REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Case No.: U-I-380/06-11
Date: 11 September 2008

D E C I S I O N

At a session held on 11 September 2008 in proceedings to review constitutionality initiated upon the petition of Roberto Battelli, Koper, represented by Dr. Andraž Teršek, Kamnik, the Constitutional Court

d e c i d e d a s f o l l o w s:

1. **The first paragraph of Article 10 of the Societies Act (Official Gazette RS, No. 61/06) is inconsistent with the Constitution.**

2. **The National Assembly is obliged to remedy the established inconsistency within a period of one year from the publication of this decision in the Official Gazette of the Republic of Slovenia.**

3. **The petition for the commencement of the proceedings to review the constitutionality of Article 3 of the Public Use of the Slovene Language Act (Official Gazette RS, No. 86/04) is dismissed.**

R e a s o n i n g

A.

1. The petitioner as a representative of the Italian national community in the National Assembly and as a member of this national community challenges Article 10 of the Societies Act (hereinafter referred to as the SA), which regulates the name of a society, and Article 3 of the Public Use of the Slovene Language Act (hereinafter referred to as the PUSLA), which regulates the public use of the languages of the national communities. In the opinion of the petitioner, the challenged regulation unconstitutionally and in a manner inconsistent with the instruments adopted upon independence restricts the use of the language of the Italian national community regarding the determination of the name of a society. Such is of essential importance for the establishment and operation of a society, and there is no evident constitutionally admissible reason for such restriction. In addition, by such regulation the legislature allegedly blurred the difference determined by the Constitution between the Italian national community and its members and the members of any other national community. Therefore, the challenged regulation allegedly violates the

special rights granted to the autochthonous national communities and their members in accordance with Articles 11 and 64 of the Constitution. It is allegedly also inconsistent with Article 2 and the first paragraph of Article 5 of the Constitution, which already guarantee the protection and rights of these communities as constitutional principles. Such regulation allegedly also violates the right of the members of these communities to freedom of expression, as determined in Article 39 of the Constitution. The petitioner is of the opinion that the first paragraph of Article 10 of the SA is inconsistent with the Framework Convention for the Protection of National Minorities (Official Gazette RS, No. 4/98 – hereinafter referred to as the FCPNM) and the European Charter for Regional or Minority Languages (Official Gazette RS, No. 17/00 – hereinafter referred to as the ECRML), and as a consequence also with Article 8 of the Constitution. He refers to the hitherto constitutional case-law regarding the protection of the use of the languages of the national communities in Constitutional Court Decision No. U-I-218/04, dated 20 April 2006 (Official Gazette RS, No. 46/06 and OdlUS XV, 29) and regarding the significance of the language ties of the national minorities with their own language within the meaning of Constitutional Court Decision No. U-I-296/94, dated 28 January 1999 (Official Gazette RS, No. 14/99 and OdlUS VIII, 21). In the opinion of the petitioner, the challenged provision of the PUSLA does not resolve the position and the use of the languages of the national communities, but preserves a state of legal uncertainty and therefore it is allegedly unclear and ambiguous, and as such inconsistent with Article 2 of the Constitution. Article 17 of the PUSLA is also allegedly constitutionally disputable. The rules on the language which apply for firms, i.e. for the names of legal entities under private law, and natural persons who carry out registered activities allegedly are subject to the same substantive inconsistency with the Constitution as the above challenged regulation if the term “a foreign language” also refers to the constitutionally protected national communities and their members.

2. In a submission in which the petitioner supplemented and corrected the petition and replied to the viewpoints stated in the Government's opinion and in the reply of the National Assembly, he redefined the principal allegation regarding the inconsistency with the Constitution, i.e. that the challenged statutory regulation entails a departure from the constitutional requirement of the “concurrent official nature” and “equality” of the Slovene language and the languages of the national communities in the geographic areas where they live. The petitioner namely believes that the requirements determined in the Constitution would be met only if a law determined that the names of societies must be in the Slovene language and in the language of the national community, whereas the challenged regulation allegedly inconsistently with the Constitution subordinates the public use of the languages of both national communities to the Slovene language. The petitioner states that the challenged provision of the SA does not explicitly prohibit the use of the languages of the national communities, nevertheless, it allegedly guarantees the protection of the use of one's own language only on the level of general constitutional protection within the meaning of Articles 61 and 62 of the Constitution. This is allegedly not enough if the special constitutional protection and the rights of the national communities and their members are taken into consideration. The petitioner states that it follows from the Government's opinion and the reply of the National Assembly that the constitutional right to use the languages of the national communities are ensured already by the possibility to choose to use one's own language along with the obligatory use of the

Slovene language. With reference to such, he draws attention to the fact that establishing and operating a society are at least partly official acts, but they are certainly public acts. Therefore, the standpoint regarding the possibility to choose is allegedly inconsistent with the criteria for the equal public use of the languages of the national communities in the geographic areas where they live, as follows from Constitutional Court Decision No. U-I-218/04. As regards the challenged provision of the PUSLA, the petitioner is also of the opinion that it is not constitutionally disputable in itself but as regards its effect, because it allegedly does not ensure that laws regulating different fields will not diminish the level of equality of the languages in nationally mixed areas. He is namely of the opinion that there exists the danger of a gradual decrease in the protection of the language rights of the national communities in different fields.

3. In its reply the National Assembly claims that the petition is not substantiated. The petitioner allegedly follows from an erroneous understanding of Article 10 of the SA, as in the opinion of the National Assembly the language of a national community is not in a subordinate position when naming a society. The challenged provision allegedly follows the regulation laid down in Article 11 of the Constitution, which, by using the word “also” only for the geographic areas where the national communities live, determines that Slovene and the language of a national community are used on an equal basis as official languages. Moreover, the challenged provision of the SA allegedly also determines the same. The facultative use of the translation of the name of a society into the language of a national community is allegedly a manifestation of the freedom of association (Article 42 of the Constitution), and the use of the term “translation” allegedly ensures the same significance of both language variants of the name of the society and not the subsidiary or subordinate nature of the language of a national community. The National Assembly stated that the challenged regulation does not only refer to the members of the national communities, but it applies to all potential founders of societies in this area. In view of the above-mentioned, there is allegedly no basis to claim that the challenged provision of the SA restricts or prohibits the members of the national community from naming societies in their language and their ties therewith. These conclusions allegedly also clearly follow from the PUSLA. This act allegedly broadens the possibility of the equal use of Slovene and the languages of the national communities beyond the boundaries of authoritative communication to the broader public space. The fact that such cases concern the right stemming from the positive obligation of the state within the meaning of the second sentence of the first paragraph of Article 5 of the Constitution, allegedly also follows from Constitutional Court Decision No. U-I-218/04. The National Assembly claims that the public use of a language also includes the establishment of societies. It is precisely the challenged Article 3 of the PUSLA in addition to the first paragraph of Article 1 of the PUSLA[1] that allegedly ensures the equal public use of Slovene and the languages of the national communities in the geographic areas where they live, whereas this general rule allegedly cannot be understood in a manner such that the laws regulating different fields can abolish or restrict such. In the opinion of the National Assembly, the principle of the equality of these languages entails that a law may neither determine that in the areas at issue only Slovene is used, nor that only a language of a national community is used. Furthermore, Article 17 of the PUSLA allegedly cannot be understood in the restrictive sense but in conjunction with Articles 1 and 3 of the PUSLA. Therefore, the challenged provisions of the SA and the PUSLA as well as

Article 17 of the PUSLA allegedly fulfil the constitutional requirements of the positive protection of the rights of the national communities and their languages.

4. The Government is of the opinion that the challenged provisions of the laws are not inconsistent with the Constitution. It claims that in order to take part in legal transactions, a society must have a name which ensures the identification of the society and which makes clearly evident the legal-organisational structure and activities of the society in a manner such that is understandable to everyone who enters into legal relations with it. Therefore, the name of the society must be understandable to everyone in the state. This is allegedly possible only if the name of the society is in the Slovene language; precisely for this reason it cannot be only in the Italian or Hungarian languages, it may be, however, bilingual. The challenged provision regarding the name of a society allegedly does not entail the implementation of Article 11 of the Constitution but additional protection of the rights of the national communities on the basis of positive discrimination (the Government refers to Constitutional Court Decision No. U-I-218/04). The selection of the order of precedence of the languages in the name of the society should allegedly be left to the founders of the society. The challenged regulation is allegedly not connected with Article 17 of the PUSLA, because in the geographic areas where the national communities live, their language is not a foreign language. The translation of the name of the society is an integral part of the bilingual name and not its secondary supplement, and therefore it allegedly does not entail a secondary foreign-language parallel, but is entered in the register of societies as a uniform bilingual name. The Government draws attention to the fact that the amendment of the challenged provision in the direction such that only societies of the members of the national communities, which they establish in order to exercise their rights, could have a name in the language of the national community, would in fact entail a restriction of their rights due to the fact that in the registration procedure such would require the establishment of their affiliation to the national community. Therefore, the right to name a society in Slovene and in the languages of the national communities should be implemented as a general right in cases in which the society has a registered office in the geographic area where these communities live. The Government claims that Article 11 of the Constitution also determines equal use of the official languages in the geographic areas where the national communities live and it does not limit the use of the languages of the national communities only to their members. The Government points out that the purpose of the PUSLA is to regulate the public use of Slovene and not the languages of the national communities, and therefore provisions with such content should not even be in the act. The challenged Article 3 of the PUSLA therefore does not regulate directly and comprehensibly the use of the languages of the national communities but leaves this issue to laws regulating different fields. The possible unconstitutionality of the regulation of this issue in any of them would allegedly not also entail the unconstitutionality of the challenged provision of the PUSLA.

B. – I.

5. The petitioner alleges that Article 3 of the PUSLA[2] is inconsistent with Articles 11 and 64 of the Constitution. In the geographic areas where the national communities live, the challenged provision ensures the public use of their languages in the same manner as prescribed by this act for Slovene and in accordance with the laws

regulating different fields. It can be understood from the text of the challenged provision alone that precisely this provision gives the languages of the national communities a special position and does not treat them as foreign languages. This also clearly follows from the comparison with Article 17 of the PULSA,[3] which determines the naming of persons under private law and which regulates the use of the name in a foreign language. The importance of such differentiation for the constitutional position of the languages of the national communities also follows from the further reasoning of this decision. The Constitutional Court has jurisdiction to separately review the consistency of particular regulations in the laws regulating different fields with the Constitution, taking into consideration the circumstances of each individual case. The possible unconstitutionality of a specific field regulation cannot, therefore, have an influence on the challenged provision. Finally, also the petitioner is of the opinion that the challenged provision of the PULSA is in itself not disputable from the constitutional point of view. As regards the above-mentioned, the Constitutional Court dismissed the petitioner's allegations regarding the unconstitutionality of Article 3 of the PULSA as manifestly unfounded.

B. – II.

6. The petitioner claims that he is challenging Article 10 of the SA, however, it is evident from his allegations that he only challenged the first paragraph of this article.[4] The Constitutional Court accepted the petition for the review of its constitutionality. In view of the fact that the conditions determined in the fourth paragraph of Article 26 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as CCA) were fulfilled, it continued with deciding on the merits of the case.

7. The Republic of Slovenia ensures a high level of protection to the autochthonous Italian and Hungarian national communities.[5] The Constitution protects the autochthonous Italian and Hungarian national communities and their members in two manners. On one hand, it guarantees to everyone, and thus also to them, equal human rights and fundamental freedoms irrespective of national origin (the first paragraph of Article 14 of the Constitution), and on the other hand it provides them some special (additional) rights. The obligation of the state determined in Article 5 of the Constitution that in its own territory it protects and guarantees the rights of the national communities justifies these rights. Certain special rights are determined already by Article 64 of the Constitution. It follows from the established constitutional case-law that the Constitution also allows the legislature to guarantee special (additional) protection of the autochthonous national communities and their members (Constitutional Court Decisions No. U-I-283/94, dated 12 February 1998, Official Gazette RS, No. 20/98 and OdlUS VII, 26, No. U-I-94/96, dated 22 October 1998, Official Gazette RS, No. 77/89 and OldUS VII, 196, and No. U-I-296/94). Special rights to which only minorities or their members are entitled are known in theory as the positive protection of minorities. Positive protection causes positive discrimination due to the fact that members of the minorities are guaranteed rights which the members of the majority are not entitled to but who do recognize such rights and thereby manifest the democratic nature of the society. This institutional framework is a prerequisite for the preservation of the identity and equal integration of both autochthonous national communities and their members into the social life (see Constitutional Court Decision No. U-I-218/04).

8. Such treatment is also in accordance with the international instruments that are binding on the Republic of Slovenia, especially with FCPNM[6] and ECRML[7] as well as with bilateral agreements between the Republic of Slovenia and the Republic of Italy and the Republic of Hungary. For the Italian national community, protection is based on the standards already determined by the Special Statute of the Free Territory of Trieste annex to the London Memorandum of Understanding between the Governments of Italy, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Yugoslavia regarding the Free Territory of Trieste (Official Gazette FPRY, IT, No. 6/54 – hereinafter referred to as the Special Charter), which ceased to be in force with the implementation of the Treaty between the SFRY and the Republic of Italy, signed in Osimo (Official Gazette SFRY, IT, No. 1/77, The Act Notifying Succession, Official Gazette RS, No. 40/92, IT, No. 11/92).[8] The protection of the Hungarian national community is based on the Agreement Guaranteeing the Special Rights of the Slovene National Minority Living in the Republic of Hungary and the Hungarian National Community Living in the Republic of Slovenia (Official Gazette RS, No. 23/93, IT, No. 6/93).

9. The petitioner challenged the first paragraph of Article 10 of the SA, as he is of the opinion that this regulation is inconsistent with Article 11 of the Constitution inasmuch as it only ensures “the use of one's own language” in proceedings before official authorities within the frameworks of Articles 61 and 62 of the Constitution and not also the use of one's own language as an official language in accordance with Article 11 of the Constitution in the geographic areas where these national communities live and regardless of the use of the language within the framework of the special rights of the autochthonous national communities determined in Article 64 of the Constitution. The petitioner's allegations are focused on the position of the language of the Italian national community. The Constitutional Court regarded that this regulation refers to the same extent also to the Hungarian national community.

10. The special rights determined in Article 64 of the Constitution are a special regulation in relation to other human rights and fundamental freedoms which the Constitution otherwise ensures. In order to preserve their national identity, the first paragraph of Article 64 of the Constitution guarantees the national communities and their members the right to establish organisations as a special right in relation to the freedom of assembly and association determined in Article 42 of the Constitution. This entails that for these national communities and their members, the right to assembly and association must be understood more broadly than is the case for other individuals, and thus as the right which also guarantees the preservation of their national identity. The special rights determined in Article 64 of the Constitution are supplemented by the constitutional provision on the languages of the autochthonous national communities as official languages in the Republic of Slovenia.[9] The Constitution in Article 11 determines that (besides the official language in Slovenia, which is Slovene) in those municipalities where Italian or Hungarian national communities reside, Italian or Hungarian are also the official languages. This entails that state authorities, local community authorities, and other bearers of public authority have a duty to use their language when performing a public function with the members of these communities.[10]

11. The Constitutional Court has already adopted the standpoint that the procedural guarantee determined in Article 62 of the Constitution (the right to use one's language and script before state and other bodies) must be understood and interpreted together with Article 64 of the Constitution in cases in which in the geographic areas where the national communities live, the party to proceedings is a member of such community. The purpose of the special rights which the above-mentioned constitutional provision in conjunction with Article 5 of the Constitution ensures to these two communities and their members, is to preserve the identity of the national communities. The content of Article 64 of the Constitution, in which also the right of the members of these communities with reference to the use of their language in proceeding before state authorities is not directly determined, must be connected with Article 11 of the Constitution, which in itself does not directly regulate human rights but, proceeding from the constitutional obligation to protect and ensure the rights of the autochthonous national communities in the geographic areas where they live, determines as official languages (beside Slovene) also Italian and Hungarian (see Constitutional Court Decision No. Up-404/05, dated 21 June 2007, Official Gazette RS, No. 64/07 and OdlUS XVI, 101, paragraph 6 of the reasoning).

12. The procedure for registering a society (Articles 17 to 22 of the SA) is an administrative task which must, in accordance with Article 11 of the Constitution, be carried out in a manner such that the regulation to use both official languages is respected in the geographic areas where the national communities live.[11] The name of a society, however, may not be understood only as an obligatory part of the registration of the society,[12] thus only in a procedural dimension, but most of all as a message to the broader public. Through its name the society as a legal entity under private law operates in the society and enters into relations with other persons, pursuing the goals for which it was established. Thus, this concerns the public use of a language. Therefore, in this case the constitutional protection of the languages of the national communities is ensured within the framework of the right of assembly, which for the members of the national communities is additionally regulated in Article 64 of the Constitution. Pursuant to this constitutional provision, special rights to establish organisations are ensured in express conjunction with the preservation of national identity. An essential component of such is the language.[13] In this regard, also the languages of the national communities are protected within the framework of this constitutional provision in conjunction with the right of assembly with the purpose of preserving national identity. This protection is broader in terms of content than that determined by Article 11 of the Constitution, and together they constitute a logical whole. Therefore, the languages of the national communities in the geographic areas where these communities live have a special constitutional position and protection and are, as such, not foreign languages.

13. On the basis of the fourth paragraph of Article 64 of the Constitution, the law regulates the position and the manner of exercising the rights of the Italian and Hungarian national communities in the geographic areas where they live and those rights which the members of these national communities exercise also outside these areas. The legislature may therefore determine how the rights of these communities are to be exercised also with regard to the language in which is the name of a society with the registered office in the area where these national communities live. However, their constitutional position and rights must be respected thereby. The legislature may therefore not treat Italian and Hungarian, as the languages of the autochthonous

national communities in the geographic areas where they live, as foreign languages. This entails that in such relations Italian and Hungarian may therefore not be (in addition to Slovene) used as a translation language. The legislature must regulate the rights regarding the use of the languages of the autochthonous national communities by determining the manner of direct use of these languages, thus the Italian and Hungarian languages. Due to the fact that the challenged regulation determines that societies with a registered office in the area where the autochthonous national communities live must use a translation of the name of the society in the Italian or Hungarian languages, whereas it does not determine the use of these languages alone, it is inconsistent with the rights enjoyed by these national communities in accordance with the first paragraph of Article 64 of the Constitution. Therefore, the Constitutional Court decided that the challenged regulation is inconsistent with the above-mentioned provision of the Constitution (paragraph 1 of the operative provisions of the decision). It determined a one year period for the legislature to remedy the established inconsistency (paragraph 2 of the operative provisions of the decision).

14. In view of the fact that solely due to the position of the languages of the national communities, the Constitutional Court established the inconsistency of the challenged regulation with the Constitution, it did not address the other allegations of the petitioner. Pursuant to the Constitution, the legislature has the authorization to regulate by a law the position and the manner of the exercise of the rights of the Italian and Hungarian national communities in the geographic areas where they live. Thereby, it must take into consideration the constitutionally guaranteed protection of the rights of the national communities, and it may also determine additional rights in accordance with the Constitution. It follows from recent international instruments that the contracting states should exercise the rights of national minorities which are determined therein, on the basis of the assessment of concrete circumstances and in the sense of adapting to the actual needs of the users of the minority languages.[14] As regards such assessments, the legislature may, after the law is harmonised with the Constitution, determine in more detail or differently the measures for the positive protection of the languages of national communities with reference to the establishment and operation of societies.

C.

15. The Constitutional Court reached this decision on the basis of the second paragraph of Article 26 and Article 48 of the CCA and the third indent of the third paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07), composed of: Jože Tratnik, President, and Judges mag. Marta Klampfer, mag. Miroslav Mozetič, Dr. Ernest Petrič, Jasna Pogačar, Dr. Ciril Ribičič, and Jan Zobec. The decision was reached unanimously.

President
Jože Tratnik

Notes:

[1]The first paragraph of Article 1 of the PUSLA reads as follows:
“The Slovene language (hereinafter referred to as Slovene) is the official language in the Republic of Slovenia. It is used in spoken and written communication in all areas of public life in the Republic of Slovenia, except in cases in which according to the Constitution of the Republic of Slovenia, besides Slovene, the official languages are also Italian and Hungarian, and in cases in which the provisions of treaties binding on the Republic of Slovenia particularly allow that also other languages may be used.”
[2]Article 3 of the PUSLA reads as follows:
“In those municipalities in which the Italian or Hungarian national communities live, the public use of Italian or Hungarian as official languages is ensured in a manner such as is determined by this act for the public use of Slovene in accordance with the provisions of individual laws regulating different fields.”
[3]Article 17 of the PUSLA reads as follows:
“(Naming Legal Entities under Private Law)

1. Firms or names of legal entities under private law and natural persons who carry out registered activities are entered into the court register or other official register, if there exists one, in accordance with the laws regulating different fields, in Slovene.
2. The translation of a firm or name into a foreign language may be used in the territory of the Republic of Slovenia only together with the firm or name in Slovene. The translation cannot be graphically more accentuated than the firm or name in Slovene.”

[4]The first paragraph of Article 10 of the SA reads as follows:
“The name of a society must be in Slovene. If the society has a registered office in the geographic area where the national communities live, the name may also be composed of the translation of the name in the Italian or Hungarian languages. The name must be differentiated from the names of other societies and may not be misleading or offensive.”
[5]See more, Dr. Mitja Žagar, Aleš Novak, Pravna praksa št. 369, 1997, pp. 5 et sub., especially paragraph 2.
[6]Article 4 of the FCPNM contains the obligation of contracting states to guarantee to persons belonging to national minorities the right to equality before the law and to the equal protection of the law and to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political, and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority, whereby such measures shall not be considered to be an act of discrimination; and in Article 5 the obligation of the contracting parties to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions, and cultural heritage.
[7]With regard to the use of regional or minority languages, Article 13 of the ECRML contains the obligation of the contracting states to oppose practices designed to discourage the use of regional or minority languages in connection with economic or social activities.
[8]See more, E. Petrič. Mednarodnopravni položaj slovenske manjšine v Italiji, Založništvo tržaškega tiska, Trst, 1980, p. 77, and E. Petrič, Die völkerrechtliche Lage der italienischen Minderheit in der SFR Jugoslawien und der slowenischen Minderheit in Italien, in G. Ernst, Das Patriarchat Aquileia – Schnittpunkt der Kulturen, Regensburg, 1983, pp. 39 to 57.

[9]M. Orehar Ivanc in L. Šturm (Editor), Komentar Ustave Republike Slovenije, Fakulteta za podiplomske državne in evropske študije, Ljubljana, 2002, p. 622.
[10]T. Jerovšek in L. Šturm (Editor), Komentar Ustave Republike Slovenije, Fakulteta za podiplomske državne in evropske študije, Ljubljana, 2002, p. 161.
[11]The Public Administration Act (Official Gazette RS, No. 113/05 – official consolidated text) in the second paragraph of Article 4 determines that administrative bodies use the language of the national community when performing official tasks if a party who lives in this area uses the language of the national community in proceedings, which entails that the use of the languages of the national communities in such proceedings depends on whether the party declares his nationality.
[12]A society acquires legal personality upon entrance into the register of societies (Article 5 of the SA), and an administrative unit issues a decision thereon (Article 19 of the SA). The name of a society is one of the obligatory components of the basic act of a society (the first paragraph of Article 9 of the SA) and consequently an obligatory component of the request for registration (the first paragraph of Article 18 of the SA). The activity of a society must clearly follow from the name of the society (the second paragraph of Article 10 of the SA).
[13]See also, E. Petrič, Mednarodnopravno varstvo narodnih manjšin, Založba Obzorja, Maribor, 1977, p. 301.
[14]See more, V. Klopčič, Individualni in kolektivni elementi v mednarodnopravnem varstvu človekovih pravic, doktorska disertacija, Univerza v Ljubljani, Pravna fakulteta, Ljubljana, September 2002, pp. 104, 105, 168.