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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**Opinion of the Rapporteurs
on the Constitutional Amendments
concerning Legislative Elections in Slovenia**

By letters of 21 July and 7 September 2000, the Prime Minister of the Republic of Slovenia, Dr Andrej Bajuk, addressed to the European Commission for Democracy through Law the question whether amendments introduced to the Constitution of Slovenia concerning provisions on Parliamentary elections, by which a proportional electoral system with a threshold of 4% for access to the distribution of seats in the National Assembly is established, is compatible with European democratic traditions and standards. The request indicated in this respect that these amendments conflict with the decision of the people as expressed in a referendum and decisions of the Constitutional Court.

The Commission's Rapporteurs, Messrs Antonio La Pergola, Pieter van Dijk and Sergio Bartole, examined the factual and legal background of the request for an opinion which can be summarised as follows:

(see the summary of facts in Doc CDL (2000) 61 and the Prime Minister's letter of 7 September 2000).

The Rapporteurs note that the question raised by the Prime Minister concerns the relationship between the people's power, exercised in accordance with the Constitution (Article 90), and the National Assembly's power to amend the Constitution.

By its decision of 8 October 1998 the Constitutional Court found that the proposal for a majoritarian electoral system submitted to referendum on 8 December 1996 had been approved. It also concluded that the National Assembly was bound to adopt, within a reasonable time, a law regulating the electoral system in accordance with the results of the referendum. The Constitutional Court further stated that this obligation is not only political and ethical but also legal. In this respect the Constitutional Court clearly recalled that despite its character as "preliminary" (because no specific norms were adopted but only a "legislative concept"), the referendum was clearly binding. The National Assembly should not therefore either adopt a law whose contents would be incompatible with the said concept or unduly delay the adoption of a law. Otherwise, the citizens' constitutional right as enshrined in Article 90 of the Constitution would be theoretical or illusory.

Despite the clear indication to the legislator by the Constitutional Court, the National Assembly did not pass the electoral law.

Undoubtedly, the situation as described above amounts to a constitutional impasse that may hinder the effective operation of democratic institutions. On 25 July 2000, in reaction to this situation, the National Assembly passed a constitutional amendment establishing a proportional electoral system with a threshold of 4% for access to the distribution of seats in the National Assembly.

The Rapporteurs find that it is the duty of both the legislator, representing the sovereign people, and the Constitutional Court, the guardian of the Constitution, to ensure that constitutional institutions of the State are able to perform their duties and are not exposed

to a risk of paralysis. They understand, on the basis of the second letter by the Prime Minister of Slovenia, that the Commission is not required to suggest alternative solutions, if there were any, to the impasse described above, but rather to consider whether the amendments to the Constitution adopted on 25 July 2000 represent a solution compatible with European democratic standards.

In this respect the Rapporteurs recall that adopting a proportional electoral system even with a threshold is certainly not in conflict with European democratic standards. Moreover, the constitutionalisation of the choice of the electoral system, although not very frequent, is followed in several European countries (e.g. Austria) and cannot be said to be incompatible with these standards either.

The Rapporteurs further observe that the National Assembly enacted the Constitutional Act amending Article 80 of the Constitution pursuant to Article 169 of the Constitution. In doing so, the National Assembly acted as a constitution making power (“*constituant*”), in accordance with the procedure provided by the Constitution of the Republic of Slovenia for its own amendment, and not as common legislator. From this perspective, there is no conflict between the decision adopted by referendum and the constitutional amendments of 25 July, as the latter, being of constitutional value, obviously prevails and takes precedence over the decision of “preliminary” legislative character adopted by the referendum.

It can of course be argued that the referendum is the manifestation of popular sovereignty and that, therefore, the validity of decisions taken by referendum can never be challenged in a democratic society. However this approach is nowadays hardly tenable. Most European Constitutions, including the Constitution of Slovenia, lay down the procedure for the referendum and define its possible scope. Moreover, there is a clear tendency in Europe today to make more frequent use of referendum as an instrument of direct democracy for legislative purposes and in this respect the referendum is subject to a control as to its compatibility with the Constitution. Consequently, both the procedural and substantive aspects of the people’s action designed to introduce new law or remove existing law are clearly subjected to constitutional scrutiny¹. Definitely, and notwithstanding their undisputed political value, decisions taken by legislative referendum are not beyond the reach of the Constitution.

This is all the more so as the referendum cannot be regarded as an exercise of sovereign power by the people, but rather it is the expression of the will of the people by a means regulated within the framework of the Constitution. This is true also for constitutional systems that establish a co-habitation of popular and parliamentary sovereignty, as is the

¹ In a recent judgment, the Portuguese Constitutional Tribunal emphasised this approach by clearly stating that the subject of the referendum should be constitutional. Ultimately, subjecting decisions taken by referendum to constitutional review amounts to reconciling the principle of majority with the principle of constitutionality (*Diário da República n° 91, 18.04.1998, 1714(2)-1714(35); Bulletin of Constitutional case law POR-1998-1-001*). The Venice Commission has on several occasions stressed the need to closely observe the constitutional provisions on amending the Constitution, even when it comes to constitutional referenda (cf. *Opinion on the Constitutional Referendum in Ukraine, of 31 March 2000, CDL-INF (2000) 11; cf. also the Commission’s position concerning the constitutional referendum in Moldova*).

case of Slovenia where the people are not excluded from the process of constitutional revision (Article 170 of the Constitution of the Republic of Slovenia). The Rapporteurs find that there is no common European standard according to which the results of any referendum of whatever nature are binding upon the constituent power even in the absence of a constitutional provision. Consequently, the results of the referendum of 8 December 1996 should not prevent the National Assembly from exercising its “constitution making” powers under the Constitution.

The Rapporteurs finally note that the National Assembly is politically responsible to the people for deciding to amend the Constitution and constitutionalise the choice of the proportional electoral system. In this respect the fact that legislative elections are to be held in the near future and the sovereign people will have the opportunity to manifest its approval or disapproval of the National Assembly’s stand is in itself a guarantee for democracy.

In view of the fact

- that there was a need to react rapidly to the risk of paralysis of the democratic functioning of the State,
- that the National Assembly acted as a constitution making body whereas the referendum of 8 December 1996 was of “preliminary” legislative character,
- that the Constitutional amendment was enacted in strict compliance with the Constitution, and
- that the National Assembly’s responsibility is engaged at the forthcoming legislative elections,

the Rapporteurs are of the opinion that the National Assembly’s reaction to the risk of a constitutional impasse, i.e. the adoption of amendments to the Constitution adopted on 25 July 2000 in strict compliance with the latter’s relevant provisions, is not in conflict with European democratic standards.

The Rapporteurs would further suggest that the National Assembly considers in the near future which legislative and possibly constitutional amendments are required to avoid the risk that similar situations arise again in Slovenia. They recall in this respect that on several occasions constitutional bodies in other European countries have been confronted with a similar risk. In a judgment given on 18 January 1995 (*Gazzetta Ufficiale, Prima Serie n° 3; Bulletin of Constitutional Case-law ITA-95-1-001*), the Constitutional Court of Italy, seized with the question of admissibility of a referendum to abrogate a set of electoral provisions, laid down some principles that should be followed when it comes to deciding by referendum issues affecting the functioning of constitutional institutions. The Italian Constitutional Court observed that it might be acknowledged that the Parliament has a constitutional duty to co-operate, in that if the outcome of the referendum is in favour of repealing the existing legislation, the Parliament has to introduce (on its own initiative) legislation to comply where necessary with the wish of the people as expressed in the referendum. However, if after the referendum the legislator fails to introduce new legislation to fill the legal vacuum or amend the electoral provisions, there would be no

effective remedy to oblige the Parliament to enact a law and the situation amounts to a crisis in the functioning of representative democracy. To avoid this, a referendum affecting the rules of functioning of constitutional bodies should only be admitted if the rules that remain in force after the referendum allow the constitutional body concerned to function without any further legislative action being required.