

**Slovenia, Constitutional Court, U-II-1/09-9, constitutional, 5 May 2009,  
ECLI:SI:USRS:2009:U.II.1.09**

Member State

 Slovenia

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Topic

Rule of law (rule of law conditionality, impact of legal aid on rule of law issues)

Professional ethics of the bar,

Trust in attorneys

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Deciding Court Original Language

Ustavno sodišče Republike Slovenije

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Deciding Court English translation

Constitutional Court of the Republic of Slovenia

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Registration N

U-II-1/09-9

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Date Decision

5 May 2009

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ECLI (if available)

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ECtHR Jurisprudence

Airey v. Ireland, app. no. 6289/73, 9 October 1979

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Subject Matter

The CC interpreted the demands of Articles 23 and 29 of the Constitution in a case, where the attorneys threatened to obstruct the regime of legal aid and obligatory representation in the criminal procedure, by unsubscribing from the list of attorneys, dealing with such cases. The CC also explained the content of Article 127 of the Constitution, which prescribes that the attorneyship is autonomous and independent.

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### Legal issue(s)

The case relates to rule of law, especially with regards to legal aid. It concerns the attorneys.

The CC had to determine whether the legislation provided sufficient safeguards against obstruction of the regime of legal aid and obligatory representation in the criminal procedure by the attorneys, who were in dispute with the Government regarding to adoption of attorney's tariff. In addition, the CC answered the question, whether Article 127 of the Constitution guarantees the attorneys the right to cooperate in the determination of their tariff.

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### National Law Sources

Articles 2, 23, 29, 44 and 74 of the Constitution

Article 21 of the Referendum and Public Initiative Act

Article 5 of the Attorneys Act - B

Article 42 of Attorneys Tariff Act

Constitutional Court, Order Up-40/97 of 7 March 1997

Constitutional Court, Order Up-692/04 of 11 March 2005

Constitutional Court, Decision Up-143/97 of 19 June 1997

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### Facts of the case

The background of the case is relatively complex, but necessary to better understand the decision of the CC. Državni zbor (lower house of the Slovene parliament) enacted new attorneys' tariff (a regulation that specifies the attorney costs that can be claimed from the opposing party in court). The Slovene Bar Association opposed the legislation and urged the attorneys withdraw from the list of mandatory (ex officio) councils in criminal procedure and from the list of councils offering legal aid in order to pressure the government to give in to the Bar's demands for a different tariff and amend the new regime. The newly composed Državni zbor responded with a legislation, which pleased the Bar. However, a group of MPs decided to demand a referendum in order to block the new legislation. Državni zbor took the case to the CC, which has the authority to prohibit a referendum, if the legislation was adopted to remedy an unconstitutional law. Therefore, the CC had to determine, whether the legislation in force was unconstitutional and whether the newly

adopted (but not yet applicable) amendment remedied such unconstitutionality.

The law in force granted the attorneys the freedom to subscribe and to unsubscribe from the list of mandatory (ex officio) councils in criminal procedure and from the list of councils offering legal aid. Further, it provided that the minister of justice adopts a regulation, which determines the manner of the participation of the Bar Association of Slovenia (the BAS) in the procedure for amending the attorney's tariff.

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#### Reasoning (role of the Charter or other EU, ECHR related legal basis)

The CC first invoked its Decision Up-40/97, where it had 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. It continued that the ECtHR considers the right to access to court to be a constituent part of the right to judicial protection and that equal opportunities should be ensured regarding the effective exercise of the right to judicial protection to a party who is financially disadvantaged and cannot hire a qualified authorized representative (a lawyer). In a footnote, it referred to the two opinions from *Airey v. Ireland*, namely that the state ensures free (or at least cheaper) legal assistance of a qualified legal representative, or that it simplifies the procedure in order to enable the unqualified party to efficiently protect his/her rights.

The CC then provided an overview of the regulation of mandatory (ex officio) councils in criminal procedure and legal aid. It invoked its previous case-law and held that in order to ensure legal aid as an element of the right to effective judicial protection (Article 23 of the Constitution) as well as to ensure the right to a criminal defence lawyer (enshrined in Article 29 of the Constitution), it is of essential importance that representation by an attorney is guaranteed.

The CC warned against an existent risk, that the attorneys would obstruct the system of legal aid and mandatory representation in the criminal procedure. Even though such obstruction was found by the CC to be unethical, especially if one is to consider the role of the attorneys for the rule of law and the fact that such behaviour resulted from a conflict concerning the attorneys' tariff, the CC held that the existent law (Article 5 of the Attorney's Act) was in fact contrary to the Constitution due to an unconstitutional legal lacuna: the legislation did not prescribe a framework, which would guarantee the protection of individual rights in a situation, when the number of attorneys voluntarily subscribed to the list would not suffice. The CC thus found an interference with the rights protected by Article 23 and 29 of the Constitution. It opined that the legislator did not point to a legitimate aim, which would justify the interference, and that the interference is as a result unconstitutional. Since the legislative amendment was found to remedy the inconsistency with the constitution, the CC prohibited the referendum.

The CC reviewed another allegation of unconstitutionality, this time of the Attorney's Tariff Act. Državni zbor claimed that the state has adopted the Attorney's tariff unilaterally, i. e. without

cooperation of the BAS, which was said to be contrary to Article 137 of the Constitution.

The CC referred to Article 137 of the Constitution, which stipulates that “[a]ttorneyship is an independent and autonomous service within the system of justice, and is regulated by law.” The CC interpreted the independence of the attorneys as a functional guarantee, which enables the attorneys to perform their duties in concrete cases without any direct external influence, pressure, threats, disturbances, or improper restrictions. The attorneys are bound only by Constitution, laws and ethical principles of attorneyship. With regards to autonomy of the attorneys, the CC explained that it concerns the organization of attorneys, i. e. to their position vis-a-vis other state authorities. It went on to interpret Article 137 of the Constitution to oblige the legislator to enable the BAS to cooperate in the process of adoption of the attorney’s tariff. As the Attorney’s Tariff Act in power only prescribed that the minister of justice adopts a regulation, which determines the manner of participation of the BAS in the procedure for amending the attorney’s tariff, it was found to have a character of a bare execution clause, contrary to Article 120 of the Constitution.

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### Relation of the case to the EU Charter

The case is relevant in the light of Article 2 and especially Article 19 (1) (2) TEU, according to which, Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, as well as from the point of view of Article 47 of the CFREU, which explicitly guarantees legal aid (paragraph 3) and the possibility of being advised, defended and represented (paragraph 2). The CC prevented a systemic threat to access to justice and safeguarded the effective protection of individual rights guaranteed *inter alia* by the EU law. In the light of the recent CJEU jurisprudence, Article 19 (1) (2) TEU (and Article 47 CFREU) would accordingly be applicable to the case. This argument was understandably not mentioned, since the case dates back to year 2009, but might nevertheless be an interesting example in the context of rule of law backsliding.

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### Use of Judicial Interaction technique(s)

Comparative reasoning with the ECtHR case-law/interpretation consistent with the ECtHR case-law

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### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The CC referred to *Airey v. Ireland*, which was used alongside the CC’s own case-law to establish the guiding principles for the latter determination of the constitutionality of the legislation in power.

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### Connected national caselaw / templates

Supreme Court, Order I Up 223/2017 of 12 September 2018

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### Other

The decision was controversial not only due to the political implications, but also because it was

adopted with 5 votes to 4. The minority argued that the CC had based its reasoning on the assumption that the legislator should have foreseen the possibility of unethical behaviour of the Bar and attorneys, arbitrarily creating unconstitutional circumstances violating human rights and disabling normal functioning of the judicial system. Such assumption is grounded in mistrust in the attorneys and is contrary to their reputation and role in a democratic society as guarantors of human rights protection in judicial procedures. The minority also disagreed that Article 42 of the Attorneys Tariff Act contained a bare execution clause with regards to cooperation of the BAS in the process of adopting of new attorney's tariff. It opined that the term "cooperation" from Article 42 provides sufficient guidance for the executive, since "cooperation" cannot be interpreted differently than to contain the right to be informed of the intended change or supplementation of fees, the right to be heard thereon (and to have influence on such) and the duty of the proposer of the law or the legislature to study the comments, opinions, positions, and viewpoints of the BAS, to take a position thereon, and dismiss those that will not be applied, and with reference to such, to provide a statement of reasons. It also opined that the provision does not concern fundamental rights, but only one of the aspects of autonomy of attorneys and that consequently the execution clause can be more open-worded.

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[\(Link to\) full text](#)

<http://odlocitve.us-rs.si/en/odlocitev/AN03220?q=U-II-1%2F09-9>

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[History of the case: \(please note the chronological order of the summarised/referred national judgments.\)](#)

Constitutional Court, Decision U-II-1/09-9 of 5 May 2009

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