REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Case No.:
U-II-1/09-9

Date:
5 May 2009

D E C I S I O N

At a session held on 5 May 2009 in proceedings in accordance with the first paragraph of Article 21 of the Referendum and Public Initiative Act (Official Gazette RS, No. 15/94 et sub.), initiated upon the request of the National Assembly, the Constitutional Court

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

Unconstitutional consequences could occur due to the suspension of the implementation or due to the rejection of the Act Amending the Lawyers Act (Gazette of the National Assembly, No. 30/09, EPA 248-V).

R e a s o n i n g

A.

1. On the basis of the first paragraph of Article 21 of the Referendum and Public Initiative Act (hereinafter referred to as the RPIA), at a session held on 8 April 2009, the National Assembly reached a decision (hereinafter referred to as the Decision) by which it requested that the Constitutional Court decide whether unconstitutional consequences could occur due to the suspension of the implementation or the rejection of the Act Amending the Lawyers Act (hereinafter referred to as the LA-C) which are not consistent with Articles 2, 15, 20, 22, and 23, with the second indent of Article 29, as well as with Articles 34 and 137 of the Constitution. Enclosed with the request is a request to call a legislative referendum on the LA-C, a request on the convening of an extraordinary session of the National Assembly, dated 7 April 2009, an opinion of the Legislative and Legal Service of the National Assembly, a report of the Committee on Domestic Policy, Public Administration, and Justice, an opinion of the Government, and a transcription of the session at which the Decision was reached. The National Assembly substantiates that unconstitutional consequences would occur, alleging that the regulation in force laid down in the Lawyers Act (Official Gazette RS, No. 18/93 et sub. – hereinafter referred to as the LA) and in the Lawyers' Fees Act (Official Gazette RS, No. 67/08 – hereinafter referred to as the LFA), does not ensure effective legal aid in accordance with the Legal Aid Act (Official Gazette RS, No. 48/01 et sub. – hereinafter referred to as the LAA) and

mandatory representation in criminal proceedings in accordance with the Criminal Procedure Act (Official Gazette RS, No. 63/94 et sub. – hereinafter referred to as the CPA), as lawyers may choose whether to be put on the list of lawyers *ex officio* and on the list of lawyers performing services within the scope of legal aid, while appropriate guarantees for instances in which the number of lawyers on these lists does not suffice for ensuring the uninterrupted performance of these institutions are not determined. This is allegedly inconsistent with Articles 2, 15, 20, 22, and 23 of the Constitution as well as with the second indent of Article 29 and Article 34 of the Constitution. The regulation in force laid down in the LA and the LFA allegedly jeopardises the performance of the functions of a social state and a state governed by the rule of law due to the disproportionate interference with the public finance funds of the state in the field of the auditing of public procurement procedures. These are namely procedures which can only be considered out-of-court procedures where the lawyer's fee is prescribed with consideration of the value of the subject in question, which could entail fees exceeding 150,000 EUR. Payment of such large fees would allegedly put the state in a difficult economic position, due to which it would allegedly not be capable of performing the functions of a social state (Article 2 of the Constitution). The regulation in force with regard to the LA and the LFA allegedly also interferes with the autonomy and independence of the functioning of the Bar as a part of the system of justice, which is guaranteed by the first paragraph of Article 137 of the Constitution. The Constitution allegedly requires a so-called *participation model* in determining lawyers' fees. Therefore, it is allegedly not admissible that the state determines fees unilaterally, without the participation of the professional organisation. The existing regulation allegedly also interferes with the right to free economic initiative determined in Article 74 of the Constitution. The applicant claims that also from the viewpoint of European Union law, a regulation by which the state merely approves a fee proposed by the lawyers' professional association is admissible. The regulation in force is allegedly also disputable from the viewpoint of Article 43 (the right of establishment) and Article 49 (the freedom to provide services) of the Treaty Establishing the European Community (consolidated version, OJ C 321E/06, 29. 12. 2006, and Official Gazette RS, No. 27/04, MP, No. 7/04). In the opinion of the National Assembly, the current system in force for determining fees is too rigid, as it partly prevents the free movement of services, as by determining fees in a law it prevents the quality of services provided by lawyers from being appropriately compensated. An unconstitutional consequence resulting from the rejection of the LA-C could also occur because of the fact that the proceedings for the review of the constitutionality of the regulation in force are already pending before the Constitutional Court. Namely, if the LA-C is not upheld at a referendum and if the Constitutional Court at the same time establishes the unconstitutionality of the regulation in force, due to the provision of the RPIA according to which the National Assembly may not adopt a law which is, in terms of content, contrary to the voters' decision at a referendum within one year after the announcement of the referendum decision, the unconstitutional regulation in force would still exist until the expiry of the prescribed one-year time limit.

2. In its opinion, the Government supported the proposal in the National Assembly's request. In the opinion of the Government, the unconstitutional consequences have already occurred, and following the possible rejection of the LA-C at a referendum, a situation would also arise in which it would not be possible within one year to harmonise the field regulated by this Act with the requirements arising from the

Constitution. Therefore, the Government does not support the proposed legislative referendum.

3. In their reply, the proposers of the referendum claim that the National Assembly indeed does state the consequences which would allegedly occur, however, only hypothetically, and in a general and abstract manner. The National Assembly does not substantiate why legal aid or mandatory representation cannot be ensured. They claim that they do not oppose the obligation to provide representation, however, they are of the opinion that the system, as envisaged in Article 5 of the LA-C, is not clear and precise. With reference to remuneration for providing representation in public procurement procedures, they draw attention to the fact that such concerns expenses which are paid by the state if it acts unlawfully, as only in such a case does the state have to pay expenses for the provision of representation to a lawyer who represented the person who initiated the audit of the public procurement procedure (the state is represented by the State Attorney's Office). Therefore, in their opinion there is no reason to limit remuneration to 3000 points or 1,377 EUR for an individual act of representation. With regard to Article 137 of the Constitution, they underline that the constitution framers explicitly authorised the legislature to regulate by law the position of the Bar and the provision of legal services. In their opinion, from this provision there follows the requirement of the absolute independence of the Bar from the executive branch of power and partial independence from the legislative branch of power. Therefore, it is precisely the legislature that is allegedly the institution which may prescribe lawyers' fees and it is not the case that such are determined with the confirmation or consent of the executive branch of power. The legislature may not, however, prescribe lawyers' fees in a manner contrary to the public interest, which is in fact protected by means of prescribing lawyers' fees (Article 74 of the Constitution), i.e. it may not excessively impinge on the level of fees and determine them to be clearly too low. Therefore, in their opinion, the statutory regulation of the provision of legal services cannot entail that the autonomy and independence of the profession of lawyer be thereby hollowed out. Furthermore, they draw attention to the fact that from the judgment of the Court of Justice of the European Communities, to which the National Assembly refers, it only follows that the regulation according to which a minister merely provides consent to a lawyer's fee proposed by the Bar association is admissible. Nevertheless, this allegedly does not entail that a regulation according to which a lawyer's fee is determined by the state (i.e. the National Assembly) is inconsistent with European Union law. As regards the above-mentioned, the proposers of the referendum propose that the Constitutional Court establish that unconstitutional consequences would not occur due to the suspension of the implementation or due to the rejection of the LA-C, and subordinately that the implementation of the LA-C would have unconstitutional consequences.

B. – I.

4. On 27 March 2009, in an urgent legislative procedure, the National Assembly adopted the LA-C. On 3 April 2009, thirty-three National Assembly deputies filed a request that a subsequent legislative referendum on the LA-C be called, at which voters were to decide whether they agree that the LA-C be implemented. In the request at issue, the National Assembly requests that the Constitutional Court decide whether the alleged unconstitutional consequences would occur due to the

suspension of the implementation or due to the rejection of the LA-C at the referendum.

5. On the basis of the eleventh indent of the first paragraph of Article 160 of the Constitution, the competence of the Constitutional Court to decide a request of the National Assembly is provided for in the first paragraph of Article 21 of the RPIA. It determines that if the National Assembly deems that unconstitutional consequences could occur due to the suspension of the implementation of a law or due to its rejection, it must request that the Constitutional Court decide thereon within the period of time determined in Article 22 of the same Act. If the Constitutional Court establishes that the statutory regulation in force is not inconsistent with the Constitution, the possible rejection of the amendments of such statutory regulation at a referendum cannot entail the occurrence of unconstitutional consequences. [1] If a statutory regulation in force is unconstitutional and the legislature would like to remedy such unconstitutionality by the adopted act, the occurrence of unconstitutional circumstances due to the rejection of the act depends on the fact whether the adopted act is consistent with the Constitution. If an act by which the National Assembly wants to remedy possible existing unconstitutionalities is also inconsistent with the Constitution, it cannot be established that by its rejection at a referendum unconstitutional consequences would occur in and of itself. If, however, the adopted act remedied the existing unconstitutionalities in a constitutional manner, its rejection would entail that the unconstitutionality still existed and could perhaps not be remedied even within one year (Article 25 of the RPIA). The occurrence of unconstitutional consequences can be established in such cases. The purpose of the first paragraph of Article 21 of the RPIA is thus that a Constitutional Court decision should prevent voters from adopting a decision at a referendum which would render it impossible that the unconstitutional statutory regulation be repealed.

6. With reference to the regulation of a legislative referendum, the Constitutional Court underlines that the statutory regulation in force allows that only a referendum on the entire text of a law be carried out, even if the law contains only certain provisions which the proposers of the referendum think voters should decide on at a referendum. As regards what was stated in the previous paragraph, the existence of even one unconstitutional provision in the statutory regulation in force which the adopted law would repeal may cause that it would be established that unconstitutional consequences would occur, which entails that a legislative referendum on the adopted law cannot be carried out. Therefore, on this occasion the Constitutional Court calls on the legislature to analyse whether the regulation of a referendum enables effective exercise of the human right to a referendum determined in the first paragraph of Article 90 with reference to Article 44 of the Constitution also with regard to the above-mentioned aspect.

7. Therefore, in the case at issue the Constitutional Court had to review the constitutionality of the statutory regulation in force, and in the event of establishing its unconstitutionality, it furthermore had to review the constitutionality of the LA-C in order to establish on such basis whether the rejection of the adopted act at a referendum could cause the unconstitutional consequences alleged by the National Assembly.

B. – II.

8. The first alleged unconstitutional consequence refers to the regulation determined in the second and fifth paragraphs of Article 5 of the LA, according to which a lawyer may freely decide whether to be put on the list of lawyers or law firms that represent clients *ex officio* or provide legal aid (hereinafter referred to as the list of lawyers). If a lawyer decides to be put on the list of lawyers, he or she may not decline to represent a client if in compliance with the law the court appoints him or her to be a client's criminal defence lawyer or authorised representative from the list of lawyers. In such a case, a lawyer may decline to represent a client only if there exist reasons for which he or she is obliged to decline representation or other justified reasons. A lawyer may propose to the Bar Association of the Republic of Slovenia (hereinafter referred to as the BAS) that he or she be struck from the list of lawyers at anytime.

9. In accordance with the first paragraph of Article 23 of the Constitution, everyone has the right to have any decision regarding his rights, duties and any charges brought against him or her made without undue delay by an independent, impartial court constituted by law. This constitutional provision does not only formally guarantee access to court, but from this right there also follows the right to effective judicial protection, which entails that the state must ensure the possibility of effective exercise of this right to everyone regardless of circumstances and any obstacle of a social nature. [2] The scope of the right to judicial protection ensured in the first paragraph of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94) is similar. Furthermore, the European Court of Human Rights (hereinafter referred to as the ECHR) considers the right to access to court to be a constituent part of the right to judicial protection. Moreover, from the case-law of the ECHR there also follows the requirement that equal opportunities be ensured regarding the effective exercise of the right to judicial protection to a party who is financially disadvantaged and cannot hire a qualified authorised representative (a lawyer.) [3]

10. As regards the statutory regulation in force, the right to judicial protection laid down in the first paragraph of Article 23 of the Constitution also includes the right to legal aid of persons who cannot ensure themselves legal aid due to their financial position. Thereby, these persons are ensured the same access to judicial protection regardless of their financial position (see Constitutional Court Order No. Up-692/04, dated 11 March 2005). [4] It follows from the very nature of this right that a law must prescribe the manner of its exercise by determining a procedure and authorities who decide on this right. The system of legal aid is regulated most comprehensively and completely in the LAA, which also determines the procedure for acquiring this right. Pursuant to this Act, the decision on granting legal aid approval is adopted by the president of the district court or the president of the specialised court of first instance (Article 2 of the LAA); legal aid may be approved for legal advice, legal representation, and other legal services provided for by law, for all forms of judicial protection before all courts of general jurisdiction and specialised courts in the Republic of Slovenia, before the Constitutional Court of the Republic of Slovenia, and before all authorities, institutions or persons in the Republic of Slovenia authorised for out-of-court settlements, as well as in the form of an exemption from the payment of the expenses of judicial proceedings (Article 7 of the LAA). On the basis of the first and second paragraphs of Article 29 of the LAA, in accordance with this Act, legal aid is provided by lawyers who are, pursuant to the act regulating the Bar, on the list of

lawyers, by law firms founded on the basis of the act regulating the Bar, and by notaries in matters they deal with pursuant to the act governing notaries. The initial legal advice referred to in Article 25 of this Act and the free-of-charge legal advice referred to in the first indent of the first paragraph of Article 26 of this Act may also be provided by persons who, with no intention to gain profit, provide legal aid on the basis of an approval given by the minister responsible for justice.

11. In accordance with the second indent of Article 29 of the Constitution (legal guarantees in criminal proceedings), anyone charged with a criminal offence must, in addition to absolute equality, be guaranteed the right to conduct his or her own defence or to be defended by a legal representative [i.e. a criminal defence lawyer]. The right to be defended by a criminal defence lawyer (and not only the right of a defendant to conduct his or her own defence) is thereby declared by the Constitution to be one of the fundamental constitutional rights, while the professional assistance that can only be provided by a criminal defence lawyer is considered one of the guarantees which is provided by the Constitution to defendants in criminal proceedings in order to ensure that their other human rights are exercised, above all a fair trial before impartial courts (*Cf.*, Constitutional Court Decision No. Up-143/97, dated 19 June 1997, OdlUS VI, 179).

12. The human right to a defence, as a fundamental right of a defendant, is reiterated by the CPA among the fundamental principles of criminal proceedings in Article 12. [5] The exercise of this right, i.e. the right to a defence which is provided by a qualified criminal defence lawyer, is mostly regulated in Chapter VI of the first part of the CPA (General Provisions), which deals with legal representation. Defence may be optional or mandatory. Mandatory defence provided by a criminal defence lawyer, who pursuant to Article 70 of the CPA must be a member of the Bar, is regulated in the CPA as an absolute system which takes place regardless of the fact whether a defendant wants this or not. Mandatory defence is from the beginning – from the first interrogation on – prescribed by the first paragraph of Article 70 of the CPA, which determines instances in which a criminal defence lawyer must be appointed already when the first interrogation is conducted, although criminal proceedings have formally not yet begun: if the defendant is mute, deaf, or otherwise unable to conduct his or her own defence, or if criminal proceedings are conducted against the defendant for a criminal offence punishable by thirty years of imprisonment. A mandatory defence when detention is ordered and an indictment served for serious criminal offences is determined in the second and third paragraphs of the same article. [6] The institution of mandatory defence is justified under the presumption that a defendant, regardless of his or her free will, is provided with professional assistance when he or she cannot successfully defend himself or herself – either in cases of serious criminal offences or in cases in which it is reasonably assumed that a defendant is not capable due to his or her personal circumstances (i.e. physical or mental disability) or procedural impediments (i.e. failing to appear at trial, the impossibility to serve a judgement) to conduct his or her own defence in a certain procedural situation. In such instances it is thus a mandatory defence which enables the exercise of a human right determined in the second indent of Article 29 of the Constitution and which provides a sufficient guarantee for a fair trial in two aspects: first, that defendants are not objects but subjects of proceedings, thus persons who have broad possibilities for their defence so that full protection is ensured with regard to their personality, freedom, and dignity; such regulation especially ensures that neither of the parties has an advantage over

the other party, which to the greatest extent possible contributes to the constitutionally required equality, not only among defendants themselves, as far as their financial situation and other civil circumstances are concerned, but also regarding establishing “the equality of arms” which refers to the professional skills of prosecutors, on one hand, and the defence on the other (see Constitutional Court Decision No. Up-143/97).

13. As regards the above-mentioned, in order to ensure legal aid as an element of the right to effective judicial protection determined in the first paragraph of Article 23 of the Constitution as well as to ensure the right to a criminal defence lawyer determined in the second indent of Article 29 of the Constitution, it is of essential importance that representation by a member of the Bar be ensured. In accordance with the first, second, and fifth paragraphs of Article 5 of the LA, a lawyer freely decides whether to take on the representation of a client who has turned to such lawyer. A lawyer freely decides whether to be put on the list of lawyers. A lawyer shall not refuse to represent a client if in compliance with the law the court appoints him or her to be a client's criminal defence lawyer or authorised representative from the list of lawyers. In such a case the lawyer may only refuse representation if there exist reasons for which he or she is obliged to refuse the representation or for other justified reasons. A lawyer may propose to the BAS that he or she be struck from the list of lawyers at any time.

14. The above-described statutory regulation does not, however, regulate instances in which the number of lawyers on the list of lawyers does not suffice to ensure uninterrupted provision of legal aid and representation *ex officio* in criminal proceedings. The legal order also does not provide a mechanism which would ensure the mandatory defence and the effective provision of legal aid. This entails that on the basis of the regulation in force a situation could occur in which criminal proceedings against defendants who must be ensured the mandatory defence pursuant to Article 70 of the CPA could not be conducted or such defence could not be provided to them *ex officio*. Detention could not be ordered against persons suspected of serious criminal offences or they could not be ensured a representative *ex officio* during detention. In addition, a situation could occur in which the right determined in the first paragraph of Article 23 of the Constitution would be violated with regard to persons who are entitled to legal aid.

15. It is not constitutionally disputable that the law envisages the existence of a list of lawyers who are willing to provide services to persons who are entitled to legal aid or to a defence lawyer in criminal proceedings. Therefore, it cannot be disputable that lawyers may at any time (taking into consideration the 30-day time limit in which they must carry out individual acts for their client in order to avert damage) propose that they are struck from the list. Such regulation does not, however, in and of itself ensure that the number of lawyers put on the list will in fact suffice to ensure services to persons entitled to legal aid. This finding is not merely hypothetical. [7] What certainly cannot be approved of is the unethical appeal for a mass withdrawal of lawyers from the list of lawyers in order to boycott the process of ensuring of the right to judicial protection and the right to a defence of a defendant in criminal proceedings, particularly from the viewpoint of their role which they have in a state governed by the rule of law (Article 2 of the Constitution) and from the viewpoint of the fact that the Constitution determines that they are part of the system of justice

(Article 137 of the Constitution). This can particularly not be approved inasmuch as the dispute over determining lawyers' fees is in the background. However, the statutory regulation allows a situation in which the number of lawyers would not suffice to ensure the exercise of the above-mentioned human rights, as it is based on the entirely free decision of lawyers whether to be put on this list of lawyers. Therefore, the legislature should, in order to ensure the right to judicial protection and the right to a defence in criminal proceedings, envisage a mechanism which ensures the effective exercise of these human rights to everyone also in cases in which the number of lawyers on this list of lawyers does not suffice for such. Due to the fact that the LA-B does not regulate such mechanism, it interferes with the rights set forth in the first paragraph of Article 23 and the second indent of Article 29 of the Constitution.

16. In accordance with the established constitutional case-law, an interference with human rights is constitutionally admissible if it pursues a constitutionally admissible aim (the third paragraph of Article 15 of the Constitution) and if the interference is consistent with the principle of proportionality determined in Article 2 of the Constitution. From the legislative materials of the LA-B it is not clear if there exists a constitutionally admissible aim for such interference. For this reason alone the regulation in force for ensuring qualified representation to persons who are entitled to legal aid or to a defence lawyer in criminal proceedings is inconsistent with the first paragraph of Article 23 of the Constitution and the second indent of Article 29 of the Constitution. If the courts can not ensure that the second indent of Article 29 of the Constitution is respected in criminal proceedings this would cause a concurrent violation of the right to adjudication without undue delay determined in the first paragraph of Article 23 of the Constitution (and would hinder the effective exercise of judicial power due to the fact that the number of lawyers on the list of lawyers would not be sufficient), whereas in cases in which detention is absolutely necessary for reasons of public safety (the first paragraph of Article 20 of the Constitution) but such measure could therefore not be ordered, this could also cause a violation of the rights of victims or persons injured due to criminal offences, as determined in Article 34 of the Constitution. This is thus a case in which the law does not regulate what it should have regulated for the effective exercise of human rights. Therefore, the regulation in force as regards Article 5 of the LA is inconsistent with the Constitution and the Constitutional Court had to review whether the LA-C remedies this unconstitutionality in a constitutional manner.

17. The LA-C regulates the situation in which the number of lawyers put on the list of lawyers would not suffice for ensuring uninterrupted provision of legal aid and representation *ex officio* in criminal proceedings. The legislature thus responded to the factual circumstances which required that relations be regulated by law. Also in this regard it must be taken into consideration that lawyers provide their services as an independent profession, and therefore the legislature must, when it wants to obligate them to provide certain services, regulate such by a law. The National Assembly envisaged a new fourth paragraph of Article 5 of the LA, according to which a court appoints a lawyer according to the alphabetical order of all lawyers listed in the register of lawyers who are part of the regional assembly organised in the territory of an individual district court, in instances in which the president of the competent court establishes that the lists of lawyers do not suffice for ensuring the institution of representation *ex officio* and legal aid. Thereby, it determined that in

such cases lawyers have the obligation to provide their services, which they can decline only if there exists a reason for which they are obliged to decline representation. The statutory determination of the obligation to perform certain legal services entails that if such statutorily determined obligation is violated, a sanction is applied which ensures its effectiveness as a legal norm. A sanction for the violation of this statutorily determined obligation is determined in item two of the first paragraph of Article 77b of the Statute of the Bar Association of the Republic of Slovenia (Official Gazette RS, No. 15/94 et sub. – hereinafter referred to as the Statute). [8] In accordance with this provision, to unjustifiably decline to defend or represent a party to proceedings in cases in which a party's criminal defence lawyer or authorised representative is appointed by the court in accordance with the law or by a competent body of the association in accordance with the Statute, entails a serious violation of the professional duties of a lawyer, for which the disciplinary measure of the revocation of the right to carry out the profession of lawyer and the deprivation of the right to carry out work or practice in a law firm may be imposed on the basis of Article 10 of the LA-C (which amends the second paragraph of Article 61a of the LA). As regards the above-mentioned, the LA-C remedies the established unconstitutionality in a constitutional manner. However, the Constitutional Court cannot examine whether the proposed regulation is the most appropriate possible from the viewpoint of the effective provision of the above-mentioned human rights.

B. – III.

18. The unconstitutional consequences that would result from the suspension or rejection of the LA-C are, in the opinion of the National Assembly, also a result of the regulation in force being inconsistent with Article 137 of the Constitution. The unilateral prescription of lawyers' fees by the National Assembly is allegedly inconsistent with the principle of the autonomy and independence of the Bar. The statutory regulation in force regarding the determination of lawyers' fees is allegedly also inconsistent with European Union law.

19. The Constitution defines the Bar in the first paragraph of Article 137: "The Bar is an autonomous and independent service within the system of justice, and is regulated by law." This provision is placed in the chapter on the organisation of the state, and therefore it must be understood not as a provision which establishes certain additional rights for lawyers, but as a provision which places the Bar in the system of the organisation of the state or as a provision which determines as a principle of law the significance of the Bar for the functioning of the state power, especially for the functioning of the judicial power and for exercising the rights and freedoms of individuals and legal entities in relation to other authorities as well as other individuals or legal entities. Hence three things can be derived from the first paragraph of Article 137 of the Constitution: (1) the Bar is a part of the system of justice, (2) within the system of justice, the Bar is an autonomous and independent service, and (3) legal services are regulated by law.

20. The fact that the Bar is "a part of the system of justice" entails that the Bar has a special role and significance in a state governed by the rule of law and a democratic state. The role of lawyers is especially important within the framework of the performance of the judicial power. In the performance of the judicial power, the role of lawyers is that they contribute to improving the quality of adjudication and thereby to

the development of law in the case-law, to the disburdening of the courts, and consequently to the acceleration of proceedings and reduction of court backlogs. The Constitutional Court reiterates that these are aims which exceed the interests of parties to proceedings and which may be defined as being in the general or public interest (Decision No. U-I-371/98, [9] Decision No. U-I-319/00, [10] Order No. Up-43/01, [11] and Order No. Up-15/02 [12]). The wording of the first paragraph of Article 137 of the Constitution thus defines the content of the social function of the Bar. The Bar as a part of the system of justice has an important and irreplaceable role in the functioning of the entire system of justice. The Bar is a service which in its function does not only serve legitimate private interests in the society, but must at the same time also meet general social interests, which are especially in the fact that Slovenia is a state governed by the rule of law (Article 2 of the Constitution). [13]

21. The constitutional role of the Bar lies not only in ensuring the effective functioning of the judicial power, but especially in providing legal assistance which also ensures the protection of human rights and fundamental freedoms. Within the scope of their law practice, lawyers provide legal advice, represent and defend their clients in courts and before other authorities, draw up documents, and act on behalf of their clients in their legal relationships. Lawyers have the right to use, within the scope of the law and their power of attorney, any legal remedy which they consider useful to the client they are representing. When representing a client lawyers must act conscientiously, honestly, with due diligence, and in compliance with the rules of professional conduct (Article 11 of the LA). In order to carry out the tasks of a lawyer, the Act not only requires professional competence, but also a higher standard of conduct of lawyers in the performance of their activities. Unless otherwise provided by the law, clients may be represented in courts for remuneration exclusively by lawyers (Article 2 of the LA). Due to the fact that in certain instances a law determines that representation by a lawyer is mandatory, thereby the assistance provided by lawyers is elevated to a necessary condition for asserting rights and freedoms as provided by the Constitution (Order No. U-I-9/98). [14]

22. Pursuant to the Constitution, the Bar is a service regulated by law. In accordance with the second paragraph of Article 1 of the LA, lawyers are engaged in the Bar as an independent profession. [15] There is thus no doubt that the legislature must adopt a law in order to regulate the Bar. However, when regulating such by law, the legislature always collides with the constitutional requirement that the Bar is an "autonomous and independent" service. Every legislative regulation of the Bar must respect this constitutional requirement. Statutory regulation of the Bar which would violate the autonomous and independent nature of the Bar is not admissible.

23. A key question which the Constitutional Court had to answer from the viewpoint of Article 137 of the Constitution is what is entailed by the Bar being "autonomous and independent" and whether the right to determine a lawyer's fee or at least to participate in its adoption falls within the scope of such autonomy and independence.

24. Considering the fact that with reference to the Bar the Constitution uses two terms – "autonomy" and "independence" – these two terms, although they are very related in their meaning, do not have the same constitutional meaning. The Constitutional Court held that independence must be understood in a functional sense, whereas autonomy in an organisational sense. Both principles apply not only

to individual lawyers, but also to their professional association, whereby as regards independence greater emphasis is laid on individual lawyers, and as regards autonomy on their professional organisation.

25. Functional independence most of all refers to the independence of lawyers when carrying out their tasks, namely in providing legal advice, representing and defending their clients in courts and before other authorities, drawing up documents, and acting on behalf of their clients in their legal relationships. As already stated above, the independence of lawyers is not their special right, but it is a constitutional requirement which is determined to the benefit of the constitutional role of the Bar and therefore to the benefit of their clients. The independence of lawyers thus entails that it must be ensured that lawyers can in concrete cases perform their duties without any direct external influence, pressure, threats, disturbances, or improper restrictions. [16] For this purpose, the LA contains provisions which regulate confidentiality between lawyers and their clients, [17] the immunity of lawyers regarding the deprivation of their liberty, [18] and regarding a search of a lawyer's office, [19] as well as the incompatibility of the profession of lawyer. [20] The duty to protect the secrecy of what a client has confided in a lawyer not only establishes the duty of a lawyer to protect such secrecy, but also the obligation of others, in the first place the state, not to interfere therewith. Therefore, lawyers' independence is fully elaborated by certain provisions of laws which regulate judicial proceedings. Among such provisions are those which allow lawyers to decline to testify on facts which their clients have confided in them. The independence of a lawyer as an individual is a condition for implementing the constitutional role of the Bar. Furthermore, to a certain extent independence also applies to the BAS, although its independence is instrumental, i.e. it serves to ensure the independence of individual lawyers. For example, the representative of the BAS must be present when a search of a law firm is conducted, the BAS must be informed of the detention of a lawyer, etc. This independence entails that lawyers are bound by the Constitution and laws, as well as by ethical principles of the legal profession; the latter must be adopted by the BAS independently from external influences.

26. Differently than independence, which mostly refers to lawyers when performing their tasks, the autonomy of the Bar must be understood in the organisational sense. Autonomy namely refers to the autonomy of the legal profession as such, and thus in its relation to state authorities (especially to the executive branch of power). From the point of view of content, the autonomy of the legal profession refers to regulating issues which concern the position of lawyers and their professional organisation. The legislature must undoubtedly regulate also these questions, however, not exhaustively, but must leave certain issues to autonomous regulation within legal profession. The list of fees by which the [standard] fees and expenses which a client must pay to a lawyer are calculated, does not determine a mandatory price of legal services as, in accordance with the first and third paragraphs of Article 4 of the LFA, a lawyer may always agree with a client for a payment of higher or lower fees than determined by the LFA. However, such fees are binding in cases in which a court decides on the obligation to reimburse the expenses of a lawyer to a party who has succeeded in a dispute (the fourth paragraph of Article 4 of the LFA). [21] Therefore, it does not follow from Article 137 of the Constitution that only such regulation of the payment of legal services according to which fees are determined by the BAS, because of the demonstrated public interest, naturally with the consent of the state

power, is consistent therewith. The legislature could have envisaged a regulation according to which fees would have been determined by the BAS with the consent of the National Assembly. It could have also determined a regulation according to which fees would be determined by the National Assembly by law. However, it cannot be overlooked that regardless of the above-mentioned, such fees entail a framework determination of the prices of lawyers' services which lawyers may apply when performing their profession already due to the competitive nature of their services. Therefore, from Article 137 of the Constitution there follows at least the obligation of the legislature in cases in which the legislature itself determines fees by a law to envisage the obligatory participation of the BAS in the legislative procedure. Article 42 of the LFA authorises the minister competent for justice to determine, by rules and within three months after the coming into force of this law, the manner of the participation of the BAS in the procedure for amending the law which regulates lawyers' fees. The Constitutional Court will not here examine the question of whether the participation of the BAS was ensured in the procedure for adopting the LFA, but it must nevertheless establish the unconstitutionality of such regulation. In accordance with the established case-law, a so-called *bare execution clause* is namely inconsistent with the second paragraph of Article 120 of the Constitution. The legislature namely authorised a minister to issue an executive regulation without determining criteria regarding their content in the law from which would be evident the manner of the participation of the BAS in determining lawyer's fees or changes thereto. [22] With reference to such, the question certainly arises whether the legislature, taking into account the second paragraph of Article 3 of the Constitution, should not have entirely regulated the manner of the participation of the BAS. As a consequence, it must be established that also Article 42 of the LFA is unconstitutional.

27. Therefore, also regarding this question the Constitutional Court had to establish whether the LA-C remedies the unconstitutionality mentioned above. The LA-C envisages one of the possible manners of determining fees for lawyers' services, i.e. that fees are determined by the BAS, however, after the prior consent of the minister competent for justice (Article 5 of the LA-C), whereby the public interest is protected. This regulation cannot be alleged to be inconsistent with Article 137 of the Constitution. As regards the above-mentioned, the LA-C remedies such unconstitutionality in a manner which is consistent with the Constitution. In this review, the Constitutional Court did not need to address the content of the list of lawyers' fees in force.

28. In its request the applicant also refers to decisions of the Court of Justice of the European Communities and claims that the regulation in force is inconsistent with European Union law. However, the applicant does not explain how European Union law can be considered from the viewpoint of the possibility that unconstitutional consequences could occur in accordance with the RPIA. Therefore, the Constitutional Court did not have to review this allegation.

B. – IV.

29. The National Assembly also alleges that the unconstitutional consequences would occur from the viewpoint of the inconsistency with Article 74 of the Constitution. The interference with the free formation of fees for services provided by

lawyers would allegedly violate the right to free economic initiative as determined in Article 74 of the Constitution.

30. In the first paragraph of Article 74, the Constitution determines that economic initiative is free, and in the second sentence of the second paragraph of the same article, that commercial activities may not be pursued in a manner contrary to the public interest. The legislature may thus limit the right to free economic initiative if the public interest requires such.

31. The question of lawyers' fees can be important from the viewpoint of free economic initiative. The Bar namely performs a profit-making activity, due to the fact that lawyers provide their services for payment. [23] The Constitutional Court has already adopted the position that the Bar is not a commercial activity in the proper sense of the word, however, due to the fact that it is carried out for payment and with a profit-making purpose in competition with other lawyers or commercial subjects, it can be regarded as an activity which is protected by the first paragraph of Article 74 of the Constitution (Decision No. U-I-212/03, dated 24 November 2005, Official Gazette RS, No. 11/05 and OdlUS XIV, 84).

32. This position of the Constitutional Court must be further elaborated so that the commercial activity of the Bar, which is subject to protection within the scope of free economic initiative, is defined in more detail. It is necessary to distinguish the following two positions: the position in which lawyers act on the market and freely look for and receive clients, and the position in which they provide services within the framework of the mandatory system of representation *ex officio* in criminal proceedings and within the framework of the mandatory system of providing legal aid. In cases in which lawyers freely act on the market, they carry out a commercial activity whose limitations are reviewed within the framework of Article 74 of the Constitution. In cases in which accepting a case is not entirely the free decision of a lawyer, it is not a commercial activity within the meaning of Article 74 of the Constitution. In cases of mandatory representation in criminal proceedings and mandatory representation in proceedings in order to provide legal aid, lawyers in fact perform tasks which follow from the Constitution as positive obligations of the state and whose financing is entirely provided for by the state. In this part lawyers do not perform a free economic activity, but carry out the obligations of the state, upon its authorisation, and upon payment from state funds. [24] Therefore, determining the fees for services provided by lawyers is not in this part inconsistent with the first paragraph of Article 74 of the Constitution.

33. An inconsistency with the first paragraph of Article 74 of the Constitution also does not exist in cases in which lawyers perform their profession as a commercial activity. As already stated above, in accordance with the first and third paragraphs of Article 4 of the LFA, lawyers may always agree with their clients on the payment of higher or lower fees than determined by the LFA. Lawyers may thus in this part freely set prices for their services, therefore the fees determined by the LFA do not interfere with their right to free economic initiative as determined in the first paragraph of Article 74 of the Constitution and are also not inconsistent therewith.

B. – V.

34. The applicant claims that the regulation in force laid down in the LA and LFA allegedly jeopardises the performance of the functions of a social state and a state governed by the rule of law due to the disproportionate interference with the public-finance funds of the state in the field of the auditing of public procurement procedures. The allegation is too general, as the applicant did not demonstrate a concrete risk for state funds and consequently for the performance of the functions of a social state (Article 2 of the Constitution). The fact that in the previous year ten lawyers could have received high fees in public procurement procedures (in cases in which the value of the public procurement exceeds 30,000,000 EUR) does not entail a concrete risk for the financial position of the state.

35. An unconstitutional consequence due to the rejection of the LA-C could also occur because of the fact that the proceedings for the review of the constitutionality of the regulation in force are already pending before the Constitutional Court. Merely the initiation of the procedure for the review of the constitutionality of a regulation before the Constitutional Court is not an obstacle that would in the meantime prevent the legislature from amending the statutory regulation being challenged. [25] Therefore, such procedure can also not be an obstacle that during this time would prevent a referendum from being carried out.

B. – VI.

36. On the basis of the request of the National Assembly, the Constitutional Court, within the framework of its allegations, reviewed the consistency of the statutory regulation in force, i.e. the LA and the LFA. Thereby, it established the existence of an unconstitutional gap in the law, as the LA does not provide a mechanism which would in every case ensure the effective exercise of the right to judicial protection and the right to a defence of a defendant in criminal proceedings, as well as the unconstitutionality of the LFA regarding the participation of the BAS in determining fees. In view of such finding, the Constitutional Court also had to review the constitutionality of the LA-C in order to determine whether the established unconstitutionalities can be remedied by the adopted act. The established unconstitutionalities can be remedied by the LA-C, whereby the solutions in this act are consistent with the Constitution. With reference to such, the Constitutional Court established that the possible rejection of the LA-C at a referendum would cause unconstitutional consequences. Therefore, the Constitutional Court decided as follows from the operative part of this decision.

C.

37. The Constitutional Court reached this decision on the basis of Article 21 of the RPIA and the third indent of the second 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 Dr. Mitja Deisinger, Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr. Ernest Petrič, Jasna Pogačar, Dr. Ciril Ribičič, and Jan Zobec. The decision was reached by five votes against four. Judges Klampfer, Deisinger, Mozetič, and Zobec voted against and submitted a dissenting opinion. Judge Ribičič submitted a concurring opinion.

Jože Tratnik
President

[1] Unconstitutional consequences could also occur if due to the activities involved in calling a legislative referendum (Article 12a of the RPIA) or due to the preparations for conducting it, the implementation of a law which the National Assembly had already adopted was postponed.
[2] In Order No. Up-40/97, dated 7 March 1997 (published on the website of the Constitutional Court <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/D8898AF7CA20A152C1257172002A2822>) the Constitutional Court already adopted the standpoint that the amount of court fees may not present an insurmountable obstacle to access to court for persons who are financially disadvantaged, which also follows from the prohibition of discrimination and equality before the law ("*From the right to judicial protection set forth in Article 23 of the Constitution also follows the requirement that the state must ensure actual and effective exercise of this right. The latter, inter alia, entails that the amount of court fees may not present an insurmountable obstacle to access to court for persons who are financially disadvantaged - this also follows from the right to equality before the law and the prohibition of discrimination in accordance with Article 14 of the Constitution.*").
[3] In the Case of Airey v. Ireland, Judgment dated 9 October 1979, the ECHR established that the equality of a financially disadvantaged party can be achieved in two manners:
1. by a simplification of the procedure or by such regulation of the procedure which in fact enables legally untrained parties acting alone to protect their "civil rights" (whereby it must be added that this manner is not appropriate in cases in which the assistance of a lawyer in proceedings is rendered mandatory or in cases in which important financial obstacles to access to legal protection are not only the expense of hiring a lawyer, but also court fees),
2. by ensuring free (or at least cheaper) legal assistance of a qualified legal representative, in general a lawyer.
[4] Published on the website of the Constitutional Court: <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/30920D9AF75DB567C125717200296B82>.
[5] The first and second paragraphs of Article 12 of the CPA read as follows:
"(1) The defendant shall have the right to conduct his or her own defence or to be defended with the expert assistance of a criminal defence lawyer chosen by himself or herself from among the members of the Bar.
(2) If the defendant does not hire a criminal defence lawyer, the court shall appoint one for him or her where so provided by the present act in order to ensure his or her defence."
[6] Article 70 of the CPA reads as follows:
"(1) If the defendant is mute, deaf, or otherwise unable to conduct his or her own defence, or if criminal proceedings are conducted against the defendant for a criminal offence punishable by thirty years of imprisonment or if he or she is, in accordance with Article 157 of this Act, brought before the investigating judge, the defendant shall have a criminal defence lawyer from the very first interrogation on.
(2) The defendant shall be bound to have a criminal defence lawyer in proceedings in accordance with Article 204a of this Act and all the time during a detention is ordered against him or her.

(3) The defendant shall be bound to have a criminal defence lawyer at the time the indictment is served on him or her if the criminal offence with which he or she is charged is punishable by a minimum eight years of imprisonment.
(4) If, in the cases of mandatory defence referred to in the preceding paragraphs, the defendant fails to engage a criminal defence lawyer himself or herself, the president of the court shall appoint a criminal defence lawyer *ex officio* for the further course of criminal proceedings until the finality of the judgement; if the defendant has been sentenced to thirty years of imprisonment or if he or she is mute, deaf, or otherwise unable to conduct his or her own defence, he or she shall have a criminal defence lawyer appointed to him or her for proceedings with extraordinary legal remedies as well. If a criminal defence lawyer is appointed *ex officio* after the indictment has been filed, the defendant shall be informed thereof at the time the indictment is served on him or her. If in a case where defence is mandatory the defendant remains without a criminal defence lawyer and fails to engage one himself or herself, the president of the court before which the proceedings are conducted shall appoint a criminal defence lawyer *ex officio*.
(5) Only a lawyer may be appointed as a criminal defence lawyer."
[7] It follows from the data submitted by the National Assembly that there exists a possibility that such a number of lawyers can be struck from the list of lawyers that ensuring effective legal assistance and the effective conduct of judicial proceedings, thus the effective performance of the judicial power, would be made impossible. This is evident from the fact that following the implementation of the Act Amending the Lawyers' Act (Official Gazette RS, No. 54/08 – hereinafter referred to as the LA-B), which provided the possibility that lawyers freely decide to be struck from the list of lawyers, and following the implementation of the LFA, some Regional Lawyers' Assemblies (from Koper, Celje, Nova Gorica, Maribor) submitted notifications to the BAS proposing that lawyers be struck from the list of lawyers or law firms that represent clients *ex officio* and that provide legal aid services. When the LA-C was being drafted they froze their decision, however, they announced that the Administrative Board of the BAS would revoke the decision on freezing due to the requested subsequent legislative referendum. This follows from the minutes of the meeting of the Administrative Board of the BAS dated 13 January 2008, which the applicant enclosed with the request and from which it also follows that the Minister of Justice does not defend such conduct and that in such a case he will have to take appropriate actions. The applicant furthermore outlines that due to the above-mentioned deficiency of the regulation in force, the provision of legal aid has already been made difficult (from the draft of the Judicial Statistics of 2008 it follows that Slovene courts in 2008 resolved the applications of approximately 11,000 applicants which they carried over from 2007 or received in 2008).
[8] Article 47 of the LA-B determined that the BAS harmonises the statutes and other general acts of the association with the provisions of this act at its first assembly after the implementation of this act. It follows from this transitional provision that the legislature did not explicitly or tacitly repeal the provisions of the statutes in force at that time. Therefore, the Constitutional Court did not have to address the issue whether the legislature could do such at all with regard to the fact that the case concerns an autonomous act of the professional organisation. It is true, however, that the provision of the Statute on Disciplinary Infringements became pointless by the implementation of the LA-B due to the third paragraph of Article 59 of the LA, as according to this provision a lawyer may be imposed disciplinary sanctions under the conditions and according to the procedure determined in this Act. To date the BAS

has not harmonised the Statute with the provisions of the LA-B. If the LA-C had been implemented, the provisions of the Statute on Disciplinary Infringements would have been taken into consideration again, as the LA-C leaves to the BAS the determination of violations with regard to carrying out the profession of a lawyer, their work, and practice.

[9] Decision dated 24 May 2001 (Official Gazette RS, No. 48/01 and OdlUS X, 104).

[10] Decision dated 11 September 2003 (Official Gazette RS, No. 92/03 and OdlUS XII, 74).

[11] Order dated 29 October 2003 (published on the website of the Constitutional Court: <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/83CCF7FAF9B98674C1257172002966AA>).

[12] Order dated 29 October 2003 (published on the website of the Constitutional Court: <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/4FF1B02F63B27431C1257172002966AB>).

[13] K. Plauštajner, Člen 137 (odvetništvo in notariat), in: L. Šturm (Editor): Komentar Ustave Republike Slovenije, Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 937.

[14] Order dated 6 February 1998 (published on the website of the Constitutional Court: <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/8A6F646B9F6F91CAC1257172002A2962>).

[15] The first paragraph of Article 1 of the LA repeats the constitutional text that the Bar is an autonomous and independent service within the system of justice.

[16] *Cf.*, Recommendation No. R (2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, adopted on 25 October 2000.

[17] The first paragraph of Article 6 of the LA reads as follows: “A lawyer shall protect the confidentiality of all information entrusted to him or her by his or her client”.

[18] Article 7 of the LA reads as follows: “A lawyer shall not be detained in a criminal procedure initiated against him or her for the suspicion of a criminal offence committed while practising the legal profession without the preliminary consent of a panel of three judges of a court of second instance established on the territory of the court of first instance where the procedure was conducted. The court shall notify the Bar Association of Slovenia that detention had been ordered.”

[19] Article 8 of the LA reads as follows: “A search of a law office shall be permitted only subject to the order of the competent court and only with reference to the files and objects explicitly stated in the search order. The search shall not affect the confidentiality of other documents and objects. A representative of the Bar Association of Slovenia shall be present at the search of the law office.”

[20] The first paragraph of Article 21 of the LA determines that the following are incompatible with the exercise of the profession of lawyer: 1. Practising other activities as a profession, save in the fields of science, teaching, art, or journalism; 2. Holding a paid position in the state administration; 3. Running a notary's office; 4. Holding an executive position in a company; 5. Performing other activities contrary to the good reputation and independence of the legal profession.

[21] If a fee were determined so that it would be considerably too low, such could entail an inadmissible limitation of the right to the effective judicial protection of a party who succeeded in proceedings. However, when reviewing the admissibility of the referendum, the Constitutional Court did not have to address this issue, as the National Assembly did not request such review.

[22] *Cf.*, Constitutional Court Decision No. U-I-58/98, dated 14 January 1999 (Official Gazette RS, No. 7/99 and OdlUS VIII, 2), Decision No. U-I-200/00, dated 28 September 2000 (Official Gazette RS, No. 24/2000 and OdlUS IX, 225, paragraph 6 of the reasoning), and Constitutional Court Order No. U-I-239/06, dated 22 March 2007, paragraph 11 of the reasoning (published on the website of the Constitutional Court: <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/BA26E1E57C25BBBBC12572B1002DE3DF>). *Cf.*, L. Šturm, Člen 120 (organizacija in delo uprave), in: L. Šturm (Editor), *ibidem*, p. 871: "Specific instances in which the legislature is bound by the legality principle exist when the legislature in a law authorises the Government or an administrative body to issue executive regulations for the implementation of the law, whereas it does not supplement such authorisation by criteria regarding its content (i.e. "bare" or "blank" authorisation). Such authorisation entails the omission of a mandatory legal regulation by the legislature and therefore it is not consistent with the constitutional order."

[23] The second paragraph of Article 1 of the LA determines that lawyers are engaged in the Bar as an independent profession.

[24] Regardless of the fact that in certain instances they are paid by the state, this dependency on state funds cannot be regulated in a manner such that the principle of the autonomy and independence of lawyers is violated. One of the aims of the autonomy and independence of lawyers determined in Article 137 of the Constitution is probably also that it must be ensured that lawyers preserve their independence also in these instances, when they act as "agents" of the state. In any case, they must be ensured that they can do for their clients whatever is legally admissible and necessary in order to achieve the best possible outcome for them.

[25] On the contrary, if the legislature or the Government, as a constitutionally authorised proposer of laws, are of the opinion that legislative amendments are needed, they are bound by the principle of the separation of powers determined in the second paragraph of Article 3 of the Constitution to regulate such in the law, regardless of the fact whether the procedure before the Constitutional Court has been initiated. The obligation of bearers of individual branches of power to responsibly carry out the tasks entrusted to them by the Constitution namely also follows from this principle.