

U-I-57/95 5.2.1998

## DECISION

At the meeting of 5 February 1998 concerning the procedure for the evaluation of constitutionality commenced on the initiative of the Independent Trade Union of Slovenia from Ptuj, the Constitutional Court

Decided as follows:

The Act on Representativeness of Trade Unions (Official Gazette of RS, No. 13/93) is not in disagreement with the Constitution and the ratified international agreements.

Reasoning:

A.

The Independent Trade Unions of Slovenia (hereinafter: "the ITUS" dispute the Act on Representativeness of Trade Unions (hereinafter: "the ZRSin"), claiming that, in disagreement with article 76 of the Constitution and ILO Conventions no. 87 (on trade union freedoms and protection of trade union rights) and no. 98 (on the application of principles concerning the right of organization and of collective bargaining), it makes it possible for the State to interfere with the organizing of trade unions.

The ITUS considers as inadmissible interference the issuance of decisions on the depositing of the statutes under article 2 of the ZRSin. They consider that the administrative authority could only keep a record on the basis of submission of statutes of a trade union, from which it would be clear when a certain trade union was established. Also supposedly inadmissible interference with freedom of trade unions are the provisions concerning the criteria for the determination of representativeness (article 6 of the ZRSin) and the determination of representativeness by a decision of the administrative authority or the employer (article 10 of the ZRSin). The ITUS disagree with the theory of representativeness of trade unions supposedly introduced by the disputed ZRSin, for in this way certain trade unions could supposedly be eliminated from collective bargaining, which is one of the basic rights of trade unions, by which they regulate the improving of the economic and social position of their members. The multitude of labour organizations and the difficulties of collective bargaining and negotiating supposedly should not entitle the State to the right by compulsion to reduce the number of labour organizations having the right to be a party in collective bargaining. Allegedly, the trade union who could not take part in the reaching of decisions in collective bargaining on an equal basis would lose its members, who will more readily become members of those trade unions which can take part in the concluding of collective agreements, by which the rights and obligations of trade union members, wages in particular, are regulated in greater detail. Such arrangement is allegedly coercion on the part of the State, for individual trade unions must seek membership of associations or confederations - which, however, is their right, nor their duty.

The division into representative and non-representative trade unions has allegedly brought non-representative trade unions into unequal position, for they can take part in collective bargaining only because of the good will of negotiating parties, while in so far as the work of the Economic and Social Council is concerned they are just passive

observers without any possibility of participating in the development of the Social Pact and the Agreement on wage policy and other receipts of persons employed in productive branches of the economy, although these documents also interfere with economic and social rights of members of non-representative trade unions. Differentiation between trade unions also has an effect at company level, for example, in reference with the exercising of the right to co-management through the nomination of candidates for members of the workers' council (article 27 of the Act on Participation of Workers in Management).

The Secretariat for Legislative and Legal Matters of the National Assembly in its reply to the initiative states that the purpose of the disputed law is to regulate the manner of acquisition of the nature of legal person and the character of representativeness. The first is supposedly necessary for reasons of orderliness and security of legal transactions, and the other is supposedly necessary because of the participating of trade unions in the consideration of matters falling within the competence of the State or employers in a manner which will allow the presentation of a majority opinion of employees in matters of general concern. What is supposedly involved are the matters claimed to be in the interest of all employees, not just in the interest of members of individual trade unions. By the decision on the depositing of the statutes, the administrative authority allegedly does not decide concerning the establishing, organization and operation of a trade union, nor concerning the subject matter of the documents submitted, and neither on whether a trade union can be a legal person or not. In the case of refusal to issue a decision or in the case of a dispute concerning the fulfilling of conditions for the determination of representativeness, legal remedies, including judicial protection, are supposedly available.

B.-I.

The Constitutional Court accepted the initiatives and, with conditions specified in paragraph 4 of article 26 of Constitutional Court Act (Official Gazette of RS, No. 15/94 - hereinafter: "the ZUstS") fulfilled, proceeded to decide on the merits of the case.

The Constitution in article 76 (freedom of trade unions) provides: "The establishment of trade unions, their operation and membership thereof shall be free." This provision is included in Part III on Economic and Social Relations. The European Convention on Human Rights deals with freedom of trade unions in the framework of the provision on freedom of association (article 11) and says: Each person shall have the right to peacefully assemble and freely associate, including the right to the establishing of trade unions and to the joining of these with a view to protecting his interests".

ILO Conventions no. 87 on trade union freedoms and the protection of trade union rights: guarantees the right of workers without prior approval to establish their organizations and become members thereof; the only condition is the respect for the statutes of these (article 2), - guarantees the right of labour organizations to adopt (by themselves) their statutes, to freely choose their representatives, to manage themselves and to formulate their programmes of action (article 3), - guarantees the right of labour organizations to establish federations and confederations and to become members thereof; and it guarantees to federations and confederations the right to become members of international labour organizations (article 5).

On the other hand it:

prohibits administrative dissolution or hindering of operation of labour organizations (article 4), - prohibits the setting of such conditions for the acquisition of the nature of legal person as would hinder the application of articles 2, 3 and 4 of the Convention, and - in general enjoins that national legislation may not endanger, nor may it be applied in a manner which would in any way endanger, the guarantees provided by the Convention (paragraph 2 of article 8).

ILO Convention no. 98 on the application of principles concerning the right of organization and of collective bargaining protects workers against discrimination relating to membership in a trade union (in particular the making employment conditional on membership in a trade union, or the withdrawal from a trade union and dismissal because of membership in a trade union or participation in trade union activities - article 1). It also provides that labour organizations must be protected against direct or indirect interference on the part of (organizations of) employers as regards the establishment, operation and management of trade unions. The Convention lists as interference, by way of example, the measures by which labour organizations are established which are under the influence of employers or organizations of employers, as well as the supporting of labour organizations through financial resources of employers or otherwise with the intention of ensuring the controlling of such organizations by employer or an organization of employers (article 2). In article 4, the Convention enjoins the encouraging, promoting or wide application of procedures of voluntary negotiations through collective bargains concluded between employers and their organizations and the workers and labour organizations.

The European Social Charter, which the Republic of Slovenia has not ratified yet (but has signed it already), enjoins on its signatories that their laws may not be such as would restrict the right of free establishment of trade unions, neither may these be applied in a manner which would make this possible (article 5). For the purpose of ensuring effective exercise of the right to collective bargaining, it, inter alia, obliges the countries to support joint consultations between workers and employers and to promote the mechanisms for voluntary negotiations between employers and their organizations and labour organizations with a view to arranging for conditions for employment and working conditions by means of collective agreements (article 6).

The Act on Representativeness of Trade Unions specifies the manner of acquisition of the nature of legal person (articles 2 to 5) and the manner of acquisition of the status of representativeness of trade unions (articles 6 to 11). As follows from the reasons accompanying the proposal for the passing of the Act, the Act was passed at a time when plurality of trade unions was being established, that is, at a time when the number of trade union was on the increase. Consequently, the question arose of the possibility for workers' interests to be represented by all trade unions, and a need to determine "representative" trade unions. This is why the Act regulated anew the questions which were not regulated until then: the principles and manner of acquisition of the nature of legal person for a trade union and the conditions and criteria concerning the representativeness of trade unions.

B.-II.

The State has the right to link the recognition of legal personality to the depositing of statutes with competent State body. In doing so, it is just not allowed to prescribe such

conditions as might indirectly interfere with the right to freely establish a trade union. This follows also from article 7 of ILO Convention no. 87.

The ZRSin in articles 2 and 3 provides that a trade union shall become a legal person on the date of issue of the decision on the depositing of statutes or other basic charter. The conditions prescribed in reference with the issuance of the decision by the Act are the submission of the charter whose depositing is requested, the presentation of evidence that the trade union has in fact been established, and the proving of the fact that the application has been filed by a person authorized by the trade union. None of these three conditions interferes with the right of each person to establish a trade union, to adopt its statutes together with other persons and to choose representatives of the trade union, nor does any of them prevent the establishing of a trade union. The administrative body merely records the said facts and, on this basis, by means of a decision confirms that the trade union has become a legal person.

The provisions of articles 2 and 3 of the ZRSin are thus not in disagreement with article 76 of the Constitution, nor are they in disagreement with ILO Convention no. 87

### B.-III.

All trade unions are representative - they represent their members in the process of exercising and protecting the economic and social interest of the same. What the ZRSin regulates in Chapter II is essentially the status "of the most representative trade union" - a trade union to which some special right are granted by the legislator, which is why it also acts as representative of all workers, those organized within trade unions as well as those not organized within trade unions.

In several of its decisions relating to the freedom of trade unions under article 11 of the EKČP (The National Trade Union of Belgian Police, 1975; Trade union of Swedish engine-drivers, 1976; Schmidt and Dahlstrom versus Sweden, 1976), the European Court of Human Rights accepted the interpretation that article 11 of the Convention does not guarantee any special treatment of trade unions or their members on the part of the State: such as for example the right that they be consulted by the State, when the latter concludes (in so far as employer) any sort of collective agreement with trade unions, etc. In acting so it took as the basis the voluntary nature of collective bargaining and collective agreements, which follows in particular from article 6 of the European Social Charter, as well as for example from article 4 of ILO Convention no. 98. The Court deemed that, neither the fact that the State has refused to conclude a collective agreement with a trade union, nor the general policy of the State aiming at reducing the number of trade unions by which it concludes collective agreements, are in conflict with the right to the freedom of trade unions. Article 11 of the EKČP in principle grants to the States the discretionary power concerning the negotiations and the concluding of collective agreements.

One of the fundamental principles of ILO Convention no. 98 is that collective bargaining (negotiating) and concluding of collective agreements is free and voluntary. Consequently, a collective agreement applies just to the parties who have concluded it, unless its universal applicability be prescribed by law. This principled starting point, however, means that the right to the freedom of trade unions cannot be interpreted as if the same guaranteed also the right to the concluding of any collective agreement whatsoever. For such right of the trade union would necessarily presuppose the obligation of concluding a collective agreement on the part of the employers: and this would not be

done freely and voluntarily but upon the request of the other contacting party. This is why the Constitutional Court considers that article 76 of the Constitution should not be interpreted in a wider sense than in the case of interpreting article 11 of the EKČP. Which means that a somewhat different formulation - which speaks about both the establishing and the working of trade unions as being free - cannot be interpreted in the sense that in this way trade unions have been guaranteed as a constitutional right also the right to effectiveness.

On the basis of the foregoing, in the judgement of the Constitutional Court, the provisions of articles 6 and 10 of the ZRSin are not in disagreement with article 76 of the Constitution and ILO Convention no. 98 is so far as introducing the institution of representative trade union, to which some special rights are granted by law, and in so far as prescribing that the fulfilling of the conditions set by statute with respect to representativeness shall be decided by competent administrative authority.

Also, such arrangement does not introduce inequality or discrimination between trade unions. The principle of equality before the law as guaranteed by the provision of paragraph 2 of article 14 of the Constitution, refers to non-arbitrary application of law in relation to legal entities both on the part of the legislator and on the part of administrative and judicial authorities. It obliges them to regulate (treat) identical or similar relations identically, and different relations differently. In reviewing the conformity of a legislative solution with the constitutional principle of equality before the law, the Constitutional Court assesses whether the differentiation or absence of differentiation with regard to legal relations on the part of the legislator is objectively justified. Thus, it assesses whether the acting on the part of the legislator might possibly not be arbitrary.

One of the consequences of plurality of trade unions is also a greater number of trade unions, each of which represents its own interests (within a particular area, individual activity, branch or profession, or individual organization) and each of which independently decides on whether to associate with other trade unions in a federation or confederation or whether to harmonize their common interests in some other way. This also means that at a particular "level" several trade unions can be established. In relations with employers and the State, each trade union acts independently as representative of its members.

Where the relationship with employers and the State in matters which apply in general is involved, such solution is justified as makes possible the representation of those trade unions which represent the majority of employees. In this way, it is possible to avoid an excessive number of negotiating or contractual parties, the consideration also of just partial interests in the course of solving issues of general concern, and concrete results are made easier to arrive at.

An actually justified reason exists (has been shown to exist) for determining some special rights "of the most" representative trade unions in the case of cooperation of trade unions with the State and employers in harmonization and settling of issues of general applicability and/or in deciding the questions regarding the economic and social security of all employees - not just of those who are trade union members. No trade union has in this way been deprived of the possibility to act as representative of its members in the enforcing or protection of their economic and social interests and/or in negotiations or the concluding of collective agreements with employers.

The evaluation of appropriateness of statutory provisions is the legislator's concern, and what is involved in the instant case is in particular the question of adequateness and appropriateness of determination of different "levels" of representativeness (at the level of the State, the activity, branch or profession, organization). The Constitutional Court would decide these questions only if an inadequate provision of law or its practical implementation should interfere with constitutional rights. But in the instant case there is no evidence of this. Regardless of the fact that the initiator clearly does not possess a decision on representativeness (what has been shown to be in existence is just the decision on the depositing of statutes), it was for example a signatory of the general collective agreement for productive branches of economy (Official Gazette of RS, Nos. 39/93 and 40/97) and, in so far as the signatory of this agreement, also the signatory of the 1994 wage policy agreement for productive branches of the economy (Official Gazette of RS, No. 23/94), by which the Economic and Social Council was established; as well as for example of the Social Compacts for the year 1995 (Official Gazette of RS, No. 22/95) and the year 1996 (Official Gazette of RS, No. 29/96).

Also guaranteed is judicial protection in such disputes on representativeness as may arise between a trade union and the State or employer. The ZRSin, it is true, explicitly guarantees such protection only at the level of "the organization". The subsequently adopted Labour and Social Courts Act (Official Gazette of RS, NO. 19/94), on the other hand, specified in clause 7 of article 6 among the powers of such courts in reference with collective labour disputes also the adjudication concerning the determination of representativeness of a trade union. The trade union will be allowed to put in a claim for any violation of constitutional rights in such proceedings through constitutional complaint proceeding.

C.

This Decision was made on the basis of article 40 and paragraph 4 of article 26 of the ZUstS by the Constitutional Court in the following composition: Dr. Lovro Šturm, President, and Dr. Miroslava Geč - Korošec, Dr. Peter Jambreč, Dr. Tone Jerovšek, Matevž Krivic, LL.M., Janez Snoj, LL.M., Franc Testen, Lojze Ude, LL.D. and Dr. Boštjan M. Zupančič, the judges. The Decision was reached unanimously.

President,

Lovro Šturm, LL.D.