

Unofficial translation [from Ukrainian into Russian]

Ruling of the Constitutional Court of Ukraine

On the constitutional complaint filed by people's deputies of Ukraine and the Human Rights Ombudsman of the Supreme Council of Ukraine on the constitutionality of sections 8, 11 and 16 of the Act of Ukraine respecting trade unions, their rights and the guarantees for their activity (case concerning freedom of association).

Kyiv, 18 October 2000
No. 11-rp/2000

Case No. 1-36/2000

The Constitutional Court of Ukraine,
[Composition of the Court]

examined in plenary session the case of the constitutional complaint filed by people's deputies of Ukraine and the Human Rights Ombudsman of the Supreme Council of Ukraine on the constitutionality of sections 8, 11 and 16 of Act of Ukraine No. 1045-XIV of 15 September 1999 respecting trade unions, their rights and the guarantees for their activity (*Official Journal of the Supreme Council of Ukraine*, 1999, No. 45, item 397).

In accordance with sections 39 and 40 of the Act of Ukraine respecting the Constitutional Court of Ukraine, the complain was examined pursuant to a constitutional complaint filed by 183 people's deputies of Ukraine on the constitutionality of sections 8, 11 and 16 of the Act of Ukraine respecting trade unions, their rights and the guarantees for their activity, and a constitutional complaint filed by the Human Rights Ombudsman of the Supreme Council of Ukraine on the constitutionality of sections 11 and 16 of the Act, on the basis of which constitutional proceedings were instituted in these cases. In accordance with section 58 of the Act of Ukraine respecting the Constitutional Court of Ukraine, by order of the Council of Judges of the Constitutional Court for constitutional complaints, these proceedings were combined in a single proceeding in the case of the constitutional complaint filed by people's deputies of Ukraine and the Human Rights Ombudsman of the Supreme Council of Ukraine on the constitutionality of sections 8, 11 and 16 of the Act of Ukraine respecting trade unions, their rights and the guarantees for their activity.

The basis for the examination of the case in accordance with section 71 of the Act of Ukraine respecting the Constitutional Court of Ukraine consists of the existence of a dispute concerning the constitutionality of sections 8, 11 and 16 of the Act of Ukraine respecting trade unions, their rights and the guarantees for their activity.

Having heard reporting Judge S. S. Yatsenko and the explanations given by V. V. Onopenko, S. V. Isakovich, A. O. Selivanov, V. G. Khara, V. V. Nosov, L. V. Efimenko and M. Ya. Volynets and studied the documents of the case, the Constitutional Court of Ukraine

Found that:

1.1 The authors of the constitutional complaint - people's deputies of Ukraine and the Human Rights Ombudsman of the Supreme Council of Ukraine – consider that sections 11 and 16 of the

Act of Ukraine respecting trade unions, their rights and the guarantees for their activity are contrary to the third paragraph of article 36 of the Constitution of Ukraine, which contains a provision concerning the establishment of trade unions without prior authorization, based on the free choice of their members.

In addition, the people's deputies of Ukraine refer to the fact that section 11 of the Act, concerning the status of trade unions, and section 8 concerning the status of associations of trade unions, are contrary to article 22 of the Constitution of Ukraine, since they bring about a deterioration in the current situation of trade unions and their associations by requiring approval of their status during legalization.

As indicated in the constitutional complaints, it follows from the content of section 16 of the Act on trade unions that a trade union is deemed to have been established only from the moment of its registration with the competent state bodies; this provision makes the establishment and future existence of a trade union dependent on the registering body.

The authors of the constitutional complaint further assert that the provisions of sections 11 and 16 of the Act run counter to the requirements of the International Covenant on Economic, Social and Cultural Rights and the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

1.2. In written explanations the Chairperson of the Supreme Council of Ukraine objects to the grounds put forward for the unconstitutionality of the above-mentioned sections of the Act on trade unions and states that the allegations of unconstitutionality of sections 8 and 11 of the Act are unsubstantiated, while section 16 "neither explicitly nor implicitly contains a requirement for prior authorization to establish a trade union and does not restrict the rights of its members".

2.1. Under clause 11 of the first paragraph of article 92 of the Constitution of Ukraine the fundamental principles for establishing citizens' associations shall be determined by the law.

The first paragraph of article 36 of the Constitution of Ukraine guarantees the right of citizens of Ukraine to freedom of association, including in public associations, for exercise and protection of their rights and freedoms and the satisfaction of their economic, social and other interests, with the exception of the restrictions established by the law in the interests of national security or public order, public health or the protection of the rights and freedoms of others. Under the third paragraph of this article, trade unions are public associations which unite citizens with mutual interests on the basis of their professional activity. Citizens have the right to membership in trade unions in order to protect their labour and socio-economic rights and interests.

Section 11 of the Act on trade unions provides that trade unions may have the status of local, provincial, regional, Republic or Autonomous Republic of Crimea, or all-Ukrainian unions (first paragraph), and lays down requirements according to status (second, third, fourth, fifth and sixth paragraphs). The seventh paragraph of this section contains a provision to the effect that all-Ukrainian trade unions may use the word "Ukraine" and its derivatives in their names without special authorization.

Trade unions are public associations, as stated expressly in the third paragraph of article 36 of the

Constitution of Ukraine. The Act of Ukraine of 16 June 1992 respecting citizens' associations covers trade unions, although the specific regulation of the activities of trade unions is laid down in the Act on trade unions (fourth paragraph of section 1). The Act respecting citizens' associations, as provided by the subsequently adopted Act of Ukraine respecting trade unions, their rights and the guarantees for their activity, forms part of the legislation on trade unions and applies to them unless otherwise provided by that Act (first and third paragraphs of section 4).

Section 9 of the Act respecting citizens' associations provides that citizens' associations in Ukraine shall be established and carry out their activities with all-Ukrainian, local and international status. Local associations comprise those whose activities cover the corresponding administrative territorial unit or region. The area of activity is determined independently by the association. Thus the types of trade union status provided for in section 11 of the Act on trade unions are essentially based on the provisions of the basic Act on citizens' associations.

Section 11 of the Act on trade unions (hereinafter referred to as "the Act") defines the status of trade unions (local, provincial, regional, Republic and all-Ukrainian) according to the presence of organizational units of the trade union in the given area and depending on their share of trade union members in the given occupation or trade.

Section 2 of the Act provides that "trade unions are established to represent, exercise and protect the labour and socio-economic rights and interests of their members". The range of rights of trade unions in the protection of workers' interests does not depend on the status of the trade union as defined in section 11 of the Act. This is confirmed by section 10 of the Act: "All trade unions are equal before the law and enjoy equal rights in the protection of union members' rights and interests". These provisions are in accordance with the provisions of the third paragraph of article 36 of the Constitution of Ukraine.

The status of a trade union determines its representation at the national, regional, local or branch levels for purposes of consultation, collective bargaining with a view to concluding a collective agreement (at the corresponding territorial and branch levels), participation in tripartite bodies (National Council on Social Partnership), the administration of social insurance, etc. The provisions of section 11 of the Act are on the whole in accordance with the legislation in force providing for specific powers of trade unions and their associations, such as the Act of Ukraine respecting collective agreements and the Act of Ukraine respecting the procedure for settling collective disputes (conflicts).

Under section 3 of the Act of Ukraine respecting collective agreements, the party to the general agreement (concluded at the state level) shall be trade unions that have united for the purpose of collective bargaining and the conclusion of a general agreement; the party to an agreement at branch level shall be trade unions or associations of trade unions or other representative organizations of workers that have the necessary powers to engage in bargaining, conclude an agreement and implement its provisions at a majority of enterprises in their area of activity; an agreement at regional level shall be concluded by associations of trade unions or other bodies authorized by work collectives; a collective agreement at the level of the enterprise, institution or organization shall be concluded by one or more trade union or other bodies authorized by the work collective to represent it or, in the absence of such bodies, by workers' representatives elected and authorized by the work collective. Consequently, the representativity of trade unions

and their associations is determined not so much by their formal status, which was defined by the legislator primarily on the basis of their geographical coverage, as by the powers conferred on them by the work collectives of enterprises, institutions and organizations and the interaction between the trade unions themselves.

Social relations involving trade union participation are regulated by legislation to the extent necessary to ensure the representation and protection of workers' interests and successful functioning of the trade unions. The definition of types of trade union status in section 11 of the Act is in itself lawful in the context of state recognition of the legal capacity of these public associations. It is not for the Constitutional Court to decide whether it is appropriate to regulate through legislative means the status of trade unions and their associations as provided by section 11 of the Act.

2.2. At the same time, the Constitutional Court of Ukraine has concluded that certain provisions of section 11 of the Act restrict citizens' right to freedom of association enshrined in the first paragraph of article 36 of the Constitution of Ukraine.

The second paragraph of section 11 of the Act provides that trade unions comprising at least three primary organizations carrying out their activities in enterprises, institutions or organizations within the same administrative territorial unit (town, district, village) or at least nine union members working in different enterprises, institutions or organizations, have the status of local trade unions. Each of these requirements places a restriction on the exercise of citizens' right to associate freely in a trade union, since they require the existence of members in several enterprises, institutions or organizations, or of at least three organizational units ("primary organizations") in the same enterprise, institution or organization, whereas these may well not exist in a particular locality or enterprise, institution or organization. The right to freedom of association in a trade union, which should be formed "on the basis of the free choice of their members" (third paragraph of article 36 of the Constitution of Ukraine) according to type of occupational activity, may also be restricted if, for instance, a given occupation is represented only in one enterprise, institution or organization located in a town, district or village. Moreover, the wording of the second paragraph of section 11 of the Act raises doubts as to the status of local trade unions at the district level in cities and at the level of settlements, which are also part of the administrative and territorial structure of Ukraine (first paragraph of article 133 of the Constitution).

As stated above, the first paragraph of section 11 of the Act provides that trade unions may have status ranging from all-Ukrainian to local (the latter being the lowest territorial level).

The second paragraph of section 11 of the Act rules out the association of citizens in trade unions with local status in a single enterprise, institution or organization, leaving only the possibility of joining with others as organizational units as part of an existing trade union with the corresponding status or of forming such a union. From the analysis of this paragraph of section 11 and other provisions of the Act it follows that such trade unions (section 37) exist as organizational units of trade unions (third and fourth clause of section 1, 11th paragraph of section 16), namely as "primary organizations carrying out their activity in enterprises, institutions or organizations" (second paragraph of section 11). These organizations cannot have the status of a trade union as defined in section 11 of the Act, i.e. that of a self-governing public association

which acquires legal personality upon registering according to the procedure laid down in the second, third, fourth, fifth and sixth paragraphs of section 16. Organizational units of trade unions, on the other hand, acquire legal personality on the basis of the by-laws of a registered all-Ukrainian union or union of another status (tenth paragraph of section 16) in which their powers are set forth (clause 6 of the third paragraph of section 14).

Section 11 of the Act thus restricts citizens' right to freedom of association in trade unions. Therefore the provision of this article which makes it impossible to establish an independent trade union in a single enterprise, institution or organization without meeting the conditions prescribed in the second paragraph, under which only trade unions "which comprise at least three primary organizations... or have at least nine union members working in different enterprises, institutions or organizations" can have the status of local trade unions, is not in conformity with the first paragraph of article 36 of the Constitution of Ukraine.

In its examination of the case concerning the official interpretation of the concept of a "trade union carrying out its activity in an enterprise, institution or organization" used in the sixth clause of the first paragraph of section 43-1 of the Labour Code of Ukraine (the case of the trade union carrying out its activity in an enterprise), formulated a legal opinion as follows: "the Constitution of Ukraine does not contain restrictions with regard to the establishment of trade unions of citizens working in the same enterprise, institution or organization", and found inter alia that it follows from the content of the third paragraph of article 36 of the Constitution of Ukraine that "all trade unions that have been established and carry out their activity in accordance with their by-laws in enterprises, institutions and organizations enjoy equal rights, guaranteed by the Constitution of Ukraine, for the protection of the labour and social rights of their members." (Ruling of the Constitutional Court of Ukraine No. 14-rp/98 of 29 October 1998, *Bulletin of the Constitutional Court of Ukraine*, 1999, No. 1).

Moreover, the provision of section 11 of the Act which makes it impossible to establish an independent trade union in an enterprise, institution or organization without meeting the conditions set forth in its second paragraph nullifies citizens' constitutional right to freedom of association in regard to the establishment of an independent trade union in an enterprise, institution or organization, thereby also violating the second paragraph of article 22 of the Constitution, which provides that constitutional rights and freedoms are guaranteed and may not be abolished.

2.3. The provisions of the third and fifth paragraphs of section 11 of the Act contain inter alia quantitative criteria for determining the status of a trade union (provincial or all-Union), laying down requirements as to the trade union's proportional share of all union members of a given branch or those working in a given trade or occupation. The Constitutional Court has concluded that the following provisions of this section restrict citizens' right to freedom of association:

In the third paragraph of section 11 the last alternative criterion for [determining] the status of provincial trade unions stipulates that they must comprise "a majority of the trade union members working in the occupation or trade in the given region or in the cities of Kyiv and Sebastopol". This makes it impossible to establish more than one provincial trade union in a given trade or occupation in a particular province or in the cities of Kyiv and Sebastopol, which violates citizens' constitutional right to freedom of association, in particular if one takes into account the

stipulation in the fifth paragraph of section 7 of the Act, according to which the by-laws (or regulations) may lay down a restriction on dual membership in trade unions.

The Constitutional Court of Ukraine proceeds from the principle that citizens' right to freedom of association in public associations under article 36 of the Constitution of Ukraine, including the constitutional right to form a trade union, cannot be restricted either by legislation or in practice by requirements with regard to the exercise of that right that rule out the possibility of forming a trade union as such, if it is objectively impossible to meet these conditions (requirements), which in fact constitutes a partial prohibition on the exercise of citizens' right to associate in the corresponding trade union. In this case the Constitutional Court of Ukraine sees an unconstitutional restriction on citizens' right to freedom of association in the fact that this right cannot be exercised by voluntarily uniting in another trade union with the same status on the basis of the same trade or occupation in a given province or in the cities of Kyiv and Sebastopol, if there is already a corresponding trade union comprising the majority of union members working in that occupation or trade in the province or in the cities of Kyiv and Sebastopol.

The provisions of clauses 2 and 3 of the fifth paragraph of section 11 of the Act also restrict in practice the number of trade unions with all-Ukrainian status in a given branch or established by trade or occupation, since they lay down a requirement that these comprise "not less than one-third of the union members in that branch or of the union members in the trade or occupation" in addition to the requirement that their organizational units cover the majority of the administrative and territorial units of Ukraine where enterprises, institutions or organizations in the given branch are located (clause 2), or that the trade union comprise "the majority of union members working in that occupation or trade in Ukraine" (clause 3).

Therefore the following provisions of section 11 of the Act run counter to the first paragraph of article 36 of the Constitution of Ukraine:

- the provisions prescribing a quantitative criterion for forming a trade union with the corresponding status – "the majority" of union members in the occupation or trade in the province or in the cities of Kyiv and Sebastopol (third paragraph) and working in the occupation or trade in Ukraine (clause 3 of the third paragraph);
- the provision prescribing a minimum number for forming a trade union with all-Ukrainian status – "not less than one-third" of union members in the branch or of union members in the trade or occupation (clause 2 of the fifth paragraph).

3.1. Section 16 regulates the legalization of trade unions and their associations.

It provides explicitly for compulsory legalization (official recognition) of trade unions and their associations through registration. Upon registration, trade unions and their associations acquire legal personality (first and ninth paragraphs of section 16).

To prescribe registration (with the acquisition of legal personality) as the only means of legalization hampers the exercise of the right to form trade unions "on the basis of the free choice of their members" (third paragraph of article 36 of the Constitution of Ukraine), since citizens may deem it necessary to unite in order to protect their labour and socio-economic rights in a

trade union (usually a small one) that does not necessarily have to have legal personality.

3.2. Given the special place of trade unions in the machinery for the protection of citizens' labour and socio-economic rights and interests, the third paragraph of article 36 of the Constitution provides an additional guarantee supplementing the general one laid down in the first paragraph of the same article, for the exercise the right of citizens united by their mutual interests on the basis of their occupational activity to form trade unions: "Trade unions shall be formed without prior authorization on the basis of the free choice of their members".

Based on an analysis of article 36 of the Constitution of Ukraine the Constitutional Court of Ukraine concluded that the cited provision of the third paragraph requires that the Act establish a procedure for the registration of trade unions that would be no more than the act of granting legal personality. Under the 11th paragraph of section 16 of the Act "registered trade unions... acquire legal personality and assume civil obligations". Even before registration a trade union has legal capacity (in particular, it has the right to appeal in court against a decision to refuse registration) but it only acquires full active legal capacity after it has been registered as a legal entity.

Section 16 of the Act provides for legalization (registration) of trade unions according to their status by the Ministry of Justice of Ukraine and its territorial bodies (second paragraph). The legalizing body verifies whether they have the corresponding status as defined in section 11 of the Act, enters the organization in the Register of Citizens' Associations and issues a certificate according to the prescribed model (fifth paragraph); if the documents submitted by the trade unions or their associations do not correspond to the status indicated, the legalizing body refuses registration (sixth paragraph). At the same time the fourth paragraph of section 3 of the Act denies the right to use the term "trade union" in its name to any organization that has not undergone legalization under section 16, since trade unions that have not been legalized are deemed under the terms of that paragraph to be unions that exist outside this Act (that do not "carry out their activity on the basis of this Act"). The first paragraph of section 13 provides that: "The State ensures the exercise of citizens' right to associate in trade unions and the observance of the rights and interests of trade unions legalized according to the procedure prescribed in this Act" (namely in section 16).

Thus, while registration in accordance with the procedure laid down in section 16 of the Act does not formally constitute a stage in the formation of a trade union, in practice it amounts to prior authorization to carry out its activity. An organization receives authorization to carry out activities as a trade union only after registration, which in principle is tantamount to a requirement to obtain prior authorization. This constitutes a restriction as provided in the third paragraph of article 36 of the Constitution on the right of citizens to form trade unions without prior authorization, on the basis of the free choice of their members.

The Constitutional Court of Ukraine has concluded that the provisions of section 16 of the Act prescribing conditions for the legalization of trade unions that in practice link the beginning of the activity as a trade union of an organization established to secure and protect workers' interests to the moment of its registration with the competent bodies, which is tantamount to a requirement to obtain prior authorization to form a trade union, are not in conformity with the third paragraph of article 36 of the Constitution of Ukraine.

3.3. Article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966, and article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 1950, which are part of the national legislation of Ukraine, guarantee the human right to freedom of association, in particular the right to establish and join trade unions for the defence of one's interests. The exercise of this right is not subject to any restriction, with the exception of those which are prescribed by law and are necessary in a democratic society in the interests of national security or public order or to protect the rights and freedoms of others.

Having ratified ILO Convention No. 87 on 11 August 1956, Ukraine undertook to take the necessary measures to ensure that workers may exercise freely the right to organize (in a trade union), as prescribed in Articles 1, 2, 7, 8, 10 and 11. The following rights are enshrined in the Convention: the right of workers to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization (Article 2); the right of workers' organizations to organize their activities (Article 3); the acquisition of legal personality shall not be made subject to conditions such as to restrict the application of Articles 2 and 3 (Article 7); the law of the land shall not be such as to impair the guarantees provided for in this Convention.

The substance of these provisions of international treaties has been incorporated in the text of the Constitution of Ukraine, in particular in articles 36 and 37, which contain similar guarantees and cautions with regard to the exercise of citizens' right to freedom of association, including in trade unions.

In view of the fact that certain provisions of the Act have been found to be unconstitutional inasmuch as they violate citizens' right to freedom of association, the Constitutional Court of Ukraine notes that in this respect the requirements laid down by the International Covenant on Economic, Social and Cultural rights and the ILO Convention [No. 87] have not been adequately incorporated in it.

4. Section 8 of the Act provides that in order to carry out the tasks laid down in their by-laws trade unions have the right to establish associations on a voluntary basis (associations, councils, federations, confederations, etc.) by branch, geographical area or on another basis, and to become affiliated to associations and freely disaffiliate from them (first paragraph). The fourth paragraph of this section provides that the status of associations of trade unions shall be determined in accordance with the status of their members, taking account of the requirements laid down in section 11 of the Act.

That is, the content of the provision of section 8 which is at issue is defined by provisions contained in sections 11 and 16 of the Act, and has no independent meaning in the context of the provisions of these sections that have been found unconstitutional, and therefore the complainant's reference to violation of articles 22 and 36 of the Constitution by the provisions of section 8 of the Act concerning associations of trade unions is unfounded.

In view of the above, and guided by articles 147 and 150 of the Constitution of Ukraine and by sections 51, 61, 63, 65 and 73 of the Act of Ukraine respecting the Constitutional Court of Ukraine, the Constitutional Court of Ukraine

Ruled that:

1. The provisions of section 11 of the Act of Ukraine respecting trade unions, their rights and the guarantees for their activity that restrict citizens' right to freedom of association are declared unconstitutional:
 - 1.1. the provision making it impossible to establish an independent trade union in a single enterprise, institution or organization without meeting the conditions prescribed in the second paragraph, under which only trade unions "which comprise at least three primary organizations... or which comprise at least nine union members working in different enterprises, institutions or organizations" have the status of local trade unions;
 - 1.2. the provisions prescribing a quantitative criterion for forming a trade union with the corresponding status – "the majority" of union members in the occupation or trade in the province, or in the cities of Kyiv and Sebastopol (third paragraph) and working in the occupation or trade in Ukraine (clause 3 of the third paragraph);
 - 1.3. the provision prescribing a minimum number for forming a trade union with all-Ukrainian status – "not less than one-third" of union members in the branch or of union members in the trade or occupation.
2. The provisions of section 16 of the Act of Ukraine respecting trade unions, their rights and the guarantees for their activity prescribing conditions for the legalization of trade unions that in practice link the beginning of the activity as a trade union of an organization established to secure and protect workers' interests to the moment of its registration with the competent bodies, which is tantamount to a requirement to obtain prior authorization to form a trade union, are declared unconstitutional.
3. The provisions of sections ^{also} 11 and 16 (except for the provisions of sections 11 and 16 that are declared unconstitutional) of the Act of Ukraine respecting trade unions, their rights and the guarantees for their activity are declared constitutional.
4. The provisions of sections 11 and 16 of the Act of Ukraine respecting trade unions, their rights and the guarantees for their activity which have been declared unconstitutional shall cease to have effect on the day on which this Ruling is adopted by the Constitutional Court of Ukraine.
5. The Ruling of the Constitutional Court of Ukraine is binding in the territory of Ukraine, is final and without appeal.

The Ruling of the Constitutional Court of Ukraine shall be published in the *Bulletin of the Constitutional Court of Ukraine* and other official publications of Ukraine.

CONSTITUTIONAL COURT OF UKRAINE