

CONSTITUTIONAL DETERMINATION OF THE ELECTORAL SYSTEM AND THE COUNTRIES OF FORMER YUGOSLAVIA²

Abstract

The author analyses the constitutional determination of the electoral system, its different manifestations and consequences, hence questions if they should find their place within materia constitutionis. Comparative constitutional examples show both theoretical and practical flaws of such determination, as both explicit and implicit prediction has more drawbacks than advantages. After explanation and differentiation of related key-concepts with comparative examples, the author focuses on former Yugoslav countries that display a variety of possible solutions. Inter alia, he finds that the Serbian constitution implicitly determines the proportional electoral system and advocates future revision of the norms in question, since the present solution can be considered as the least favourable.

Keywords: *electoral system, constitution, proportional system, countries of former Yugoslavia, constitutional determination, constitutional law.*

1. Introduction

Elections belong to the group of the most sensitive and important topics of a democratic society and state. They are defined as “a specific form of political decision-making of citizens, who, by the manifestation of their will, elect individuals and establish bodies of decision-making powers of general social significance”³. Elections are carried out within the legal framework of the electoral system - “an institutional modus in which voters express their political preferences in the form of votes and

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³ M. Jovanović, *Izborni sistemi – izbori u Srbiji 1990-1996*, Institut za geopolitičke studije, Službeni glasnik, Beograd 1997, 11.

within which voters' votes are converted into mandates"⁴. The electoral system, which is sometimes described in the literature as possibly "the most manipulative element of the institutional design"⁵ is legally determined and protected by electoral laws and the constitution.

Modern constitutions, by rule, determine the most important electoral aspects that include the definition of active and passive voting rights, the number of members of the parliament (MPs), the length and nature of their mandates and, sometimes, their parliamentary incompatibility.⁶ Constitutions also often determine the type of the electoral system and therefore raise the issue of its selection to the constitutional level.⁷ In such countries, as well as others, detailed regulations of the way how the electoral system should look like are left to electoral laws, but the constitutional determination of the electoral system sets the highest limits for major electoral reforms which leads to the following questions: What are the consequences of such determination and should it have its place within the constitution? Is there a difference between electoral systems when this issue is in question? What do the comparative constitutional experiences show, and finally, how is that matter regulated in Serbia and the other countries of former Yugoslavia?

2. Electoral systems and *materia constitutionis*

2.1. Short differentiation of electoral systems

There are only two fundamental electoral systems: proportional (election by list⁸) and majority (sometimes called "plurality" or "majoritarian"⁹)

⁴ M. Kasapović, *Izborni leksikon*, Politička kultura, Zagreb 2003, 160.

⁵ M. Jovanović, „Institucije i konsolidacija demokratije – dve decenije tranzicije u Srbiji“, *Dve decenije višestranačja u Republici Srbiji – Ustavi, izbori i nosioci vlasti 1990-2010*, Službeni glasnik, 2011, 15.

⁶ D. Simović, V. Petrov, *Ustavno pravo*, Kriminalističko-policijska akademija, Beograd 2014, 156.

⁷ D. Nohlen, *Wahlrecht und Parteisystem – Zur Theorie und Empirie der Wahlsysteme*, Verlag Barbara Budrich, Opladen&Farmington Hills (MI), 2009, 145. Some authors however consider these countries to be exceptions from the rule that electoral determination is left to the respective laws: D. Simović, V. Petrov, 156; M. Pajvančić, *Parlamentarno pravo*, Fondacija Konrad Adenauer, Beograd 2008, 16.

⁸ Proportional representation system (or system of election by list) is "the type of electoral system based on the principle of fair political representation of the electorate and distribution of seats in the representative body according to the rules of proportionality of votes and mandates"- M. Kasapović, 321.

⁹ Majority electoral system is "the type of electoral system in which the winner is chosen by the relative or absolute majority of voters". The main purpose of such systems is "not the fair political representation of social groups and political parties, but the creation of an effective and responsible government"- M. Kasapović, 353.

representation systems, which both have their subdivisions.¹⁰ Although literature sometimes clearly (or vaguely) suggests that there is also a third, separate system, we share the opinion that there is no such thing as a separate “mixed system”, but only majority and proportional systems that more or less correspond to the “pure form” of the respective principles.¹¹ In other words, it is either the combination of the two, with the prevailing elements of one of them, or simply the use of both systems together.¹² The latter can be, for example, found in Germany, where half of the representatives are elected by the majority system and half by election by the list. The two principles of proportional and majority systems cannot be mixed together because they are antithetically opposed.¹³ The German example, as well as similar systems, could, however, be addressed as “combined systems”¹⁴, indicating that the two existing systems “work together” in some correlation, and not that “the merger” has created some new system with its own logic, rules and repercussions. The disambiguation of the “mixed system” as nothing more than the combination of the two major systems is important from the standpoint of its possible unconstitutionality (if proportionality is explicitly determined by the constitution).

2.2. Content of *materia constitutionis*

The Constitution, being the foundational legal act, should regulate the basics of the state and social order, ideally all the basics, but at the same time - only the basics.¹⁵ Introduction of norms that do not necessarily belong to *materia constitutionis* is often done on purpose in order to secure the highest legal protection for the norms in question (because of the present political or some other interest). This should be avoided,

¹⁰ One of the more influential typologies in literature divides both the majority and the proportional electoral systems into five subdivisions each. For more see: D. Nohlen, M. Kasapović, *Wahlsysteme und Systemwechsel in Osteuropa*, Springer Fachmedien, Wiesbaden 1996, 28-32. The mandate distribution method, number of constituencies and selection of the particular model of the electoral list are within the most important criteria for the classification of proportional systems. Just the choice of the electoral list could substantially alter the visage of the concrete electoral system and should therefore be always seriously considered. See: M. Đorđević, „Zašto je izborna lista značajna za izborni sistem“, *Pravni život*, 12/2016, 649-663.

¹¹ Also: M. Jovanović, (1997), 81; D. Simović, V. Petrov, 153; Đ. de Vergotini, *Uporedno ustavno pravo*, Službeni glasnik, Beograd 2015, 404-407; etc.

¹² The so called mixed electoral system should present some sort of “new alchemy synthesis of the proportional and majority systems, but lacks the general, systematic determination to be a system on its own.” – S. Manojlović, “Izborna reforma u Srbiji – kako i zašto?”, *Reforma izbornog sistema u Srbiji*, Centar za javno pravo, Sarajevo 2015, 34 – 35.

¹³ „Sie stehen sich (...) antithetisch gegenüber“ – D. Nohlen, 144.

¹⁴ D. Nohlen, M. Kasapović, 32.

¹⁵ M. Jovičić, „O ustavu“, *Ustav i ustavnost*, Službeni glasnik, 2006, 149.

not only because the constitutional text should not be too extensive and consequentially possibly overburdened and disorganized, but also because such solutions can backfire with serious consequences. If it turns out that the norm, wrongfully put in the constitutional text, suddenly does not meet to the requirements of changed social circumstances, the result will be the instability of the constitution and the need for its change, all of which could have been avoided if the relevant norm was simply determined by law.¹⁶

From the standpoint of the traditional, doctrinal understanding of *materia constitutionis* as the relation between the government and its citizens (*gouvernants et gouvernés*)¹⁷ the question immediately emerges whether the constitutional determination of the electoral system should belong to this group or not. On one hand, it is reasonable to claim that in a modern democratic society electoral systems present one of the most crucial aspects of the relation between the government and its citizens because it is the very citizens who partially give up their sovereignty through elections to form the government. It can also be claimed that the possible abusive change of the electoral system sets it high on the list of values that should be firmly protected. On the other hand, the combined importance and delicate nature of electoral systems and its consequences, as well as the fact that they require more flexibility than most constitutional norms (in order to be able to respond and adapt if necessary to the ever-changing requirements of the political system), have as a consequence the fact that such “firm protection” by the constitution could be a double-edged sword. If the political situation, for whatever reason, at one point demands the change of the electoral system, that would consequentially lead to the necessity of constitutional revision, which is, as a rule, far more difficult than the procedure required for the change of laws. Also, since the proportional and majority electoral systems have many subtypes (sometimes combined), a general constitutional determination of the electoral system creates the constant need for interpreting every significant change within the electoral system, because of the danger that the change in question could be contradictory with a constitutionally proclaimed principle and therefore – unconstitutional.

2.3. Constitutional options

Most constitutions do not determine the type of the electoral system, but a significant number does, out of which almost all do it explicitly and very few implicitly. If the electoral system is constitutionally determined, it is usually done within the section dedicated to the national assembly.

¹⁶ *Ibid*, 150-151.

¹⁷ M. Jovičić, „Putevi i stranputice jugoslovenske ustavnosti”, *Srbija na prelomu vekova*, Službeni glasnik, 2006, 98.

There is simply an article stating that the “members of the parliament will be elected according to the proportional principle”, or some other similar formulation. By rule, if the constitution openly declares the type of electoral system, it is the proportional one. Hence the question – why isn’t that the case with the majority or some combined systems as well? The answer can be widely discussed, just like the “eternal” debate about the advantages of both systems, but it seems reasonable that the answer lies in the very nature of the proportional system. Briefly put, it is obvious that the system of election by list represents the sovereign people more accurately than the majority system and therefore better fulfils the ideal of semi – representative democracy.¹⁸ That fact can interfere with the ideas of some prevailing political parties and elites who could benefit more from the majority systems since they produce overrepresentation, hence further strengthening of power. That is why constitutions sometimes determine the proportional system, to exclude the other (the majority system is easier to get misused), and ensure better representation of parties as well as minorities. With such action, the choice of the electoral model is elevated into the rank of the highest values (along with, for example, human rights) and is given the highest possible legal protection.

2.4. Explicit determination

If the constitution makers decide that the determination of the electoral system has to find its place in the constitution, it is definitely much better to achieve that by clear, explicit norm, then implicitly. However, even such determining, sharp-cut norms can be, depending on the legal system, susceptible to diverse interpretations which lead to interesting practical and theoretical conclusions.

Austria, for example, is one of the countries that have constitutionally, explicitly adopted the proportional principle. Art, 26 par. 1 of the Austrian Constitution says: “The National Council is elected by the Federal people in accordance with the principles of proportional representation on the basis of equal, direct, personal, free and secret suffrage by men and women who have completed their sixteenth year of life on the day of election”. What at first glance seems quite clear can be, however, analytically disputed. Markus Andreas Haller in his PhD thesis „*Das Mehrheitswahlrecht und seine Vereinbarkeit mit der österreichischen Bundesverfassung*“ uses various methods of interpretation to question the limits of such determination. He finds that, although the majority vote is obviously incompatible with the constitutionally proclaimed proportionality, the aforementioned article,

¹⁸ M. Đorđević, 658- 660.

literally analyzed, does not require the “pure” form of the proportional electoral system¹⁹, while the constitutional principles of equal voting and the democratic principle²⁰ would not necessarily be incompatible with a majority vote. Possible contradictions between the determined proportionality and the other constitutional norms (on parliamentary fragmentation, constituencies etc...) are also exposed.²¹

The Austrian constitution predicts two different procedures for its change, depending on the content of the norm.²² A complicated procedure that requires a compulsory referendum applies when the provisions relating to democracy, rule of law and the federal principle (with the addition of the separation of powers and the liberal principle²³) need to be changed. In his work Haller concludes that the introduction of the majority electoral system in Austria would not have to trigger this constitutional revision mechanism, but rather a simple, constitutionally determined procedure for an amendment, because of the fact that the choice of the electoral system does not violate or affect any of the aforementioned fundamental principles and values of the Constitution.²⁴ This conclusion can be considered as another argument in favour of the claim that the choice of the electoral system does not belong to the traditionally understood *materia constitutionis*. It is also a good example that the simple constitutional prediction of the electoral principle, that at first glance seems to be crystal clear and assuring, can actually introduce an element of uncertainty, as well as being restraining.

2.5. Implicit determination

Finally, there are some constitutions that determine the electoral system implicitly, either by norms directly unrelated to the electoral matter (that assume and require a certain electoral system for their application), or “by the spirit of the constitution” leading to the conclusion that a certain electoral type must be applied. The first situation can be the consequence either of the constitution-maker’s intention to determine the electoral system “undercover”²⁵, which would be unethical and unacceptable or – just a plain mistake, still with severe consequences as if it has been done intentionally. One of the countries with the implicit constitutional determination of the electoral system is, as we

¹⁹ M. A. Haller, *Das Mehrheitswahlrecht und seine Vereinbarkeit mit der österreichischen Bundesverfassung*, Dissertation, Rechtswissenschaftliche Fakultät Wien, 2013, 81.

²⁰ *Ibid.*, 200.

²¹ *Ibid.*, 82, 86, etc.

²² Austrian constitution, art. 44.

²³ Interpretation of the Constitutional Court.

²⁴ M. A. Haller, 211.

²⁵ In which case the deceptive intention cannot be ruled out, since the electoral determination could have been done explicitly, if it was not intended underhandedly.

shall see, the Republic of Serbia. The second situation, where the constitution does not either directly or indirectly norm the electoral system type, but such conclusion derives from the constitutional logic, is very rare but still can be found. For example, the widespread public debate has been going on in Canada since the last year because of the wish for a change of the electoral system (from the present majority to the proportional one) and the possible unconstitutionality of such action.²⁶ Although the present first-past-the-post (majority) electoral system is not even mentioned in the constitutional text, the Supreme Court interprets electoral changes as altering the “constitutional architecture”, which is unconstitutional and consequently in need for a constitutional amendment.²⁷ Canada, therefore, presents an exception on two accounts – it has a (possible) implicit constitutional determination, and that determination establishes the majority system. Out of all the possibilities, it seems that Canadian example, at least theoretically, can be considered as the least desirable, as it sets vague and loose lines, susceptible to (un)deliberate (mis) interpretation.

2.6. Lists of European countries

However, unlike Canada, most constitutions whose makers had decided to determine the electoral system, opted for the proportional one, and by rule – explicitly. Dieter Nohlen, in his famous work „*Wahlssysteme und Parteiensystem – zur Theorie und Empirie der Wahlssysteme*“, gives a list of eighteen Western European countries that do or do not have the constitutional determination of the electoral system.²⁸

Countries whose constitutions proclaim the (proportional) electoral system are Belgium, Denmark, Ireland, Island, Luxembourg, The Netherlands, Austria, Portugal, Switzerland and Spain. This list has been quoted and expanded by Eckhard Jesse, who adds Estonia, Latvia, Malta, Poland and the Czech Republic, with the intention of covering all the EU member states at that time (2008) with the list.²⁹ Countries that leave the determination of the electoral system to the electoral laws are Germany,

²⁶ “Proportional representation may require Constitution change”, <http://www.cbc.ca/news/politics/electoral-reform-constitutional-change-1.3433335>, last visited November 4, 2017.

²⁷ Y. Dawood, „Is a constitutional amendment required for electoral reform?“, *Policy Options*, <http://policyoptions.irpp.org/magazines/june-2016/is-a-constitutional-amendment-required-for-electoral-reform/>, last visited November 4, 2017.

²⁸ D. Nohlen, 145. It is interesting to note that since the first edition of Nohlen’s book in 1986 nothing has changed in the respective countries on this matter, apart from the fact that Belgium’s and Ireland’s constitutions determine the proportional system in the same manner, just in a different article (because of constitutional changes that have in the meantime occurred).

²⁹ E. Jesse, “Wahlssysteme und Wahlrecht“, *Die EU Staaten im Vergleich – Strukturen, Prozesse, Politikinhalt*, Wiesbaden 2008, 302.

Finland, France, Greece, the United Kingdom, Italy and Sweden³⁰, and in addition – Bulgaria, Lithuania, Romania, Slovakia, Hungary and Cyprus.³¹ Russia and Croatia belong to this group as well. Jesse mistakenly puts Slovenia in the second group, although it has, as we shall see, determined the proportional system constitutionally by amendment in 2000.

Each one of the countries that have the proportional electoral system determined by the constitution needs some sort of constitutional reform in order to introduce either the majority system or some form of a combined system whose majoritarian elements could violate the principle of proportionality. Countries that leave this regulation to respective laws, however, often try to find the balance between protection of this important and vulnerable political institute and its flexibility through the required qualified parliamentary majority for the passing of electoral laws.

Countries that emerged after the breakup of Yugoslavia offer illustrative and diverse examples of constitutional and legislative frameworks that deal with this issue.

3. Former Yugoslav countries whose constitutions determine the type of the electoral system

3.1. The Republic of Slovenia

Slovenia is the only former Yugoslav country that explicitly determines the proportional electoral system in its constitution. The country has an incomplete bicameral parliament³² which consists of the National Assembly (*Državni zbor*) and the National Council (*Državni svet*). The upper chamber, the National Council, presents „the representative body for social, economic, professional and local interests”³³, and its election is left to the respective law. However, for the lower chamber which is the main holder of the legislative function, the National Assembly, the Constitution

³⁰ D. Nohlen, 145.

³¹ E. Jesse, 302.

³² Constitutional Court of the Republic of Slovenia, U-I-295/07.

³³ Slovenian constitution, Art. 96. Slovenian parliamentarism could be therefore considered as a type of “social-economic bicameralism (*bicaméralisme socio-économique*)”. This model of bicameralism “... is achieved by the representation of political interests of the people in the first, lower house, represented by individuals through political parties, whereas in the second, upper house, individuals are represented as performers of a particular profession or as participants in a particular economic activity, in other words, the economic and professional interests of the same people are represented by deputies elected by the church, academy, university, commercial, industrial and craftsmen chambers, farmer associations and other cultural and economic communities.” - Spektorsky, Evgeni Vasilevich, quoted by: R. Marković, *Ustavno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd 2014, 294.

itself norms the principle of proportionality: “Deputies, except for the deputies of the national communities, are elected according to the principle of proportional representation with a four-percent threshold required for election to the National Assembly, with due consideration that voters have a decisive influence on the allocation of seats to the candidates”.³⁴

It is interesting that Slovenia has introduced this solution with the constitutional amendment in 2000, contrary to the prevailing opinion of the people. It is often emphasized that citizens of Slovenia prefer the majority electoral system over the proportional one because the latter is “very non-personalized”.³⁵ Public debate on the choice of the electoral model ended up with a referendum on the issue, which took place in 1996. The voters could choose between three electoral system types, and the proposal for the majority system won with a relative majority of votes but failed to receive the prescribed majority to be valid.³⁶ However, two years later, the Constitutional court declared that the referendum was nevertheless successful and that the majority electoral system had won³⁷, but that the result of the referendum (in later opinion, which was also the opinion of the Venice Commission) does not prevent the constitutional introduction of a different electoral system, in accordance with the requirements of the constitutional revision procedure.³⁸

With the constitutional amendment in 2000, the proportional principle was introduced. The idea was to achieve some sort of compromise with those who were strongly advising against the proportional system (because of its assumed depersonalization), hence the part “with due consideration that voters have a decisive influence on the allocation of seats to the candidates” was added to the typical determination that can be found in the other countries. This “addition” was supposed to aid the prevention of depersonalization (through the use of preferential vote and other instruments) but has also opened up space for different interpretations. There are opinions, for example, that because of that part it would not be unconstitutional to introduce the German combined model.³⁹ We, however, are more prone not share the opinion that the constitutional breach would not occur if the German model was introduced since it has distinctive

³⁴ Slovenian constitution, Art. 80 par. 5.

³⁵ Z. Božić, *Prekletstvo večinskega volilnega sistema*, <https://www.portalplus.si/2394/vecinski-volilni-sistem/>, last visited November 4, 2017.

³⁶ C. Ribičić, *From the Electoral System Referendum to Constitutional Changes in Slovenia (1996-2000)*, Venice Commission, 2004, 8, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD\(2004\)008-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD(2004)008-e), last visited November 4, 2017.

³⁷ *Ibid.*

³⁸ C. Ribičić, “Primerjava prednosti in slabosti volilnih sistemov”, *Zbornik znanstvenih razprav*, 2013, 59-60.

³⁹ C. Ribičić (2004), 10.

majoritarian elements that would clearly be in conflict with declared proportionality. The essence of the problem is that the determining norm is too open for confronting interpretations and most likely self-contradictory. It is certain that any confusion and possible self-contradiction within the constitutional text is highly undesirable, and Art. 80 par. 5 of the Slovenian constitution presents one such inconsistency. Slovenia can, therefore, be considered as a country with the explicit determination of the proportional electoral system, which could have been formulated more clearly in order to prevent misinterpretation and possible misuse.

3.2. The Republic of Serbia

The Serbian constitution implicitly determines proportional elections for the Parliament (*Народна скупштина*), hence any change of the electoral law which would introduce some combined or majority system would require a constitutional revision. Such a conclusion derives from two articles of the Constitution: Art. 102 par. 2 (which arranges the status of MPs), and Art. 112 par. 1 pt. 3 (on the competences of the President of the Republic).

Art. 102 par. 2 says that: “Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at the disposal to the political party which proposed him or her to be elected a deputy”. Constitution-makers were led by intention to prevent MPs from “changing the will of voters” by leaving the political party through which he or she had got the mandate and joining some other party, consequently changing the relation of power in the parliament compared to the electoral results (“defectors”). This provision has practically abolished the free mandate of MPs, contradictory to the fact that it is a constitutionally declared principle.⁴⁰ It has been widely criticized by experts and the general public in Serbia⁴¹, as well as the Venice Commission, and was finally put out of power in 2010 (four years after the enacting of the constitution) by the decision of the Constitutional court that has practically disabled the enactment of the law to empower the norm in practice.⁴² However, although the application of the norm has been blocked, it still stands witness to the fact that the constitution makers have opted for the proportional electoral system. If the majority system was introduced, neither would the practical application of the norm be possible since the party to whom the mandate has been “given back” could not simply assign the mandate to someone

⁴⁰ M. Pajvančić, *Komentar Ustava Republike Srbije*, Fondacija Konrad Adenauer, Beograd 2009, 128–129.

⁴¹ See: M. Stanić, „Problem pravne prirode poslaničkog mandata u Republici Srbiji“, *Reforma izbornog sistema u Srbiji*, Centar za javno pravo, Sarajevo 2015, 259 – 283.

⁴² Constitutional court decision IUz-52/2008 – *Official Gazette of the Republic of Serbia* 34/2010.

else (to nominate him or her after the finished elections), nor would the repetition of elections fulfill the goal of the norm, because it is uncertain if the later nominated candidate would win the election at all.⁴³

The majority of Serbian scholars support the claim that this constitutional norm implicitly determines the proportional electoral system, but some reach this conclusion through what seems to be questionable argumentation. Irena Pejić, for example, after referring to Art. 102 par. 2 and the statement that the Constitution implicitly norms the model of proportional representation, says: “Since the system of proportional elections is based on the assumption of party candidacy according to the model of the electoral list, the constitutional provision implies proportional elections as an electoral model. If majority elections were applied, there would be a problem within the system in which sovereignty belongs to the citizens: only party candidates could enjoy “freedom” to make their mandate available to the political party, and this would not apply to the so-called independent candidates or candidates of a group of citizens, which would ultimately lead to the double nature of the parliamentary mandate.⁴⁴ There are three key points here to draw attention to. First, the claim that proportional elections “are based on the assumption of a party candidacy according to the model of the electoral list” seems to be arguable, because the Law on the Election of MPs (Art. 4 and Art. 40) provides for three categories of electoral lists: registered political parties, party coalitions and groups of citizens. Although it is without any doubt that parties have a central place in the electoral process and political life in general, groups of citizens are also very present and visible. Second, the claim how in the case of the implementation of the majority system, the problem would be that only the party candidates would have the “freedom” to make their mandate available to the party, the major problem, as we explained above, would be both a practical and theoretical impossibility to apply this norm in the majority system in the first place. It would not even be possible to come to this discriminating situation at all. Finally, the third argument about inequality between party and other list proposers undoubtedly stands, but relates not only to the hypothetical situation with the majority system, but to the proportional system as well.⁴⁵

Milan Jovanović, concludes quoting the same article and paragraph that the Serbian constitution implicitly predicts the proportional model and says: “This constitutional norm has transformed the free mandate of a

⁴³ M. Đorđević, 652 – 654.

⁴⁴ I. Pejić, “Izborna lista u srazmernom predstavništvu – iskustvo Srbije“, *Izbori u domaćem i stranom pravu*, Institut za uporedno pravo, Beograd 2012, 79.

⁴⁵ V. Đurić, „Dileme slobodnog mandata: između volje naroda i vlasti stranaka“, *Nova srpska politička misao* 1-2/2012, 196-197.

representative into a kind of bound, party mandate. In addition, explaining that the vacant seats of the deputies are filled in the order of the electoral list, the Constitution implicitly constitutes a proportional model of the electoral system, thus reinforcing the criteria for change, i.e. blocking it.”⁴⁶ The claim that the paragraph in question establishes a certain kind of bound, party mandate certainly stands, but the rest of the argument is questionable, since the mentioned filling of seat vacancy is not regulated by the Constitution itself, but by the Law on the election of MPs (Art. 92). The Constitution only states that “the election, termination of office and the position of deputies are regulated by law”⁴⁷.

On the other hand, there are some authors who generally reject the conclusion that the constitutional electoral determination can be drawn out of Art. 102. par. 2. Vladimir Mikić finds the norm in question to be neutral in the sense of this analysis because it’s “content is limited to the determination of the procedural aspects of MPs (the mechanism of calling for parliamentary elections, constituting parliamentary convening, immunity and incompatibility of MPs, etc.)”⁴⁸. He also suggests that the explicit determination of the electoral system should find its place in the future constitutional revision.⁴⁹ Although this kind of restrictive systematic interpretation presents a reasonable standpoint, we are still prone to conclude, using primarily verbal and logical interpretation methods, that art. 102 par. 2 of the Serbian constitution is sufficient to claim that proportional electoral system is determined constitutionally.

Art. 112 par. 1 pt. 3 in our view strengthens this opinion and removes any doubts that the Serbian constitution determines the proportional system. It says that “the President of the Republic shall (...) propose to the National Assembly a candidate for Prime Minister, after considering views of representatives of elected lists of candidates”. This norm is, just like the first one, not directly related to the electoral system, but would be inapplicable if any other but the proportional system was introduced. It completely excludes majority systems and surely most combined ones (actually it is difficult to think of any other system but the proportional one, which would not be vulnerable to unconstitutionality because of this norm).

Analysis of these two articles shows that the constitution makers have indeed implicitly determined the proportional electoral system within

⁴⁶ M. Jovanović, “Izborni sistemi Srbije – da li, šta i kako menjati?”, *Reforma izbornog zakonodavstva u Srbiji*, Centar za javno pravo, Sarajevo 2015, 21.

⁴⁷ Serbian Constitution, Art. 102. par. 4.

⁴⁸ V. Mikić, „Reforma izbornog sistema u Srbiji – predlozi za dostizanje veće reprezentativnosti narodnih poslanika“, *Reforma izbornog sistema u Srbiji*, Centar za javno pravo, Sarajevo 2015, 121.

⁴⁹ *Ibid.*

the Constitution.⁵⁰ It is difficult to assume what was the intention of the constitution maker for such action. Art. 102 par. 2 was probably motivated by daily politics and suspension of unwanted parliamentary praxis, hence the electoral system determination could be considered as “collateral damage” of an unsuccessful and inadequate attempt to stop such praxis. Once this norm was introduced, the formulation of art. 112 par. 1 pt. 3 was not important anymore – it could have also been just an oversight. It remains unclear why the explicit determination was not introduced, instead of this least favourable solution. What seems to be certain is the fact that because of this implicit determination of the proportional electoral system, any future change of the proportional principle in parliamentary electoral legislation would require constitutional revision and referendum, since both determining norms belong to the parts of the Constitution for whose revision referendum is mandatory.⁵¹

4. Explicit determination of the electoral system on the entity level – Bosnia and Herzegovina

Bosnia and Herzegovina (BiH) is a specific, complex state, consisting of two entities, Republic of Srpska and Federation of Bosnia and Herzegovina, while the district Brčko has special status. Elections in BiH are constitutionally regulated by Annex 4 of the Dayton peace agreement (Constitution of BiH), Constitution of Republic of Srpska, and Constitution of the Federation of BiH.⁵² Before the enactment of the Electoral Law by the Parliamentary Assembly of BiH in 2001, Annex 3 of the Dayton peace agreement (“On the elections”) along with accompanying sub-constitutional norms, was in power, although it was just intended to help establish the initial institutions after the end of the war, i.e. only set the temporary electoral system of BiH.⁵³ The electoral system is not constitutionally determined for elections of the lower chamber of the bicameral parliament of BiH (*Predstavnički dom*), as well as the parliament of Republika Srpska (*Narodna skupština*)⁵⁴.

⁵⁰ Simović and Petrov share this opinion: D. Simović, V. Petrov, 157.

⁵¹ Serbian constitution, art. 203 par. 7: “The National Assembly shall be obliged to put forward the act on amending the Constitution in the republic referendum to have it endorsed, in cases when the amendment of the Constitution pertains to the preamble of the Constitution, principles of the Constitution, human and minority rights and freedoms, the system of authority, proclamation of the state of war and emergency, derogation from human and minority rights in the state of emergency or war, or the proceedings of amending the Constitution.”

⁵² Annex 3 of the Dayton peace agreement (“On the elections”) was introduced to help establish the initial institutions after the end of the war.

⁵³ M. Sahadžić, „The Electoral System of Bosnia and Herzegovina“, *Suvremene teme*, 2009/1, 65 – 67.

⁵⁴ Constitution of the Republic of Srpska, Art. 71 par. 4 : „Election and cessation of MP’s mandate and formation of constituencies is determined by law“.

However, the constitution of the Federation of BiH explicitly determines the proportional principle for the House of Representatives of the Federation of BiH (*Zastupnički dom*). In art. 3 par. 2 of section 4 of the Constitution (“The House of Representatives of the Federation”) it is clearly stated that before every election, each registered party announces its electoral list of the candidates. Elected MPs in the Parliament are persons starting from the top of the electoral list, according to the number of votes received. Replacements of MPs are made with respect to the order of remaining candidates from the list. This regulation, which is usually left to the respective law, clearly determines the proportional principle.⁵⁵

Although BiH, as a member of the UN and internationally recognized country, doesn’t constitutionally determine the type of the electoral system on state level, because of its complexity and the fact that the entities have their own constitutions and the elements of statehood, it was worth mentioning that one of the entities, the Federation of BiH, explicitly determines the proportional system within its constitution.

5. Former Yugoslav countries whose constitutions do not determine the type of the electoral system – the Republic of Croatia, Republic of Macedonia and Montenegro

Slovenian and Serbian constitutions explicitly and implicitly predict their electoral systems. In Bosnia and Herzegovina, it is explicitly predicted in the constitution of one entity. All the other former Yugoslav countries, however, do not have such determination; therefore the change of the electoral system does not trigger any need for constitutional revision.

The Croatian constitution regulates the election of MPs in art. 72 in which it says that “the Croatian Parliament (*Hrvatski Sabor*) shall have no less than 100 and no more than 160 members, elected on the basis of direct universal and equal suffrage by secret ballot”. Next article simply states that “the number of members of the Croatian Parliament, and the conditions and procedures for their election, shall be regulated by law”⁵⁶. The decision of the Croatian constitution makers not to specify the number of MPs, but only set the limits and leave that matter to the respective law is doctrinally considered to be exceptional⁵⁷, but paradoxically two out of the six former Yugoslav countries utilize this principle: Croatia and Macedonia. Croatian Electoral law enjoys special constitutional protection since the constitution sets it within the group of laws for whose revision a qualified majority is

⁵⁵ N. Ademović, J. Marko, G. Marković, *Ustavno pravo Bosne i Hercegovine*, Fondacija Konrad Adenauer, Sarajevo 2012, 342.

⁵⁶ Croatian constitution, art. 73 par. 2.

⁵⁷ V. Petrov, *Parlamentarno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd 2010, 52.

required.⁵⁸ If the Serbian norm on presidential competences (one of two that determine proportionality) is set beside to the analog Croatian one – a small, but very important difference can be noted: “The President of the Republic shall (...) confide the mandate to form the Government to the person who, upon the distribution of the seats in the Croatian Parliament and consultations held, enjoys confidence of the majority of its members”⁵⁹. Unlike the Serbian norm, the Croatian one does not give any clues that would implicate the application or need for exclusion of any electoral system type. Croatia has changed a couple of electoral models (including combined ones)⁶⁰ under the present constitution and has never had to revise its text on that matter.

The same principles can be found in Macedonia as well. The constitution states that “the Assembly of the Republic of Macedonia (*Собрание на Република Македонија*) is composed of 120 to 140 Representatives. The Representatives are elected at general, direct and free elections and by secret ballot.”⁶¹ The rest of the regulation is left to the law.⁶² Just like in Croatia, the constitution sets only the range for the number of MPs and, also like in Croatia, votes of the majority of all the MPs are necessary for the revision of the Electoral law. There are no norms in the Constitution that would suggest the application of a particular electoral system type.

The constitution of Montenegro also does not determine the type of the electoral system and leaves this matter to the respective law.⁶³ Article 83 says that “the Parliament (*Скупштина Црне Горе*) shall consist of the Members of the Parliament elected directly on the basis of the general and equal electoral right and by secret ballot”. Revision of the Electoral law is constitutionally placed on a higher rank compared to Croatia and Macedonia since the qualified majority of 2/3 of all the MPs is required.⁶⁴ Norms on the presidential competences contain nothing that would indicate the application of a certain electoral type.⁶⁵

⁵⁸ Croatian constitution, art. 83 par. 2.

⁵⁹ *Ibid.* art. 98 par. 1 pt. 3.

⁶⁰ M. Stanić, „Расподела мандата у европским посткомунистичким земљама на примерима Полске, Бугарске, Хрватске и Македоније“, *Страни правни живот*, 2013/3, 320 – 322.

⁶¹ Macedonian constitution, art. 62.

⁶² *Ibid.*

⁶³ M. Šuković, *Ustavno pravo – univerzalna ustavna tematika i ustavno pravo Crne Gore*, Cid, Podgorica 2009, 345.

⁶⁴ Montenegro constitution, art. 91 par. 3

⁶⁵ „The President of Montenegro (...) proposes to the Parliament: the Prime Minister-Designate for composition of the Government after the completion of the discussions with the representatives of political parties represented in the Parliament...” – Montenegro constitution, art. 95 par. 1 pt. 5.

6. Conclusion

Constitutional determination of the electoral system type is not the best way to protect the electoral system from its possible misuse. The constitution has to protect the highest values of society, but at the same time allow undisturbed functioning of the state. Although the countries whose constitution makers have opted for this solution, almost always predict the proportional electoral system (which we find to be the most democratic), such determination could possibly jam the political system and endanger normal functioning of the state, hence the protection and exercise of other important rights. The state should serve the constitution, but the constitution should also serve the state and society, therefore a certain flexibility of constitutional legal solutions is desirable due to unforeseen social and political circumstances. For this reason, it seems that *materia constitutionis* should be set restrictively, since the extensive normative leads either to rather frequent constitutional revision (which we consider to be unfavourable) or to the rigidity of the system that could hinder progress.

Comparative analyses show that countries with the constitutional determination of the electoral system are prone to have problems if in need of electoral system changes. Even if the prediction is explicit, it is by rule rudimentary and can be vulnerable to various interpretations. An implicit determination is even less desirable since it produces more uncertainty and possible misapplication. Former Yugoslav countries display all the possible solutions of this issue: the absence of constitutional determination (Croatia, Macedonia and Montenegro), the explicit (Slovenia) and the implicit one (Serbia), and even the “partial determination” (Bosnia and Herzegovina). In the case of Serbia, it is clear that the two norms of the Constitution indirectly stipulate the proportional system. Although Serbia was one of the first countries in history to introduce the proportional system⁶⁶ and its application should undoubtedly remain, its constitutional determination presents the least favourable solution. Therefore, we would strongly advise that this is taken into consideration within the announced, upcoming revisions of the Constitution. Any determination of the electoral system should be left out of the Constitution and this matter should be arranged within the Electoral law, which would require a qualified majority for its enacting and revision, thus ensuring adequate protection.

⁶⁶ M. Đorđević, “Istorijat izbora u Kneževini i Kraljevini Srbiji”, *Izbori u domaćem i stranom pravu*, Institut za uporedno pravo, Beograd 2012, 284.

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USTAVNO ODREĐENJE MODELA IZBORNOG SISTEMA I ZEMLJE BIVŠE JUGOSLAVIJE

Rezime

Zakonodavac se u određenom broju zemalja odlučio da eksplicitno ili implicitno samim ustavom propiše model izbornog sistema i na taj način mu, kao jednoj od najvišoj vrednosti, pruži najjaču pravnu zaštitu. Iako su ovakva rešenja najčešće motivisana sprečavanjem zloupotrebe izmene izbornog sistema, što predstavlja veoma osetljivo pitanje, na osnovu teorijskih razmatranja i uporednopravnih primera se može zaključiti da ovakvo ustavno predviđanje po pravilu donosi više štete nego koristi, te da se efikasnija zaštita može postići na druge načine. Implicitno određenje izbornog sistema predstavlja najnepoželjnije rešenje, jer dovodi do nesigurnosti i otvara prostor za najrazličitija tumačenja, što ne znači, kako primeri pokazuju, da su na to imuni ustavi koji eksplicitno determinišu model izbornog sistema. Na primeru ustava nekadašnjih jugoslovenskih država mogu se videti gotovo svi, različiti pristupi ovom pitanju. Hrvatska, Makedonija i Crna Gora uopšte ne poznaju ustavno određenje modela izbornog sistema, Slovenija poznaje pak eksplicitno, Bosna i Hercegovina delimično (samo za jedan entitet), a Srbija implicitno ustavno određenje modela izbornog sistema, koje bi u budućoj reviziji ustava trebalo promeniti, tj. ukloniti. U traženju prave mere *materiae constitutionis* treba nastupiti restriktivno, uz uvažavanje potrebe za elastičnim rešenjima kada odnosno pitanje to nalaže. Kako odabir izbornog modela spada u jedno od takvih pitanja, njegovo određenje je najbolje ostaviti relevantnom zakonu, a zaštitu obezbediti traženjem kvalifikovane većine za njegovo donošenje i izmenu.

Ključne reči: izborni sistem, ustav, proporcionalni sistem, države bivše Jugoslavije, ustavno određenje, ustavno pravo.