 of the Constitution, be observed.

The determination of candidates is an electoral task. A formal deficiency is a deficiency that can be remedied without the need to carry out any new electoral tasks in the nomination procedure. If a list of candidates has not been composed in accordance with the condition from the sixth paragraph of Article 43 of the National Assembly Elections Act, such does not constitute a formal but a substantive deficiency, as the entire nomination procedure would have to be repeated in order to remedy it. Therefore, an electoral commission is not obligated to require that such a deficiency be remedied.

Lists of candidates have to be submitted to electoral commissions within a specific time limit. In order to ensure respect for the principle of equality with regard to the exercise of the right to vote, the same time limits have to apply to all proposers of lists of candidates. Enabling substantive deficiencies of lists of candidates to be remedied after the expiry of such time limits would entail that the procedure for determining lists of candidates would be conducted anew. In order to observe the principle of equality, such would have to be applied to all proposers of lists and would result in a significant prolongation of procedures and require that the date of the vote be postponed, which would not only entail disregard for the third paragraph of Article 81 of the Constitution, but also an inadmissible interference with the principle of periodic elections.

It is not inconsistent with the Constitution for political parties to be required to act diligently when exercising the right to vote. If they fail to act diligently, the rejection of a list of candidates entails an interference with the right to vote, not due to the conduct of state authorities, but due to a lack of diligence on the part of the proposer of the list. Therefore, an electoral commission cannot be held liable for such. An electoral commission may further not interfere with a list of candidates without an express statutory basis.

When reviewing the legality of a list of candidates, an instance wherein a proposer submits a list of candidates for registration that does not satisfy the required gender ratio of candidates already from the outset must be distinguished from an instance wherein a proposer submitted a list of candidates that initially fulfilled this condition but the ratio of representation by gender shifted due to the subsequently established invalidity of an individual candidate’s nomination that was exclusively a consequence of the candidate’s conduct and which could not have been known to the proposer of the list.

---

SUMMARY

**Gender Quotas with regard to Lists of Candidates in Elections to the National Assembly**

By Order No. **Up-716/18, Up-745/18**, dated 17 May 2018 (Official Gazette RS, No. 35/18), the Constitutional Court decided on a constitutional complaint against a decision of the Supreme Court which by the challenged judgments upheld the decisions of two electoral commissions that in the election procedure dismissed the lists of candidates "Kangler & Primc Združena desnica – Glas za otroke in družine" and "Nova ljudska stranka Slovenije". In constituencies 1 and 6, the lists of candidates were determined contrary to the sixth paragraph of Article 43 of the National Assembly Elections Act (the NAEA), which requires a certain percentage of candidates of each gender on a list of candidates (so-called gender quotas).

The sixth paragraph of Article 43 of the NAEA determines that on a list of candidates each gender must not comprise less than 35 percent of the total actual number of female and male candidates on the list. In accordance with the fourth paragraph of Article 43 of the Constitution, a law shall provide measures for encouraging the equal opportunity of men and women in standing for election to state bodies and local community bodies. The legislature thus adopted the sixth paragraph of Article 43 of the NAEA on a constitutional basis. The provision is clear and comprehensible to anyone. As the legislature did not determine a specific sanction for not observing this rule, it is deemed that a list of candidates that does not observe it has not been determined in accordance with the law. An electoral commission must reject such a list on the basis of the first paragraph of Article 56 of the NAEA. In the Republic of Slovenia, such a statutory regulation has been in force since the year 2006, and the Supreme Court provided a clear interpretation thereof in a 2011 judgment. All political parties thus had prior knowledge of the sanction for disregarding the rule in question.

The Constitutional Court already clarified in Decision No. Up-304/98, dated 19 November 1998, that elections entail a process that has to take place and be completed within an uninterrupted period of time, and therefore all tasks that have to be performed as part of this process are restricted by statutorily precisely determined time limits that are very short. It stressed that all bodies authorised to decide in this process have to take into account the particular nature of the right to vote, which must also be considered by all participants in the process. Therefore, a political party that wants to participate in an election must align its organisation and functioning with these requirements and ensure that all relevant statutory conditions are fulfilled upon the submission of a list of candidates. The electoral commission is tasked with rejecting lists of candidates that are not determined in accordance with the statutorily determined rules.

As the Constitutional Court has repeatedly stressed, including in the cited decision, the right to vote has a particular nature, as it is a personal right, but all holders of this right can only exercise it concurrently in an organised procedure and within a precisely determined time frame. This restricted time frame and the ensuing extremely short time limits for carrying out individual acts are a consequence of the principle of periodic elections, which the Code of Good Practice in Electoral Matters determines as one of the fundamental principles of the European electoral heritage. In the Republic of Slovenia, the time limits determined by the Constitution are particularly short and thus the restricted time frame for carrying out elections is especially accentuated. Such substantiates the statutory determination of short time limits and the requirement that political parties that want to participate in the electoral process have to carry out all electoral tasks in accordance with the rules and within the time limits determined by law. These rules must apply to all political parties that are competing for power in an election, as only in such manner can the principle of equal suffrage enshrined in the first paragraph of Article 43 of the Constitution be observed.

In accordance with the above, the competent electoral commission has the express statutory authorisation to only require the remedying of formal deficiencies. The Constitutional Court clarified already in Decision No. Up-304/98 that the term "formal deficiency" is an open-textured legal term

and its precise content is subject to interpretation by the competent body. By Decision No. Up-2385/08, dated 9 September 2008 (Official Gazette RS, No. 88/08), the Constitutional Court adopted the position that a formal deficiency is a deficiency that can be remedied without the need to carry out any new electoral tasks in the nomination procedure. In light of the above, the distinction between formal and substantive deficiencies is precisely and substantively defined, and at least since 2008 it has also been expressly and unequivocally defined by the Constitutional Court.

The Constitutional Court concurred with the position of the Supreme Court that in order to remedy a deficiency as regards the gender quota, the entire nomination procedure would have to be repeated. Therefore, a change in the candidates on a list after the expiry of the time limit for submitting the list cannot constitute the remedying of a formal deficiency, but entails the remedying of a substantive deficiency of such list. Formal deficiencies are those that can be remedied without having to carry out any electoral tasks anew (i.e. determining the candidates on a list).

The time limits for submitting lists of candidates were the same for all political parties. In accordance with the principle of equal suffrage (the first paragraph of Article 43 of the Constitution), the same rules applied to all. As was evident from the large number of confirmed lists of candidates for the upcoming election, the great majority of the proposers had no difficulty fulfilling their statutory obligations. Enabling a substantive deficiency of a list of candidates to be remedied after the expiry of the time limit for submitting lists of candidates would entail that the procedure for determining lists of candidates would be conducted anew. In order to observe the principle of equality, such would have to be applied to all proposers of lists and would result in a significant prolongation of procedures and require that the date of the vote be postponed, which would not only entail disregard for the third paragraph of Article 81 of the Constitution, but also an inadmissible interference with the principle of periodic elections.

The Constitutional Court stressed that it is not inconsistent with the Constitution for political parties to be required to act diligently when exercising the right to vote. If they fail to act diligently, the rejection of a list of candidates entails an interference with the right to vote, not due to the conduct of state authorities, but due to a lack of diligence on the part of the proposer of the list. Therefore, an electoral commission cannot be held liable for such. The reason underlying the illegality of the list of candidates at issue was a lack of diligence on the part of the proposer of the list and not the conduct of a state authority.

The Constitutional Court decided that failure to fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA is thus not a formal deficiency of a list that would compel the electoral commission to require that it be remedied. Furthermore, electoral commissions may not by themselves, without an express statutory basis, interfere with lists of candidates; therefore, it was not possible to concur with the complainants' allegation that the electoral commissions could themselves have chosen individual candidates and struck them off the list of candidates. However, the requirement determined by the sixth paragraph of Article 43 of the NAEA is a requirement that applies to a list of candidates in its entirety. Therefore, the fact that a proposer disregards such cannot be attributed to anything other than the proposer's insufficient diligence.

**Thesaurus:**
1.5.51.2.2 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - In constitutional-complaint proceedings - Non-acceptance as there is no clear violation of constitutional rights.

1.5.5.1 - Constitutional Justice - Decisions - Individual opinions of members - Concurring opinions.
1.5.5.2 - Constitutional Justice - Decisions - Individual opinions of members - Dissenting opinions.
5.3.38 - Fundamental Rights - Civil and political rights - Electoral rights.

**Legal basis:**
Art. 55.b.2, Constitutional Court Act [CCA]

**Cases joined:**
¤

**PDF Format:**
Up-716-18 Up-745-18 - Order - EN.pdf
Up-745-18, Up-716-18 - LM Dr Mežnar.pdf
Up-745-18, Up-716-18 - LM Dr Sovdat.pdf
Up-745-18, Up-716-18 - LM Dr.Dr. Jaklič - EN.pdf

**Full text:**
Up-716/18-8
Up-745/18-8
17 May 2018

**ORDER**

At a session on 17 May 2018, in proceedings to examine the constitutional complaints of Uroš Primc, Dobrnič, and Damijan Kozina, Mavčiče, representatives of the lists of candidates "Kangler & Primc Združena desnica – Glas za otroke in družine, Nova ljudska stranka Slovenije", the Constitutional Court

decided as follows:

**1. The constitutional complaint against Supreme Court Judgment No. Uv 6/2018, dated 7 May 2018, is not accepted for consideration on the merits.**

**2. The constitutional complaint against Supreme Court Judgment No. Uv 7/2018, dated 10 May 2018, is not accepted for consideration on the merits.**

REASONING

**A**

1. On 4 May 2018 and on 7 May 2018, the electoral commissions of the 6th and the 1st constituencies, respectively, (hereinafter referred to as the ECs) rejected the lists of candidates "Kangler & Primc Združena desnica – Glas za otroke in družine, Nova ljudska stranka Slovenije". They established that the lists were drawn up contrary to the sixth paragraph of Article 43 of the National Assembly

Elections Act (Official Gazette RS, Nos. 109/06 – official consolidated text, and 23/17 – hereinafter referred to as the NAEA).[1] By means of the challenged judgments, the Supreme Court dismissed the complainants' appeals and confirmed the decisions of the ECs. It found that the ECs applied the sixth paragraph of Article 43 and the first paragraph of Article 56 of the NAEA correctly as the lists of candidates did not include a sufficient number of female candidates. It clarified that such are not formal, but substantive deficiencies of lists, and therefore in order to remedy them electoral tasks of a substantive character would have to be carried out anew. In order to remedy them the entire nomination process would allegedly have to be repeated, as a candidate who gave his or her consent in writing and who was included in a list of candidates in accordance with the procedure provided by law may not be arbitrarily struck off such list. The Supreme Court further clarified that the deficiencies affected the lists in their entirety and as a result they could not be remedied in the manner suggested by the complainants, i.e. that the ECs themselves should remedy the deficiencies by striking as many male candidates off the lists as necessary to ensure that the "gender quota" was met. In light of such, the principle of proportionality allegedly prevented the partial rejection of the lists on the basis of the third paragraph of Article 56 of the NAEA. Such is allegedly only possible if there exists a statutory basis for partial rejection that only affects an individual candidature. The Supreme Court held that the rejection of the lists of candidates in the relevant constituencies was a consequence of a lack of diligence on the part of the proposers of the lists, whereby the interpretation of the clear provision of Article 43 of the NAEA has been known for a considerable amount of time as it delineated such already in its Judgment No. Uv 12/2011, dated 15 November 2011.

2. The complainants assert that they already drew attention to the erroneous application of the sixth paragraph of Article 43 of the NAEA in their appeal to the Supreme Court. Therefore, they do not repeat their assertions but only provide additional reasons substantiating violations of constitutional provisions. They assert violations of Articles 1, 2, 3, 5, 15, 25, 44, and 80 of the Constitution. They stress that the electoral legislation currently in force does not attain sufficiently high standards of precision and predictability that would enable political parties and their candidates to unequivocally understand the rules and submit lists of candidates in accordance therewith. The fact that the complainants' understanding of the condition determined by the sixth paragraph of Article 43 of the NAEA differs from the interpretation thereof by the ECs allegedly proves that the law is imprecise, which is alleged to have grave consequences for the electoral process.

3. The complainants allege violations of the candidates' passive right to vote and the active right to vote of potential voters for the lists at issue (the second paragraph of Article 43 of the Constitution). They are of the opinion that the ECs and the Supreme Court interpreted the sixth paragraph of Article 43 and the first paragraph of Article 56 of the NAEA contrary to the Constitution because a failure to fulfil the condition of balanced gender representation may not result in the rejection of a list of candidates in its entirety. The statutory provision is thus allegedly either unconstitutional or it was erroneously interpreted by the ECs and the Supreme Court. Their interpretation allegedly did not take into consideration the principle of proportionality with regard to an interference with the right to vote; on the contrary, the NAEA should have been interpreted in a manner that would have entailed the use of a more lenient sanction. The complainants propose the more lenient measure of the EC only striking some of the candidates off the list or enabling the list's proposer to do so. They further allege that the ECs and the Supreme Court also adopted an erroneous position regarding the application of the second paragraph of Article 56 of the NAEA, which refers to the remedying of formal deficiencies. A constitutionally consistent application of this provision would allegedly allow for a remedying of deficiencies regarding the balanced gender composition of a list of candidates and thereby the candidates' passive right to vote could be protected. The complainants refer to the judgments of the European Court of Human Rights (hereinafter referred to as the ECtHR) in the following cases:

*Podkolzina v. Latvia*, dated 9 April 2002; *Paksas v. Lithuania*, dated 6 January 2011; *Sejdić and Finci v. Bosnia in Herzegovina*, dated 22 December 2009; *Melnychenko v. Ukraine*, dated 19 October 2004; *Grosaru v. Romania*, dated 2 March 2010; *Kovach v. Ukraine*, dated 7 February 2008; *Aziz v. Cyprus*, dated 22 June 2004; *Lykourezos v. Greece*, dated 15 June 2006; *Russian Conservative Party of Entrepreneurs and others v. Russia*, dated 11 January 2007; *Petkov and others v. Bulgaria*, dated 11 June 2009; and *Tănase v. Moldavia*, dated 18 November 2008.

4. The rejection of a list in its entirety allegedly also entails a violation of the second paragraph of Article 14 of the Constitution as it leads to inequalities among candidates for deputies as well among voters in different constituencies. In this regard, the complainants also allege a violation of Article 3 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR), Article 25 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the ICCPR), and Article 7a of the Convention on the Elimination of All Forms of Discrimination against Women (Official Gazette SFRY, No. 11/81, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the CEDAW).

5. The complainants further allege a violation of the right to the equal protection of rights (Article 22 of the Constitution). They state that during the submission of the lists of candidates lists were treated differently in different constituencies. Staff members of certain constituencies allegedly rigorously reviewed lists already upon their submission and only accepted them after having established that they were complete and lawful. If the ECs had acted in such a manner also in the cases at issue, the lists of candidates could have been composed in accordance with the law. They allege that the Supreme Court also violated Articles 22 and 25 of the Constitution because it allegedly did not decide on the basis of the Constitution and it concurrently claimed that the electoral process has certain specificities which require short time limits and due to which possible errors cannot be remedied at a later time. Therefore, the burden that all electoral tasks be performed immediately and correctly lies entirely with the political party.

6. The complainants propose that the Constitutional Court grant the constitutional complaints, or – if it deems that the ECs and the Supreme Court decided in accordance with the law – that it establish a "potential unconstitutionality" of the NAEA and, after having previously suspended its implementation, abrogate the mentioned regulation.

7. The complainant Uroš Primc supplemented his constitutional complaint on 11 May 2018. He clarified that on 7 May 2018 he lodged a proposal in accordance with Article 134 of the General Administrative Procedure Act (Official Gazette RS, Nos. 24/06 – official consolidated text, 126/07, 65/08, 8/10, 82/13 – GAPA) for a partial withdrawal of candidates in the 6$^{th}$ constituency, thereby allegedly fulfilling the condition determined by the sixth paragraph of Article 43 of the NAEA. He attached to the supplement the internal acts of both political parties regarding the withdrawal of candidatures and a letter of the EC explaining that it had not taken the withdrawal into account because an application can no longer be supplemented or withdrawn following a decision to reject a candidature.

8. In addition, the complainant Damijan Kozina also challenges the position of the Supreme Court in Judgment No. Uv 7/2018, i.e. that it did not take into account the supplement to his appeal because it had been lodged after the expiry of the 48-hour time limit for lodging the appeal (the first paragraph of Article 105 of the NAEA). Such position allegedly violates the rights stemming from Articles 14, 22, 23, 25, and 43 of the Constitution, Articles 6 and 13 of the ECHR, as well as Points 96 and 3.3.g. of the

Code of Good Practice in Electoral Matters adopted by the so-called Venice Commission. He additionally substantiates the violations of Articles 14 and 22 of the Constitution with the claim that the list of candidates in question did not receive the same treatment as the list of candidates that the Supreme Court confirmed by Judgment No. Uv 8/2018, dated 12 May 2018, even though it did not meet the condition determined by the sixth paragraph of Article 43 of the NAEA.

9. The complainants also filed a petition to initiate proceedings to review the constitutionality of Articles 43, 54, and 56 of the NAEA, which for the most part contains the same statements as the constitutional complaint. The petitioners allege that the challenged regulation is inconsistent with the principle of clarity and substantive precision (Article 2 of the Constitution). The lack of clarity of the challenged statutory regulation allegedly resulted in a different application of the challenged provisions in practice. The petitioners further claim that Article 56 of the NAEA draws an artificial distinction between formal and other deficiencies and unconstitutionally determines that the latter cannot be remedied. He alleges that the first paragraph of Article 56 of the NAEA interferes excessively with the passive right to vote of candidates (the second paragraph of Article 43 of the Constitution) and the right to participate in the management of public affairs (Article 44 of the Constitution), as well as, consequently, the outcome of the electoral process and the development of the democratic system in general, which allegedly is in evident contradiction to Article 1 of the Constitution.

10. The petitioners allege that the fourth paragraph of Article 43 of the Constitution does not determine that an electoral commission may deprive all female and male candidates on a list in a specific constituency of their passive right to vote in its entirety due to the failure to fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA. A regulation that enabled such would allegedly also be inconsistent with the first, second, and third paragraphs of Article 15 of the Constitution. The petitioners claim that although legislation governing elections promotes the equal participation of both genders and seemingly pursues the constitutionally admissible aim defined by the fourth paragraph of Article 43 of the Constitution, the rejection of a list in its entirety due to failure to fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA is not consistent with the principle of proportionality and is further inconsistent with the purpose underlying the fourth paragraph of Article 43 of the Constitution. The rejection of a list in its entirety without any fault on behalf of the candidates allegedly causes inequality before the law (the second paragraph of Article 14 of the Constitution) among the candidates for deputies and among voters and is allegedly contrary to the right to free elections determined by the First Protocol to the ECHR, Article 25 of the ICCPR, and Article 7 of the CEDAW. The petitioners maintain that the legislature should determine a less stringent sanction for failure to fulfil the condition of balanced gender representation.

11. The petitioners also challenge the first paragraph of Article 105 of the NAEA. They claim that the 48-hour time limit for lodging an appeal before the Supreme Court is extremely short. Therefore, it is allegedly inconsistent with the right to an effective legal remedy (Article 25 of the Constitution), the right to judicial protection (the first paragraph of Article 23 of the Constitution), and Article 13 of the ECHR. As it is shorter than three days, it is allegedly contrary to Point 3.3.g. of the Code of Good Practice in Electoral Matters.

12. On 15 May 2018, the complainant Damijan Kozina submitted two new supplements to his petition and constitutional complaint in which he included the opinion of Professor Dr Jurij Toplak, according to which allegedly only an interpretation of Articles 54 and 56 of the NAEA that allowed a list to be remedied would be consistent with the Constitution. If the mentioned provisions of the NAEA cannot be interpreted in such manner, they are allegedly unconstitutional.

**B – I**

13. At the outset, the Constitutional Court draws the attention of the legislature to the fact that it has to adopt a special regulation of the time limits in which a constitutional complaint against a decision to reject a candidature may be lodged if it allows for the filing of an appeal against such decision before a competent court prior to the day of the vote. Otherwise, effective and timely decision-making of the Constitutional Court cannot be ensured, as [in electoral matters] a decision must namely be adopted long before the expiry of the general time limit for lodging a constitutional complaint, which is regulated by the first paragraph of Article 52 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA). In order to be able to fulfil its role [in the absence of such regulation], the Constitutional Court must thus itself determine acceptable time limits for consideration of the constant influx of supplements to the applications of petitioners and complainants. In the proceedings at issue, the Constitutional Court took into consideration the supplements it received by 15 May 2018.

14. In constitutional complaint proceedings the Constitutional Court only considers alleged violations of human rights. As Articles 1, 2, 3, 5, and 80 of the Constitution do not directly regulate human rights, they cannot be invoked with regard to individual violations of the Constitution in constitutional complaint proceedings. In accordance with established constitutional case law, a constitutional complaint can furthermore not be substantiated by means of general references to statements and substantiations contained in legal remedies that have been exhausted prior to the lodging of the constitutional complaint. A constitutional complaint is a special legal remedy with a particular scope as to the substance that may be challenged and reviewed. On the basis of the first paragraph of Article 53 of the CCA, the reasons substantiating a constitutional complaint have to be expressly stated.[2] Therefore, the Constitutional Court only took into account the assertions that the complainants made in the constitutional complaint, and not the assertions from the appeals to the Supreme Court.

**B – II**

15. The second paragraph of Article 43 of the Constitution regulates the active right to vote and the passive right to vote. In accordance with the second paragraph of Article 15 of the Constitution, the manner of its implementation must be regulated by a law. The law may also determine its limitations, *inter alia*, when such is envisaged by the Constitution (the third paragraph of Article 15 of the Constitution). The election of deputies is regulated by the NAEA. Article 48 thereof determines, *inter alia*, that the number of candidates on a list may not exceed the number of deputies that are to be elected in the constituency, whereby every candidate may only stand for election in one constituency. In accordance with the first paragraph of Article 49 of the NAEA, in determining a list of candidates, the electoral district in which the individual candidates are to stand for election must also be determined. Therefore, in accordance with the second paragraph of Article 51 of the NAEA, the allocation of candidates to electoral districts must be enclosed with the proposed list of candidates. Although the proposer of a list of candidates may freely decide which candidate from the list will stand for election in which electoral district in a constituency, the NAEA contains cogent rules regarding the composition of the list of candidates. These are determined by Article 43 of the NAEA. The competent electoral commission must verify whether a list of candidates fulfils all statutory requirements. If it fulfils such, it confirms the list (Article 58 of the NAEA); if it does not, it must reject the list of candidates (Articles 55 and 56 of the NAEA).

16. The sixth paragraph of Article 43 of the NAEA determines that on a list of candidates each gender may not comprise less than 35 percent of the total actual number of the female and male candidates on the list. In accordance with the Code of Good Practice in Electoral Matters, rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis (Point I.2.5. of the Code). In accordance with the fourth paragraph of Article 43 of the Constitution, a law shall provide measures for encouraging the equal opportunity of men and women in standing for election to state bodies and local community bodies. The legislature thus adopted the sixth paragraph of Article 43 of the NAEA on a constitutional basis. It determines that on a list of candidates each gender may not comprise less than 35 percent of the total actual number of the female and male candidates on the list. The provision is clear and comprehensible to anyone. As the legislature did not determine a specific sanction for not observing this rule, it is deemed that a list of candidates that does not observe it has not been determined in accordance with the law. An electoral commission must reject such a list on the basis of the first paragraph of Article 56 of the NAEA. It is true that some states that have also introduced this type of measure prescribe a different form of sanction for the non-observance thereof, such as fines (e.g. Albania and Croatia) or a decrease in the amount of the public funding of the political party, where such funding is in place (e.g. France). However, like Slovenia, some have determined the rejection of the list in its entirety. 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 Professor Dr Jurij Toplak, expressly states 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 to ensure that the mentioned constitutional requirement is observed. Clear prior awareness of the fact that political parties will not be able to participate in elections unless they ensure balanced gender representation on their lists of candidates provides the strongest impetus to satisfying “gender quotas” (the study cites Belgium, Poland, and Slovenia as systems with such a regulation).[3] In Slovenia, such a statutory regulation has been in force since the year 2006, and the Supreme Court provided a clear interpretation thereof in its cited 2011 Judgment. All political parties thus had prior knowledge of the sanctions for disregarding the rule in question.

17. The complainants state that the rejection of the list of candidates in its entirety due to failure to fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA is a disproportionate sanction, as it allegedly concerns a deficiency that, following a request of the ECs, the proposers of the list could have remedied by striking some of the candidates off the lists. In accordance with the second paragraph of Article 54 of the NAEA, immediately after receiving a list of candidates the electoral commission of a constituency must verify whether the list was submitted in due time and whether it was determined in accordance with the NAEA. The verification does not fall within the competence of the individual official whom the electoral commission authorised to accept the submission of lists of candidates (along with all appendices), but within the competence of the electoral commission, a specific independent collegiate body established in accordance with the NAEA. As a number of lists of candidates may be submitted concurrently, the statutory provision has to be understood as meaning that the electoral commission must convene as soon as possible following the expiry of the time limit for submitting candidatures and verify whether these are composed in accordance with the statutory rules. The provision regarding the immediate verification of the submitted lists of candidates is one of many statutory provisions that determine very short time limits in order to ensure that all necessary electoral tasks are performed in time. If the electoral commission establishes that a submitted list of candidates has deficiencies, it acts in accordance with the first or second paragraph of Article 56 of the NAEA, depending on the type of deficiency. If it establishes formal deficiencies (the second paragraph of Article 56 of the NAEA), it requires the

proposer to remedy such; if it establishes substantive deficiencies (the first paragraph of Article 56 of the NAEA), it rejects the list.

18. Already in Decision No. Up-304/98, dated 19 November 1998 (OdlUS VII, 240), the Constitutional Court clarified that elections entail a process that has to take place and be completed within an uninterrupted period of time, and therefore all tasks that have to be performed as part of this process are restricted by statutorily precisely determined time limits that are very short. It stressed that all bodies authorised to decide in this process have to take into account the particular nature of the right to vote, which must also be considered by all participants in the process. Therefore, a political party that wants to participate in an election must align its organisation and functioning with these requirements and ensure that all relevant statutory conditions are fulfilled upon the submission of a list of candidates. It is a task of the electoral commission to reject lists of candidates that are not determined in accordance with the statutorily determined rules. As the Constitutional Court has repeatedly stressed, including in the cited decision,[4] the right to vote has a particular nature, as it is a personal right, but all holders of this right can only exercise it concurrently in an organised procedure and within a precisely determined time frame. This restricted time frame and the ensuing extremely short time limits for carrying out individual acts are a consequence of the principle of periodic elections, which the Code of Good Practice in Electoral Matters determines as one of the fundamental principles of the European electoral heritage. The constitutional expression thereof with regard to the election of the deputies to the legislative body is not only the determination of the duration of their term of office, but also the express rule of the third paragraph of Article 81 of the Constitution, which determines the time frame in which a new election has to be held. The terms of office of the members of the National Assembly may only be extended during a war or state of emergency (the second paragraph of Article 81 of the Constitution). In Slovenia, the time limits determined by the Constitution are particularly short and thus the restricted time frame for carrying out elections is especially accentuated. Such substantiates the statutory determination of short time limits and the requirement that political parties that want to participate in the electoral process have to carry out all electoral tasks in accordance with the rules and within the time limits determined by law. These rules must apply to all political parties that are competing for power in an election, as only in such manner can the principle of equal suffrage enshrined in the first paragraph of Article 43 of the Constitution, which is a special expression of the general principle of equality determined by the second paragraph of Article 14 of the Constitution, be observed.

19. In accordance with the above, the competent electoral commission has the express statutory authorisation to only require the remedying of formal deficiencies. Already in Decision No. Up-304/98 the Constitutional Court clarified that the term “formal deficiencies” is an open-textured legal term and its precise content is subject to interpretation by the competent body; in the case at issue, these are the competent electoral commissions, which are not administrative authorities, but specific independent bodies in charge of organising an election. In Decision No. Up-2385/08, dated 9 September 2008 (Official Gazette RS, No. 88/08, and OdlUS XVII, 80, Paragraph 9 of the reasoning), the Constitutional Court adopted the position that a formal deficiency is a deficiency that can be remedied without the need to carry out any new electoral tasks in the nomination procedure.[5] In this light, the distinction between formal and substantive deficiencies is precisely and substantively defined, and at least since 2008 it has also been expressly and unequivocally defined by the Constitutional Court. The position of the Supreme Court in the challenged judgment follows such completely, as it already did in its cited 2011 Judgment.

20. The position of the Supreme Court that in order to remedy the deficiencies at issue here the entire nomination procedure would have to be repeated has to be affirmed. Two or more political parties

may submit a joint list of candidates, whereby each of the political parties has to determine its candidates according to the procedure determined by its rules and by secret vote (the first and fifth paragraphs of Article 43 of the NAEA). A joint list of candidates may be submitted in a constituency if [a sufficient number of] either deputies or voters support it with their signatures (the second and fourth paragraphs of Article 43 of the NAEA). The political parties determine a joint list when collecting voters' signatures. In the case at issue, it is of particular relevance that the lists of candidates were submitted on the basis of voters' signatures. The determination of the candidates on a list, including the manner in which they obtained the support required by the NAEA, is an essential electoral task within the nomination procedure. Therefore, a change in the candidates on a list after the expiry of the time limit for submitting the list cannot constitute the remedying of a formal deficiency, but entails the remedying of a substantive deficiency of such list.

21. The time limits for submitting lists of candidates were the same for all political parties. In accordance with the principle of equal suffrage (the first paragraph of Article 43 of the Constitution), the same rules applied to all. As is evident from the large number of confirmed lists of candidates for the upcoming election, the great majority of the proposers had no difficulty fulfilling their statutory obligations. Even the complainants fulfilled them as they submitted correct and lawful lists of candidates in six constituencies. Enabling substantive deficiencies of lists of candidates to be remedied after the expiry of the time limit for submitting lists of candidates would entail that the procedure for determining lists of candidates would be conducted anew. In order to observe the principle of equality, such would have to be applied to all proposers of lists[6] and would result in a significant prolongation of procedures and require that the date of the vote be postponed, which would not only entail disregard for the third paragraph of Article 81 of the Constitution, but also an inadmissible interference with the principle of periodic elections. As follows from Constitutional Court Decision No. Up-304/98, due to the particular nature of elections, it is vital that all proposers of lists of candidates ensure that they submit complete and lawful lists of candidates within the prescribed time limit[7] and thereby enable not only the timely conclusion of the electoral process, but above all enable their candidates to participate in the electoral battle, which entails the realisation of the passive right to vote of the candidates competing in an election. It is not inconsistent with the Constitution for political parties to be required to act diligently when exercising the right to vote. If they fail to act diligently, the rejection of a list of candidates entails an interference with the right to vote, not due to the conduct of state authorities, but due to a lack of diligence on the part of the proposer of the list. Therefore, an electoral commission cannot be held liable for such. The Constitutional Court has already granted the complaint of a proposer of a list of candidates when it established that the deficiency in connection with the composition of the list of candidates was a consequence of the conduct of a state authority during the process of the collection of voters' signatures in support of a list of candidates (see Decision No. Up-2385/08). The case at issue here is different. The reason underlying the illegality of the lists of candidates is the lack of diligence on the part of the proposer and not the conduct of a state authority.

22. The situation with regard to formal deficiencies is different, as they can be remedied without having to carry out any electoral tasks anew (i.e. determining the candidates on a list). The need for electoral tasks to be carried out (anew) is thus the reason for differentiating between substantively incomplete (i.e. unlawful) and formally incomplete lists of candidates. In instances of substantively adequate (i.e. lawful) lists that are formally incomplete, the competent electoral commissions have to require the proposers thereof to remedy the lists to ensure respect for the principle that decision-making should favour the right to vote.

23. The mentioned failure to fulfil the condition determined by the sixth paragraph of Article 43 of the

NAEA is thus not a formal deficiency of a list that would compel the electoral commission to require that it be remedied. An electoral commission may not interfere with a list of candidates without an express statutory basis. Therefore, the complainants' assertion that the ECs could have themselves chosen individual candidates and struck them off the list of candidates cannot be affirmed. And this applies even more in instances where an electoral commission has previously rejected a list of candidates, which is what the complainants proposed regarding the case at issue (Paragraph 7 of the reasoning of this Order). The position of the Supreme Court that the ECs would have acted in such manner if one of the candidates had been included in the list contrary to the law (e.g. if one of the candidates did not enjoy the right to stand in the election) has to be affirmed. However, the requirement determined by the sixth paragraph of Article 43 of the NAEA is a requirement that applies to the list of candidates in its entirety. Therefore, the fact that a proposer disregards such cannot be attributed to anything other than the proposer's insufficient diligence. In light of such, it is thus not inadmissible if a list of candidates is rejected in its entirety.

24. From among the ECtHR judgments the complainants refer to in order to substantiate the alleged violation of the passive right to vote, only the Judgment in *Russian Conservative Party of Entrepreneurs and others v. Russia* refers to the rejection of a list of candidates in its entirety.[8] However, the essential characteristics of that case were different from the case at issue here. The rejection of the list of candidates in the mentioned case was a consequence of a candidate's conduct that the party and the remaining candidates could not influence. In the case at issue here, however, the substantive deficiency of the list in its entirety was caused exclusively by its proposer, who, together with the voters who provided supporting signatures, is the holder of the active right to vote. The proposer is the one responsible for submitting a complete and lawful list.

25. In light of the above, the allegation regarding the violation of the right to vote is unsubstantiated.

26. As the complainants failed to provide reasons for their allegations that the Supreme Court violated Articles 22 and 25 of the Constitution, such cannot be examined. The violations of these human rights can namely not be substantiated solely by claiming that the court did not decide directly on the basis of the Constitution. Furthermore, the complainants failed to provide reasons for their allegations of violations of Article 25 of the ICCPR and point a) of Article 7 of the CEDAW. The Constitutional Court has already examined the allegation of a violation of Article 3 of the First Protocol to the ECHR in the framework of its consideration of the alleged violation of the right to vote as determined by the Constitution, as the Convention right does not ensure a greater scope of protection, but merely also explicitly highlights the principle of periodic elections.

27. With regard to the allegation of a violation of the right to the equal protection of rights (Article 22 of the Constitution) as lists of candidates in different constituencies were allegedly treated differently, it has to be noted that in their appeal to the Supreme Court the complainants neither alleged nor established that any EC required a proposer to remedy a list of candidates that did not fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA.

28. In addition, the complainant Damijan Kozina also challenges the position of the Supreme Court from Judgment No. Uv 7/2018 as it allegedly did not consider a supplement to the appeal because it was submitted after the expiry of the 48-hour time limit for lodging the appeal (the first paragraph of Article 105 of the NAEA). Such position allegedly violates the rights stemming from Articles 14, 22, 23, 25, and 43 of the Constitution, Articles 6 and 13 of the ECHR, as well as Point 3.3.g. of the Code of Good Practice in Electoral Matters and Point 96 of the Explanatory Memorandum of the Code. By means of these allegations, the complainant essentially asserts a violation of the right to effective

judicial protection (the first paragraph of Article 23 of the Constitution), which concurrently entails a legal remedy (Article 25 of the Constitution). By claiming that in order to protect the right to vote the Supreme Court should have deemed that the supplement to the appeal was lodged in time although it was lodged after the time limit had expired, the complainant requests that the court do something that neither the NAEA nor the Constitution compels it to do. The fact that the complainant lodged a timely appeal within the statutorily determined time limit and the Supreme Court considered it on the merits shows that the challenged time limit enables effective judicial protection and an effective legal remedy. The statutory regulation that determines a short time limit for lodging an appeal is completely clear. Insofar as through that allegation the complainant aims at the unconstitutionality of the statutory regulation, the Constitutional Court cannot decide on such in this decision due to the reasons stated in Paragraph 31 of the reasoning of this Order.

29. The complainant Damijan Kozina additionally substantiates the violations of Articles 14 and 22 of the Constitution with the claim that the list of candidates in question did not receive the same treatment as the list of candidates that the Supreme Court confirmed by Judgment No. Uv 8/2018. Such allegation is also not substantiated, as the two cases are not comparable. By Judgment No. Uv 8/2018 the Supreme Court did in fact confirm a list of candidates that did not fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA. However, it established that an instance wherein a proposer submits a list of candidates for registration that does not satisfy the required gender ratio of candidates already from the outset must be distinguished from an instance wherein a proposer submitted a list of candidates that initially fulfilled this condition but the ratio of representation by gender shifted due to the subsequently established invalidity of an individual candidate’s nomination that was exclusively a consequence of the candidate’s conduct and which could not have been known to the proposer of the list (see also Paragraphs 21 and 24 of the reasoning of this Order).

30. As the conditions determined by the second paragraph of Article 55b of the CCA are not fulfilled, the Constitutional Court did not accept the constitutional complaints for consideration on the merits.

**B – III**

31. The Constitutional Court did not decide on the petition to initiate proceedings to review the constitutionality of the challenged provisions of the NAEA. Already in the time leading up to an election, and even more so during the electoral process itself, the statutory rules that govern the carrying out of the election may not be amended; this is due to the fact that it is inadmissible to interfere with the principle of periodic elections and to extend the term of office of deputies, as well as in order to ensure respect for the equality of the political parties during an election. Therefore, the Constitutional Court will decide on the petition at a later date (Case No. U-I-360/18).

**C**

32. The Constitutional Court adopted this Order on the basis the second paragraph of Article 55 b of the CCA and the first indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS Nos. 86/07, 54/10, 56/11, and 70/17), composed of: Dr Jadranka Sovdat, President, and Judges Dr Matej Accetto, Dr Dunja Jadek Pensa, Dr.Dr. Klemen Jaklič, Dr Rajko Knez, Dr Etelka Korpič – Horvat, Dr Špelca Mežnar, Dr Marijan Pavčnik, and Marko Šorli. It adopted the Order by seven votes against two. Judges Jaklič and Šorli voted against. Judge Jaklič submitted a dissenting opinion. Judges Mežnar and Sovdat submitted concurring opinions.

Dr Jadranka Sovdat
President

---

[1] The electoral commission of the 6th constituency established that the list included six male and two female candidates, and the electoral commission of the 1st constituency established that the list contained five male and two female candidates. In both instances it was established that female candidates represented less than 35 percent of the total actual number of female and male candidates on each list.
[2] See, e.g., Constitutional Court Order No. Up-80/16, dated 25 October 2016, Paragraph 9 of the reasoning.
[3] See L. Freidenval *et al.*, Electoral Gender Quota System and their Implementation in Europe, Update 2013, European Parliament, Directorate General for Internal Policies, Brussels 2013, p. 17. Accessible at:
http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493011/IPOL-FEMM_NT(2013)493011_EN.pdf.
[4] *Cf.* also Constitutional Court Order No. U-I-100/13, Up-307/12, dated 10 April 2014, and Constitutional Court Decision No. Up-304/98, Paragraphs 11 and 14 of the reasoning.
[5] The case concerned a list of candidates that did not fulfil the condition determined by the third paragraph of Article 43 of the NAEA – i.e. fifty supporting signatures of voters with permanent residence in the constituency. The Constitutional Court found that such cannot be deemed to constitute a formal deficiency that could be remedied within the time limit and according to the procedure determined by the second paragraph of Article 56 of the NAEA.
[6] Including in circumstances that are the same as those decided on in Decision No. Up-304/98.
[7] In accordance with the first paragraph of Article 54 of the NAEA, lists of candidates have to be submitted to the electoral commissions of the constituencies no later than on the 25th day prior to the election day. Support by signature may be given from the day determined for the start of electoral activities until the day determined for the submission of lists of candidates (the first paragraph of Article 46 of the NAEA).
[8] That case concerned the national list of the Russian Conservative Party of Entrepreneurs, which competed in elections to the *Duma* – the lower chamber of the Russian Parliament. When verifying the list of candidates, the central electoral commission found that 17 candidates, including the candidate listed second, had not provided correct information about their financial situation. The central electoral commission deemed that the candidate listed second withdrew his candidature and, consequently, rejected the party's national list of candidates in its entirety. As the party was punished for circumstances that were not connected with its own conduct and over which it had no control (i.e. the actions of one of the candidates), the ECtHR decided that the reason underlying the adopted measure (i.e. the rejection of the list in its entirety) was disproportionate to the legitimate aim pursued (i.e. to disclose the financial situation of the candidates and promote the integrity of the lists of candidates and the parties).

⇒

Up-716/18-6
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).

⇒

Up-745/18-7
Up-716/18-7
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 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 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, 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 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

---

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

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

⇒

Up-745/18-9
Up-716/18-9
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 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"

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 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 32$^{nd}$ instead of by the 30$^{th}$ 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 30$^{th}$ day before election day. 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 (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 24$^{th}$ 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 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 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

---

[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.

[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.

[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.

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

[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.

[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 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*.

⇒

**Type of procedure:**
ustavna pritožba

**Type of act:**
posamični akt
posamični akt

**Applicant:**
Uroš Primc, Dobrnič and Damijan Kozina, Mavčiče

**Date of application:**
10. 5. 2018

**Date of Decision:**
17. 5. 2018

**Type of decision adopted:**
sklep

**Outcome of proceedings:**
nesprejem ustavne pritožbe
nesprejem ustavne pritožbe

**Published:**
Official Gazette RS, No. 35/2018

**Document:**
AN03907